WORLD TRADE ORGANIZATION

WT/DS471/R

19 October 2016

(16-5669)

Page: 1/165

Original: English

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

REPORT OF THE PANEL

BCI DELETED, AS INDICATED [[BCI]]

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

CHINA

UNITED STATES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Import Measures	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, p. 2031
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157

Short title	Full case title and citation
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)

Short title	Full case title and citation
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Orange Juice (Brazil)	Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, adopted 17 June 2011, DSR 2011:VII, p. 3753
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773
US – Shrimp (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011, DSR 2011:X, p. 5301
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified

Short title	Full case title and citation
	by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, circulated to WTO Members 11 March 2016 [adoption/appeal pending]
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AFA	Adverse Facts Available
AFA Norm	Use of Adverse Facts Available Norm
Aluminum	Aluminum Extrusions from the People's Republic of China
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Antidumping Manual	United States Department of Commerce's Enforcement and Compliance Antidumping Manual
APP-China	Gold East Paper (Jiangsu) Co., Ltd., Gold Huasheng Paper Co., Ltd., Gold East (Hong Kong) Trading Co., Ltd., Ningbo Zhonghua Paper Co., Ltd., Ningbo Asia Pulp and Paper Co., Ltd.
AR	Administrative Review
AT	Alleged target
AT&M	Advanced Technology & Materials Co., Ltd.
BTIC	Beijing Tianhai Industry Co. Ltd
Bags	Polyethylene Retail Carrier Bags from the People's Republic of China
China's Accession Protocol	Protocol on the Accession of the People's Republic of China to the WTO, WT/L/432
China's Accession Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and Corr.1
Coated Paper	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China
CONNUM	Control numbers
Diamond Sawblades	Diamond Sawblades and Parts Thereof from the People's Republic of China
Double Coin	Double Coin Group Shanghai Donghai Tyre Co., Ltd.
DPM	Differential Pricing Methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DuPont Group	DuPont Teijin Films China Limited, DuPont Hongji Films Foshan Co., Ltd., and DuPont Teijin Hongji Films Ningbo Co., Ltd
Furniture	Wooden Bedroom Furniture from the People's Republic of China
GATT 1994	General Agreement on Tariffs and Trade 1994
IA	Import Administration
JJ New Material	Jiangyin Jinzhongda New Material Co., Ltd.
NME	Non-market economy
NME-wide entity	Non-market economy-wide entity
NT	Non-target
OCTG	Certain Oil Country Tubular Goods from the People's Republic of China
OI	Original investigation
OTR Tires	Certain New Pneumatic Off-The-Road Tires from the People's Republic of China
PET Film	Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China
POI	Period of Investigation
Policy Bulletin No. 05.1	United States Department of Commerce's Import Administration Policy Bulletin No. 05.1
PRC	People's Republic of China
PRC-wide entity	People's Republic of China-wide entity
Q&V	Quantity and value
Ribbons	Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China

Abbreviation	Description
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Shrimp	Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China
Solar	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China
SRP	Single Rate Presumption
Steel Cylinders	High Pressure Steel Cylinders From the People's Republic of China
TPCO	Tianjin Pipe (Group) Co.
TRRs	Trade-related requirements
T-T	Transaction-to-transaction
USCAFC	United States Court of Appeals for the Federal Circuit
USCIT	United States Court of International Trade
USD	United States dollar
USDOC	United States Department of Commerce
VCLT	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WA-T	Weighted average-to-transaction
WA-WA	Weighted average-to-weighted average
Wood Flooring	Multilayered Wood Flooring from the People's Republic of China
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by China

1.1. On 3 December 2013, China requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 23 January 2014 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 13 February 2014, China requested the establishment of a panel.[2] At its meeting on 26 March 2014, the Dispute Settlement Body (DSB) established a panel pursuant to the request of China in document WT/DS471/5 & Corr.1, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS471/5 & Corr.1 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 18 August 2014, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 28 August 2014, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr José Pérez Gabilondo
Members:	Ms Beatriz Leycegui Gardoqui Ms Enie Neri de Ross

1.6. Brazil, Canada, the European Union, India, Japan, the Republic of Korea (Korea), Norway, the Russian Federation (Russia), the Kingdom of Saudi Arabia, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Turkey, Ukraine, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultations with the parties, the Panel adopted its Working Procedures[5] and timetable on 11 February 2015. Following the parties' requests, the Panel modified its timetable on 1 April 2015 and again on 28 July 2015.[6]

---

[1] See WT/DS471/1.
[2] WT/DS471/5 and WT/DS471/5/Corr.1.
[3] See WT/DSB/M/343.
[4] WT/DS471/6.
[5] See the Panel's Working Procedures in Annex A-1.
[6] In this regard, based on the United States' request for an extension, dated 26 March 2015, of the deadline for the United States' first written submission, and after taking into consideration China's comments on the United States' request, the Panel, through its communication dated 1 April 2015, extended the deadline for the United States' first written submission and the third parties' written submissions. On the basis of a joint request received from China and the United States, on 27 July 2015, requesting an extension of the deadline for the parties' responses to written questions posed by the Panel following the first substantive meeting as well as the second written submission of the parties, the Panel, through its communication dated 28 July 2015, extended the deadlines for these submissions by the parties. Due to the extension of the deadline for written

1.8. The Panel held its first substantive meeting with the parties on 14, 15, and 16 July 2015. The session with the third parties took place on 15 July 2015. The Panel held its second substantive meeting with the parties on 17 and 18 November 2015. On 26 January 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 15 April 2016. The Panel issued its Final Report to the parties on 6 June 2016.

1.3.2 Additional Working Procedures on Business Confidential Information (BCI)

1.9. After consultations with the parties, the Panel adopted, on 16 February 2015, additional procedures for the protection of BCI.[7]

2 FACTUAL ASPECTS

2.1. In this dispute, China presents claims with respect to three issues concerning certain anti-dumping measures imposed by the United States Department of Commerce (USDOC), namely, the use of the weighted average-to-transaction (WA-T) methodology in dumping margin calculations, the treatment of multiple companies as a non-market economy-wide entity (NME-wide entity), and the manner in which the USDOC determines anti-dumping duty rates for such an entity as well as the level of such duty rates.[8]

2.2. In relation to the first issue, China's as applied claims challenge the USDOC's determination that, in three anti-dumping investigations involving exports from China, the conditions for use of the WA-T methodology provided in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement were met, as well as the manner in which the USDOC applied the WA-T methodology in these investigations. Regarding the first issue, China also brings a claim against the USDOC's use of zeroing in calculating the margin of dumping for a Chinese exporter in one administrative review involving exports from China.[9]

2.3. With respect to the second issue, China raises both as such and as applied claims. The as such claims concern what China calls the Single Rate Presumption, that is, the USDOC's alleged presumption that all exporters from a non-market economy (NME) country comprise a single entity under common government control and the assignment of a single margin of dumping, or anti-dumping duty rate, to that entity.[10] To rebut this presumption, and obtain an individually determined margin of dumping, China submits that an exporter must prove, through the Separate Rate Test, an absence of government control, both in law and in fact, over its export activities.[11] China's as applied claims regarding the second issue relate to the application of the alleged Single Rate Presumption in 13 anti-dumping investigations and 25 administrative reviews involving Chinese exporters.[12]

2.4. Regarding the third issue, China also raises both as such and as applied claims. The as applied claims concern the manner in which the USDOC determined the anti-dumping duty rates for the People's Republic of China-wide entity (PRC-wide entity) in 13 anti-dumping investigations and 17 administrative reviews involving Chinese exporters.[13] Specifically, these claims challenge

questions posed by the Panel following the first substantive meeting, the Panel also extended the deadline for submission of the first executive summaries of the parties.

[7] See Additional Working Procedures on BCI in Annex A-2.

[8] Whether China's claims challenging the manner in which the USDOC determines anti-dumping duty rates for NME-wide entities and the level of such duty rates also take issue with the treatment of the individual exporters included in such entities is discussed in paragraphs 7.493-7.496 below.

[9] In this regard, we use the words "producers" and "exporters" interchangeably in our report, with both referring to companies subject to an anti-dumping investigation or administrative review initiated by the USDOC.

[10] China's first written submission, para. 317.

[11] China's first written submission, para. 318.

[12] Of the 25 administrative reviews challenged by China, 19 were identified in China's panel request, while six additional administrative reviews were introduced at the first substantive meeting of the Panel with the parties. See paragraphs 7.240-7.270 below for our assessment of the objection raised by the United States concerning the Panel's terms of reference with respect to the six additional administrative reviews.

[13] Of the 17 administrative reviews challenged by China, 13 were identified in China's panel request, while four additional administrative reviews were introduced at the first substantive meeting of the Panel with the parties. See paragraphs 7.240-7.270 below for our assessment of the objection raised by the United States concerning the Panel's terms of reference with respect to the four additional administrative reviews.

the USDOC's alleged failure to give notice of the information required, its recourse to and use of facts available, as well as the level of the anti-dumping duty rates assigned to the PRC-wide entity in these determinations. China's as such claims concern the manner in which the USDOC uses facts available when determining the anti-dumping duty rates for NME-wide entities under the alleged "Use of Adverse Facts Available Norm" (AFA Norm).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China requests the Panel to find as follows[14]:

a. The United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in three challenged determinations[15] of the USDOC, because in each of these determinations[16]:

i. The USDOC used the WA-T methodology without having properly met the first condition of Article 2.4.2, second sentence. Specifically:

- the USDOC used the statistical tools of its own choice in an arbitrary and biased manner;
- the USDOC's reliance, in the Nails test, on weighted-average prices instead of individual export transactions was inconsistent with the treaty text and biased the Nails test, as applied, towards finding a pattern; and
- the USDOC failed to assess whether the observed export prices differed significantly in a qualitative sense.

ii. The USDOC used the WA-T methodology without having properly met the second condition of Article 2.4.2, second sentence. Specifically, the USDOC's explanation as to why it could not use the weighted average-to-weighted average (WA-WA) comparison methodology was inadequate, and the USDOC did not address whether the transaction-to-transaction (T-T) comparison methodology could appropriately take account of the relevant pricing pattern.

iii. The USDOC applied the WA-T methodology to all reported US sales by the Chinese exporters APP-China (in the *Coated Paper* investigation), BTIC (in the *Steel Cylinders* investigation) and TPCO (in the *OCTG* investigation) despite the fact that it had identified a relevant pricing pattern only amongst a subset of US sales.

iv. The USDOC impermissibly applied zeroing procedures when aggregating the transaction-specific WA-T intermediate comparison results, thereby failing properly to determine a margin of dumping for the product as a whole.

b. The United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, in the third administrative review in *PET Film*, because through the application of zeroing procedures, the USDOC failed to determine a margin of dumping for the product as a whole and, in so doing, artificially inflated the level of the anti-dumping duty for the DuPont Group as assessed in this administrative review.[17]

c. The Panel should reject the United States' contention that the six challenged determinations filed with the Panel during the course of the first substantive meeting – namely, the fifth administrative review in *OTR Tires*, the first administrative review in *Solar*, the fourth administrative review in *Diamond Sawblades*, the second administrative

[14] China's second written submission, paras. 495-502.
[15] In this regard, China challenges the following determinations of the USDOC: *OCTG* OI, *Steel Cylinders* OI and *Coated Paper* OI. (China's second written submission, para. 495).
[16] China's second written submission, para. 495.
[17] China's second written submission, para. 496.

review in *Wood Flooring*, the fifth administrative review in *PET Film*, and the ninth administrative review in *Furniture* – fall outside the Panel's terms of reference.[18]

d. The United States acted inconsistently with Articles 6.10, 9.2, and 9.4 of the Anti-Dumping Agreement, because the USDOC's Single Rate Presumption for NMEs, as such and as applied in the 38 challenged determinations, violates these provisions of the Anti-Dumping Agreement in the following manner[19]:

China's as such claims

i. Article 6.10 of the Anti-Dumping Agreement, because by presuming the existence of a single NME-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC fails to determine an individual margin of dumping for each known exporter or producer.

ii. Article 9.2 of the Anti-Dumping Agreement, because by presuming the existence of a single NME-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC fails to specify individual duties for each supplier.

iii. Article 9.4 of the Anti-Dumping Agreement, because the Separate Rate Test imposes, in NME cases in which the USDOC uses sampling, an additional condition, not contemplated by Article 9.4, for the receipt of an individual duty. This condition applies to non-selected producers or exporters that are included in the NME-wide entity and is a condition that applies even if such respondents provide all the "necessary information" required for the calculation of a margin of dumping.

China's as applied claims concerning 38 challenged determinations[20] of the USDOC

iv. Article 6.10 of the Anti-Dumping Agreement, because by presuming the existence of a single PRC-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC failed to determine an individual margin of dumping for each known exporter or producer.

v. Article 9.2 of the Anti-Dumping Agreement, because by presuming the existence of a single PRC-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC failed to specify individual duties for each supplier.

vi. Article 9.4 of the Anti-Dumping Agreement, because in each of the challenged determinations, the USDOC used sampling under the second sentence of Article 6.10, yet, by applying the Separate Rate Test, it imposed an additional condition, not contemplated by Article 9.4, for the receipt of an individual duty by non-selected producers or exporters included within the PRC-wide entity.

e. The United States acted inconsistently with Articles 6.1, 6.8 and Annex II of the Anti-Dumping Agreement, because the USDOC's failure to request the information required to calculate a margin of dumping for the PRC-wide entity in 30 challenged determinations[21]

[18] China's second written submission, para. 497.

[19] China's second written submission, paras. 498-499.

[20] In this regard, China challenges the following determinations of the USDOC: *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* OI, *OTR Tires* AR3, *OTR Tires* AR5, *OCTG* OI, *OCTG* AR1, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *Bags* AR4, *PET Film* OI, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* OI, *Furniture* AR7, *Furniture* AR8, and *Furniture* AR9. (China's second written submission, para. 499, fn 764).

[21] In this regard, China challenges the following determinations of the USDOC: *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OTR Tires* AR5, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1,

in which the USDOC determined a rate for the PRC-wide entity violated these provisions of the Anti-Dumping Agreement in the following manner[22]:

i. Article 6.1 of the Anti-Dumping Agreement, because the USDOC did not give notice of the information required and did not provide ample opportunity for certain interested parties to present, in writing, all evidence they considered to be relevant.

ii. Article 6.8 and Annex II of the Anti-Dumping Agreement, because the USDOC had recourse to facts available to determine the rate for the PRC-wide entity, and all the producers or exporters included within it, without having specified in detail the information required in order to calculate a margin of dumping for the PRC-wide entity.

f. The United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement, because the USDOC's use of adverse facts available in certain challenged determinations and its AFA Norm, as such, violate these provisions of the Anti-Dumping Agreement in the following manner[23]:

China's as such claims

i. The USDOC's AFA Norm, as such, is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, because when it applies that Norm, the USDOC does not undertake a comparative, evaluative process aimed at identifying the best information available, but rather chooses information that is adverse to the interests of NME-wide entities, including all the producers or exporters within them, based on the procedural circumstance of non-cooperation alone.

China's as applied claims

ii. The USDOC's use of facts available in each of the 20 challenged determinations[24] in which the USDOC made an express finding of non-cooperation as well as the eight challenged administrative reviews[25] in which the USDOC pulled-forward or re-applied a facts available rate is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, because each determination involved application of the WTO-inconsistent AFA Norm; and in each determination, the USDOC: (a) failed to undertake a comparative, evaluative process aimed at identifying the best information available, but rather chose information that was adverse to the interests of the PRC-wide entity and all of the producers or exporters included within it; (b) selected facts available based on the procedural circumstance of non-cooperation alone; (c) failed to properly undertake a reasoned and selective evaluation in order to find the best facts available; and (d) failed to provide a reasoned and adequate explanation of how it had exercised special circumspection and selected the best information available.

iii. The USDOC's use of facts available in two challenged determinations — the fifth administrative review in *OTR Tires* and the fourth administrative review in *Diamond Sawblades* — is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, because in each determination, the USDOC: (a) failed properly to undertake a reasoned and selective evaluation in order to find the best facts available; and (b) failed to provide a reasoned and adequate explanation of how it had exercised special circumspection and selected the best information available.

Wood Flooring AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *PET Film* OI, *Furniture* OI, *Furniture* AR7, and *Furniture* AR8. (China's second written submission, para. 500, fn 765).

[22] China's second written submission, para. 500.

[23] China's second written submission, para. 501.

[24] In this regard, China challenges the following determinations of the USDOC: *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, *PET Film* OI, *Furniture* OI, and *Furniture* AR7. (China's second written submission, para. 501, fn 766).

[25] In this regard, China challenges the following determinations of the USDOC: *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, and *Furniture* AR8. (China's second written submission, para. 501, fn 767).

g. The United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement, in assigning a rate to the PRC-wide entity and all of the distinct producers or exporters included within it in 30 challenged determinations.[26] This is because, to the extent that the PRC-wide entity was not individually investigated in any of these challenged determinations, the anti-dumping duties applied to the PRC-wide entity as well as the non-individually investigated producers or exporters included within that entity exceeded the weighted average of the rates determined for the mandatory respondents, excluding facts available, zero or *de minimis* rates or otherwise failed to comply with the disciplines of Article 9.4.[27]

3.2. China requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures, found to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, into conformity with its WTO obligations.

3.3. The United States requests that the Panel reject China's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, the European Union, Japan, Korea, Norway, Turkey, and Viet Nam are reflected in their executive summaries, provided in accordance with paragraph 21 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, and C-8). India, Russia, the Kingdom of Saudi Arabia, Chinese Taipei, and Ukraine did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 15 April 2016, the Panel issued its Interim Report to the parties. On 3 May 2016, China and the United States each submitted written requests for the Panel to review aspects of the Interim Report. On 23 May 2016, both parties submitted comments on the other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. The numbering of some of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Final Report and, where it differs, includes the corresponding numbering in the Interim Report.

6.3. The parties' requests for substantive modifications are discussed below. In addition to the requests discussed below, corrections were made for typographical and other non-substantive errors in the Report, including those identified by the parties.

6.1 China's claims concerning the USDOC's use of the WA-T methodology under Article 2.4.2 of the Anti-Dumping Agreement

6.4. China requests us to modify the first sentence of **paragraph 7.2** where we describe the WA-WA and T-T methodologies as the two "normal" methodologies provided for in Article 2.4.2 of the Anti-Dumping Agreement, because the word "normal" does not appear in that provision. Instead,

[26] In this regard, China challenges the following determinations of the USDOC: *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OTR Tires* AR5, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *PET Film* OI, *Furniture* OI, *Furniture* AR7, and *Furniture* AR8. (China's second written submission, para. 502, fn 768).

[27] China's second written submission, para. 502.

China requests us to refer to these methodologies as the two methodologies that must "normally" be used, to accurately reflect the text of Article 2.4.2. The United States has not commented on this request by China. In order to address China's concern in this regard, we have made the suggested modification to this paragraph.

6.5. The United States notes that in **paragraph 7.4**, **footnote 43** to that paragraph (footnote 31 of the Interim Report) and other parts of the Interim Report, we use the term "pattern test" to refer to the first stage of the Nails test and "price gap test" to refer to the second stage of the Nails test. By contrast, the United States observes that the records of the three investigations at issue show that the USDOC used the terms "standard deviation test" and "gap test" to refer to the first and second stages of the Nails test, respectively. The United States does not object to our use of the term price gap test to refer to the second stage of the Nails test but objects to our use of the term pattern test to refer to the first stage of that test and requests us to use the term standard deviation test instead. In this regard, the United States submits that the use of the term pattern test could give the wrong impression that the USDOC considered the obligations under the pattern clause of Article 2.4.2 to be met when the requirements of only the first stage of the Nails test were met, when in actuality the USDOC used the first as well as the second stage of the Nails test to meet these obligations. China opposes the United States' request and finds it unnecessary to change the term that we used in the Interim Report in this regard. Further, noting that the first stage of the Nails test comprised two steps, the first involving the use of a one standard deviation threshold and the second involving a 33% volume threshold, China argues that using the term standard deviation test to describe both steps of this first stage may confuse the reader.

6.6. Given that the USDOC itself used the term standard deviation test in referring to the first stage of the Nails test in the *OCTG*, *Steel Cylinders* and *Coated Paper* investigations (three challenged investigations), we have granted the United States' request, and modified the relevant parts of the Report, including footnote 43. We are not convinced by China's objection since we do not see how the use of a term which was used by the USDOC itself in the challenged investigations could confuse the reader. Therefore, with the exception of paragraph 7.71 where we quote directly from China's first written submission, we have modified relevant parts of the Report to refer to the first stage of the Nails test as the standard deviation test rather than the pattern test. We have also modified the relevant part of paragraph 7.71 to clarify that the term pattern test is used by China, not the Panel. We continue to use the term price gap test to refer to the second stage of the Nails test because the United States does not object to this.

6.7. China states that **paragraph 7.18** does not fully reflect its argument regarding the qualitative issues with the Nails test, and asks the Panel to add two additional sentences, either at the end of this paragraph or in a footnote. The United States has not commented on this request by China. Considering that the requested modification concerns the description of China's own arguments in these proceedings and has a basis on the record, we have accepted China's request. Since the additional sentences suggested by China pertain exclusively to the *Steel Cylinders* investigation, we have introduced these additional sentences after the first two sentences in that paragraph, which explain China's arguments regarding that investigation.

6.8. China notes that in **paragraph 7.147** we find that the explanation provided by the USDOC in the three challenged investigations before resorting to the exceptional WA-T methodology violates the explanation clause of Article 2.4.2 because it is premised on the use of zeroing under the WA-T methodology, which we find to be inconsistent with Article 2.4.2. China observes that in light of this finding we do not assess China's second argument that this explanation was also inconsistent with Article 2.4.2 because it was overly brief, offered no analysis and did not consider any of the characteristics of the relevant pricing pattern. China requests us to address this second argument in order to provide greater certainty in connection with the United States' implementation obligations in the event the Appellate Body reverses our finding that the use of zeroing under the WA-T methodology is inconsistent with Article 2.4.2. The United States disagrees with China and notes that the Panel's approach in this regard is a proper use of judicial economy and that a panel need not address each and every argument made by a party.

6.9. We recall that it is well established in WTO dispute settlement that a panel has the discretion to address only those arguments, which it deems necessary to resolve a particular claim.[28] Having

[28] See, e.g. Appellate Body Reports, *EC – Fasteners (China)*, para. 511; and *EC – Poultry* para. 135.

already found that the USDOC's explanation in the three challenged investigations was inconsistent with the explanation clause of Article 2.4.2 because it was premised on the use of zeroing under the WA-T methodology, we do not find it necessary to also examine whether that explanation was inconsistent with that provision for the reasons presented under China's second argument.

6.10. The United States notes that in paragraph 135 of the Appellate Body report in *US – Zeroing (Japan)*, which we quote in **paragraph 7.178** of our Report, the Appellate Body misquotes the second sentence of Article 2.4.2 when it states that the emphasis of that sentence is on finding a pattern of export prices which "differs" significantly among purchasers, regions or time periods. This is because Article 2.4.2 uses the word "differ" rather than "differs". To make it clear that we correctly quote the Appellate Body report, the United States requests us to either add [sic] after the word "differs" in this quote, or, alternatively, add a footnote after the word "differs" to note that the text of Article 2.4.2 uses the word "differ" rather than "differs". China has not commented on this request by the United States. We have granted the United States' request and provided the requested clarification in footnote 308 introduced to paragraph 7.178.

6.11. The United States notes that the first sentence of **paragraph 7.181** does not accurately reflect its argument. Specifically, the United States observes that while the first sentence of this paragraph suggests that the United States' argument is that the WA-T methodology "must" be applied to all export sales, in fact, its argument is that the WA-T methodology "may" be applied to all export sales. China has not commented on this request by the United States. In order to accurately reflect the United States' argument, we have made the requested modification to paragraph 7.181.

6.12. China makes two comments regarding **paragraph 7.201**. First, China requests us to add a cross-reference to paragraph 7.150 of the Report in the fourth sentence of this paragraph. Second, China requests us to state in paragraph 7.201 that the exceptional nature of the WA-T methodology is apparent from the text of Article 2.4.2. The United States has not commented on this request by China. We have granted China's first request and added a cross-reference to paragraph 7.150 in the fourth sentence of paragraph 7.201 in order to enhance the clarity of the Report. We have declined China's second request because, in our view, paragraph 7.150 of the Report, which is now cross-referenced in paragraph 7.201, already makes it clear that the exceptional nature of the WA-T methodology is apparent from the text of Article 2.4.2.

6.13. China notes that in **paragraph 7.202** we refer to the three principles concerning the calculation of dumping margins, developed by the Appellate Body in previous zeroing disputes. China observes that these principles were developed by the Appellate Body with close regard to the text and context of the Anti-Dumping Agreement and the GATT 1994. China requests us to explicitly refer to those textual and contextual bases in the Report. The United States opposes China's request on the ground that the additions requested by China would not enhance the clarity of the Report. In our view, unless relevant for a particular reason, it is not necessary to describe in detail the bases for the Appellate Body findings every time we make a reference to such findings in our Report. In this particular case, we do not consider that reproducing the discussion in these Appellate Body reports regarding the textual and contextual bases for these three principles would enhance the clarity of our Report. Therefore, we have declined China's request.

6.14. China makes two comments regarding **paragraph 7.203**. First, China requests us to explicitly refer to the textual and contextual bases of the Appellate Body's reasoning that the term "margins of dumping" has the same meaning throughout the Anti-Dumping Agreement. Second, China requests us to rephrase the penultimate sentence in this paragraph where we note that the USDOC disregarded negative intermediate comparison results by treating them as zero in calculating the margin of dumping for the investigated product as a whole in the three challenged investigations. China finds the phrase "calculating the margin of dumping" in this context, and without further qualification, to be confusing because a margin calculated using zeroing is not a margin of dumping within the meaning of the Anti-Dumping Agreement. Therefore, China requests us to modify this sentence such that it says that the "USDOC disregarded negative intermediate comparison results by treating them as zero in purporting to calculate the margin of dumping for the investigated product as a whole."[29] The United States opposes both aspects of China's request.

[29] China's request for review of the Interim Report, para. 13.

Regarding the first aspect, the United States argues that the additions requested by China would not enhance the clarity of the Report. Regarding the second aspect, the United States disagrees with China's contention that the Panel's description of the manner in which the USDOC calculated the dumping margins in the challenged investigations is confusing, and notes that China itself described the USDOC's dumping margin calculations in a substantially similar manner in its panel request.

6.15. We have declined both requests by China. Regarding China's first request, as we stated in paragraph ‍6.13 above, unless relevant for a particular reason, we do not find it necessary to describe in detail the bases for the Appellate Body findings every time we make a reference to such findings in our Report. We also do not consider that such an addition would enhance the clarity of the Report. Regarding China's second request, the statement that the USDOC disregarded negative intermediate comparison results by treating them as zero "in calculating the margin of dumping", makes it clear, in our view, that the USDOC used zeroing in the process of calculating the margin of dumping. It does not suggest, as China appears to contend, that a margin calculated using zeroing is a margin of dumping within the meaning of the Anti-Dumping Agreement.

6.16. China requests us to expressly state in **paragraph ‍7.219** that when the T-T comparison methodology is applied to any subset of the export transactions, mathematical equivalence does not arise. The United States opposes China's request, and notes that China does not submit any evidence to support this broad assertion. Further, the United States asserts that the dumping margin obtained through the T-T methodology could also be mathematically equivalent to that obtained through the WA-WA and WA-T methodologies in certain circumstances, depending on the values of home market and export sales. Our view is that when an investigating authority applies the WA-T methodology to the export transactions falling within the pattern and the T-T methodology to the export transactions falling outside the pattern, mathematical equivalence will not necessarily arise. This view is explained in paragraphs ‍7.219 and ‍7.215 of the Report. Hence, we have declined China's request to modify paragraph ‍7.219. In order to further clarify our view, however, we have added the word "necessarily" to the last sentence of paragraph ‍7.215 of the Report.

6.17. China requests us to delete **footnote 385** (footnote 370 of the Interim Report) on the ground that the issue addressed in this footnote was not subject to any briefing by the parties or third parties in these proceedings. China also states that the relevant paragraphs from the panel report in *US – Washing Machines* that we refer to in this footnote have been appealed and therefore, it is neither necessary nor appropriate for us to address this issue, which is not before us. The United States opposes China's request and asserts that the issue addressed in this footnote was subject to extensive argumentation in these proceedings. We note that footnote 385 contains an observation reflecting our understanding of the objective of the WA-T methodology provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. It is not uncommon for WTO panels or the Appellate Body to make such observations, and we do not consider that we are precluded from making such an observation in this case. Hence, we have declined China's request to delete footnote 385.

6.2 Whether the six administrative review determinations introduced at the Panel's first substantive meeting with the parties are within the Panel's terms of reference

6.18. China requests us to be more precise in **paragraph ‍7.262** when referring to the determinations that are explicitly listed in China's panel request, by adding the word "explicitly" before references to these determinations. China argues that this modification would ensure consistency between paragraph ‍7.262 and our finding in paragraph ‍7.260 that the six determinations introduced at the first substantive meeting of the Panel with the parties fall within our terms of reference because they are closely connected and subsequent to the determinations explicitly listed in China's panel request. The United States opposes China's request for the modification of paragraph ‍7.262, arguing that the text of this paragraph does not create any confusion with respect to the findings made in paragraph ‍7.260. The United States argues that, in making this request, China misinterprets the Panel's findings in paragraph ‍7.260, which are based on the Panel's view that the six determinations subsequently introduced by China are closely connected to the determinations that were listed in China's panel request. While we agree with the

United States' characterization of our findings in paragraph ‍7.260 with respect to the six new determinations, we have granted China's request because it adds clarity to our explanation in paragraph ‍7.262. For purposes of consistency, we have also made the same modification in paragraphs ‍7.260, ‍7.268, ‍7.271, and ‍7.389 of the Report.

6.3 Whether the Single Rate Presumption is, as such and as applied in 38 determinations, inconsistent with Articles 6.10, 9.2, and the second sentence of Article 9.4 of the Anti-Dumping Agreement

6.19. The United States requests that we delete the references to "jurisprudence" and modify certain language used in **paragraph ‍7.305** in order to clarify that we are merely drawing upon the analyses of prior panels and the Appellate Body in support of our legal reasoning, rather than indicating that rights and obligations may originate from WTO panel or Appellate Body reports. China has not commented on the United States' request. We have modified the relevant language in paragraph ‍7.305 to clarify that we are merely relying on the analyses conducted by prior panels and the Appellate Body, reflected in adopted reports, in support of our legal reasoning.

6.20. The United States requests that we use the phrase "issues with" rather than "shortcomings of" in **paragraph ‍7.317** when explaining Policy Bulletin 05.1's description of the previous regime regarding the assignment of separate duty rates to exporters in anti-dumping proceedings involving NME countries. In particular, the United States notes that the phrase "shortcomings of" was employed by certain commenters and only referred to in Policy Bulletin 05.1 in the context of recalling such comments. China opposes the Unites States' request, arguing that "shortcomings of" is an accurate description of the relevant part of the Policy Bulletin explaining the previous regime. Having reviewed the relevant exhibits, we consider that the modification suggested by the United States adds precision to the description of the content of Policy Bulletin 05.1 and have therefore made the suggested modification to paragraph ‍7.317.

6.21. China is of the view that a cross-reference to earlier parts of the Report would be useful in **paragraph ‍7.331**, which states "[a]s explained above, the filing of the separate rate certification may absolve the exporter concerned from filing a full separate rate application." The United States has not commented on China's request. We have added references to relevant parts of the Report through footnote 650, introduced to paragraph ‍7.331.

6.22. China requests us to delete the fourth and fifth sentences of **paragraph ‍7.352** in order to accurately reflect the text of paragraph 15(d) of China's Accession Protocol. China also requests that we refer, in paragraph ‍7.352, to the notions of "market economy status" and "non-market economy" in a more complete and precise manner and in strict conformity with paragraph 15(d) of the Accession Protocol. The United States disagrees with China's request for the deletion of the fourth and fifth sentences of paragraph ‍7.352, arguing that China's concern regarding these sentences is misplaced. The United States also disagrees with the second aspect of China's request and opposes the textual modification proposed by China. We have granted China's request and deleted the two sentences, and also made further modifications to the text of this paragraph in order to more accurately reflect the text of paragraph 15(d) of China's Accession Protocol.

6.23. Rather than referring generally to "certain concerns the representative of China raised during the WTO accession process over the treatment of China in anti-dumping proceedings conducted by other WTO Members" in **paragraph ‍7.357** of the Report, China asks us to explain these concerns in greater detail, in particular to note that "the Representative of China had expressed concerns that anti-dumping measures had been imposed by certain WTO Members without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner."[30] The United States disagrees with China's request on the ground that this is not a request "to review precise aspects of the interim report" within the meaning of Article 15.2 of the DSU, and that paragraph ‍7.357 adequately explains the basic rationale underlying the finding that the Panel makes therein, as required under Article 12.7 of the DSU. The United States also notes that a panel report does not need to summarize every argument made by a party. Although the addition requested by China is not particularly relevant to the issue

[30] China's request for review of the Interim Report, para. 27.

dealt with in paragraph ‍7.357, namely, whether China's Accession Working Party Report provides a legal and factual predicate for the Single Rate Presumption, we have granted China's request in order to explain the content of paragraph 151 of China's Accession Working Party Report. To this end, we have quoted the relevant part of this paragraph in footnote 711 to paragraph ‍7.357. We have also added, in paragraph ‍7.357, a more specific description of the contents of paragraph 152 of China's Accession Working Party Report.

6.24. China requests that, when rejecting the United States' argument that Article 9.2 of the Anti-Dumping Agreement does not apply to original investigations in **paragraph ‍7.366**, we refer to the Appellate Body's prior findings "that cash deposit rates calculated with zeroing are inconsistent with the obligations under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994"[31] and the Appellate Body's "revers[al of] a finding by the Panel in *US – Shrimp (Thailand) / US – Customs Bond Directive* 'that cash deposits required under United States law following the imposition of an anti-dumping duty order are not anti-dumping duties covered by Article 9 of the *Anti-Dumping Agreement*'."[32] The United States disagrees with China's request, arguing that it is not a precise request for review, and that China has not demonstrated where in its submissions it referred to these prior reports, nor explained their relevance to the present issue. In any case, the United States contends that China's characterization of these reports is erroneous and that such reports are not pertinent to the issue discussed in paragraph ‍7.366 of the Report.

6.25. We do not consider that references to these Appellate Body reports would be useful in the context of our finding in paragraph ‍7.366. With respect to the Appellate Body's findings in the first group of reports, we note that these were related to Article 9.3 of the Anti-Dumping Agreement, which requires that the amount of the anti-dumping duty not exceed the margin of dumping as established under Article 2, whereas the issue discussed in paragraph ‍7.366 is the obligation under Article 9.2 to assign an individual anti-dumping duty rate to each supplier. With respect to the Appellate Body's finding in *US – Shrimp (Thailand) / US – Customs Bond Directive* that China refers to, we note that the Appellate Body stated that it had not been necessary for the panel in that dispute to decide whether cash deposits are anti-dumping duties governed by Article 9 of the Anti-Dumping Agreement. In light of this, the Appellate Body stated:

> Therefore, we do not consider it necessary to rule on the merits of the appeals by Thailand and India concerning the cash deposits. We do not share the reasoning of the Panel on this issue and declare of no legal effect the interpretation developed by the Panel that the cash deposits required under United States law following the imposition of an anti-dumping duty order are not anti-dumping duties governed by Article 9 of the *Anti-Dumping Agreement*.[33]

The Appellate Body was thus explicit in stating that it did not rule on the question of whether cash deposits required under US law are anti-dumping duties governed by Article 9 of the Anti-Dumping Agreement. Although the Appellate Body declared the panel's finding that such cash deposits are not anti-dumping duties governed by Article 9 moot and of no legal effect, we do not consider it appropriate to interpret this to mean that cash deposits are anti-dumping duties governed by Article 9. We therefore decline China's request.

6.26. China requests that we provide additional evidence in support of our findings in **paragraphs ‍7.372 through ‍7.377** that the Single Rate Presumption was applied in the 13 challenged investigations. To this end, China requests, first, that we refer to the United States' response to Panel question No. 44, confirming that in all 13 challenged investigations "all Chinese exporters concerned were notified that to receive a rate separate from that of the China-government entity, they would need to submit a Separate Rate Application or Separate Rate

[31] China's request for review of the Interim Report, para. 29 (referring to Appellate Body Reports, *US – Stainless Steel (Mexico)*, paras. 133-134 and 156(a); *US – Continued Zeroing*, paras. 315-316 and 395(d); *US – Zeroing (EC) (Article 21.5 – EC)*, para. 304; and *US – Zeroing (Japan)*, para. 156). (emphasis original)

[32] China's request for review of the Interim Report, para. 29 (quoting Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 242). (emphasis original)

[33] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 242. (emphasis original)

Certification, where appropriate, or complete 'Section A' of the dumping questionnaire."[34] Second, China requests us to refer to China's response to Panel question No. 44, demonstrating "that the initiation notice in all 13 challenged investigations also made explicit that respondents would need to prove separate rate status before receiving an individual rate".[35] The United States disagrees with China's request, arguing that this is not a precise request for review, and that China has failed to demonstrate where this evidence should be placed in these paragraphs and its relevance to the findings made by the Panel.

6.27. We have granted the second aspect of China's request and referred to China's response to Panel question No. 44 as well as the relevant exhibits referred to by China in footnote 735, introduced to paragraph 7.377. In this regard, we note that China itself, in its response to Panel question No. 44, acknowledges that "in the initiation notice of *Furniture* OI, [the] USDOC did not refer to separate rate applications. Indeed, the *Furniture* OI does not seem to contain any language informing Chinese respondents about the need to satisfy the separate rate test."[36] We have therefore reflected this factual difference in the text of footnote 735, introduced to paragraph 7.377. In light of this modification, we do not consider that an additional reference to the United States' response to the same question would provide any further clarity and therefore decline the first aspect of China's request.

6.28. China requests that a cross-reference to earlier parts of the Report be inserted in **paragraph 7.381**, which states "[a]s explained above, the Separate Rate Test may be satisfied in two ways, namely, through the filing of a separate rate application or a separate rate certification." The United States has not commented on this request by China. We have granted China's request and introduced footnotes 741 and 742 to paragraph 7.381 in order to refer to the relevant parts of the Report.

6.4 China's claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement

6.29. China requests that we modify **paragraph 7.389** to clarify that the 30 determinations challenged by China under its as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement are those of the 38 challenged determinations in which the USDOC determined an anti-dumping duty rate for the PRC-wide entity. The United States has not commented on China's request. We have provided the requested clarification through footnote 753, introduced to paragraph 7.389.

6.30. For the same reasons that it asks the Panel to modify paragraph 7.305 of the Report, the United States asks the Panel to delete the reference to "jurisprudence" and modify certain language used in **paragraph 7.419** of the Report. China has not commented on the United States' request. We have modified the text of paragraph 7.419 in a manner similar to the modification of paragraph 7.305.

6.31. China points out that **paragraph 7.437** of the Interim Report contains a quote from the USCIT decision in *Peer Bearing Co.-Changshan v. United States*, in addition to the excerpt quoted by China as evidence of the existence of the alleged AFA Norm, which, in China's view, is incomplete and misleading. China requests us to complete the quote and provide a reference for it. The United States argues that completing this quote as suggested by China might be misleading without the context of the subsequent discussion in the decision, and requests that we maintain the language as it is. In light of both parties' comments, and given that this paragraph merely served to reinforce our reasoning in the two preceding paragraphs, we have deleted paragraph 7.437 of the Interim Report in its entirety.

6.32. China requests us to modify our description in **paragraph 7.441** (paragraph 7.442 of the Interim Report) of the excerpt from the USCIT decision in *East Sea Seafoods LLC v. United States* to more accurately reflect the actual text of this excerpt, in particular with regard to the reference

[34] China's request for review of the Interim Report, paras. 30 and 32 (quoting United States' response to Panel question No. 44, para. 115).
[35] China's request for review of the Interim Report, paras. 31-32.
[36] China's response to Panel question No. 44, para. 252.

to the USDOC's use of adverse inferences. The United States does not object to the modification of the description of the USCIT decision in paragraph 7.441 but emphasizes that this modification should not imply that the USCIT decision supports China's description of the precise content of the alleged AFA Norm. We have made the modification requested by China. We have also made further modifications to the text of this paragraph to ensure the coherence of our analysis.

6.33. China requests us to use the phrase "less favourable than the missing facts" instead of "less favourable than those [facts] being withheld by the NME-wide entity" in **paragraph 7.453** (paragraph 7.454 of the Interim Report) as China understands the Panel not to take a position on the factual issue of whether the information at issue was actually requested by the USDOC and deliberately withheld by the individual respondents forming part of the NME-wide entity. The United States does not object to China's request, and proposes that we use the phrase "less favourable to the non-cooperative NME-wide entity" in order to address China's concern. China is right that this is a factual issue that we did not have to decide on in resolving China's claim. In our view, the modification proposed by China better captures the relevant issue, namely whether the facts chosen as facts available by the USDOC were less favourable than the facts not provided by the NME-wide entity, regardless of the reason behind these facts not being provided. We have therefore granted China's request and modified paragraph 7.453 in the manner requested by China.

6.34. China asks us to refer, in **footnote 933** (footnote 916 of the Interim Report) to paragraph 7.472 (paragraph 7.473 of the Interim Report), to the United States' "negative" response to a question from the Panel at the second substantive meeting with the parties, inquiring about examples of anti-dumping determinations involving non-cooperating NME-wide entities in which the USDOC did not draw adverse inferences. The United States argues that China has failed to explain why the United States' response to that question at the second substantive meeting with the parties is pertinent to the Panel's findings in paragraph 7.472. Furthermore, the United States asserts that the Panel's finding in paragraph 7.472 that "there is no evidence of determinations made during that period in which the USDOC did not follow the process of which the alleged AFA Norm consists, namely, that upon finding that an NME-wide entity had failed to cooperate to the best of its ability, the USDOC drew adverse inferences and selected adverse facts" encompasses its response to the question at issue at the second substantive meeting of the Panel with the parties. While we agree with the United States that our finding in paragraph 7.472 is sufficiently broad to encompass the United States' response to this question at the second substantive meeting of the Panel with the parties, given its relevance to our finding, we have included a reference to the United States' response in footnote 933.

6.35. China requests that we delete **footnote 980** (footnote 963 of the Interim Report), which quotes a statement by the United States regarding the use of judicial economy, as it "may be read as endorsing the United States' argumentative view that it was somehow inappropriate for China to raise claims under Articles 6.1, 6.8, 9.4 and Paragraphs 1 and 7 of Annex II."[37] The United States disagrees with China's request, arguing that footnote 980 "does not create the broad inference that China claims – that China acted illegitimately by raising certain claims under the [Anti-Dumping Agreement]."[38] We do not agree with China's characterization of the United States' statement as an "argumentative view that it was somehow inappropriate for China to raise claims under Articles 6.1, 6.8, 9.4 and Paragraphs 1 and 7 of Annex II." Rather, we view the United States' statement as one that links the use of judicial economy to the effective allocation of resources. We have, however, modified the text of this paragraph in order to better illustrate the nature of the United States' statement. To this end, we have provided a more complete quote in footnote 980 and modified the introductory language in order to underline the fact that this quote represents the views of the United States and not the Panel.

6.36. China requests that we provide an additional finding under our alternative factual findings with respect to China's as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement, namely that the PRC-wide entity was not selected as a mandatory respondent in any of the 30 challenged determinations at issue. The United States disagrees with China's request, pointing out that China

[37] China's request for review of the Interim Report, para. 44.
[38] United States' comments on China's request for review of the Interim Report, para. 25.

does not refer to any record evidence in support of its request nor explain why this additional factual finding would be relevant.

6.37. We first recall that the purpose of our alternative factual findings, provided in **paragraphs 7.501 through 7.508** of the Report, is to assist the Appellate Body in completing the legal analysis of China's as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement, should it consider such analysis necessary or useful. In making these additional findings, we have not considered it necessary to address the issue of whether the PRC-wide entity was explicitly designated as a mandatory respondent by the USDOC. Furthermore, we note that China has not pointed to record evidence in support of its request. To the contrary, we note that in the *Shrimp* original investigation, for instance, the USDOC's preliminary determination lists the PRC-wide entity as a mandatory respondent.[39] We have therefore declined China's request.

7 FINDINGS

7.1 China's claims concerning the USDOC'S use of the WA-T methodology under Article 2.4.2 of the Anti-Dumping Agreement

7.1.1 Provisions at issue

7.1. 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.

7.2. Article 2.4.2 refers to two methodologies that must "normally" be used and one exceptional methodology that may be used to calculate dumping margins in anti-dumping investigations. The first sentence of this provision stipulates that the two methodologies that an investigating authority "shall normally" follow in an anti-dumping investigation are the WA-WA methodology or the T-T methodology. The second sentence of this provision permits the use of the WA-T methodology when two conditions are met. First, the investigating authority should find "a pattern of export prices which differ significantly among different purchasers, regions or time periods" (significantly differing pricing pattern). We refer to this requirement as the "pattern clause of Article 2.4.2". Second, the investigating authority should provide an "explanation" as to why "such differences" in the pattern cannot be "taken into account appropriately" by the use of a WA-WA or T-T methodology. We refer to this requirement as the "explanation clause of Article 2.4.2".

7.1.2 Factual background

7.3. In the three challenged investigations, the 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.[40] 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

[39] *Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-215), p. 42671.

[40] In this regard, while the pattern clause of Article 2.4.2 also refers to a pattern of export prices which differ significantly among different regions, that is not at issue in this dispute because the USDOC did not find a pattern on that basis in the three challenged investigations.

periods (non-targets).[41] The USDOC required the domestic industry petitioner to make a specific allegation of targeted dumping and also identify the alleged target, before it applied the Nails test.[42]

7.4. 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 we refer to as the "price gap test".[43] In the three challenged investigations, the USDOC stated that it used the standard deviation test to meet the "pattern" requirement whereas it used the price gap test to meet the "significant difference" requirement of the pattern clause of Article 2.4.2. We understand this reference in the USDOC's determinations to mean that that the objective of the standard deviation test was to find a pattern of export prices which 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. Both parties agree with our understanding in this regard.[44]

7.5. In the *Coated Paper* investigation, applying the Nails test, the USDOC found that the pattern of export prices of APP China to alleged targeted purchaser [[BCI]] differed significantly from export prices to non-targeted purchasers.[45] In the *Steel Cylinders* investigation, the USDOC found that the pattern of export prices of BTIC in alleged targeted time periods [[BCI]] differed significantly from export prices in non-targeted time periods.[46] In the *OCTG* investigation, the USDOC found that the pattern of export prices of TPCO in the alleged targeted time period [[BCI]] differed significantly from export prices in non-targeted time periods.[47]

7.6. Having concluded that the export sales of these exporters to the United States showed a pattern of export prices which differed significantly among different purchasers or different time periods, the USDOC calculated the margins of dumping for these exporters using both the WA-WA and the WA-T methodology. The USDOC found that, in each of the three challenged investigations, the margin of dumping calculated through the WA-WA methodology, without zeroing, was lower than that calculated through the WA-T methodology, with zeroing.[48] In the *Coated Paper* investigation, the margin of dumping for APP China was [[BCI]]% under the WA-WA methodology whereas it was 7.62% under the WA-T methodology. In the *OCTG* investigation, the margin of dumping for TPCO was [[BCI]]% under the WA-WA methodology whereas it was 32.07% under the WA-T methodology. In the *Steel Cylinders* investigation, the margin of dumping for BTIC was [[BCI]]% under the WA-WA methodology whereas it was 6.62% under the WA-T methodology. The USDOC considered that these differences in the margins showed that the WA-WA methodology "conceal[ed] differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted

[41] We use the term "alleged target" to refer more generally to an allegedly targeted purchaser or time period. Similarly, we use the term "non-targets" to refer, more generally, to non-targeted purchasers or time periods.

[42] United States' first written submission, para. 85.

[43] In this regard, we note that in the three challenged investigations, the USDOC described this first stage of the Nails test as the "standard deviation test", and the second stage as the "gap test". In contrast, China uses the terms "pattern test" and "price gap test" in its submissions. Because the United States objects to the use of the term "pattern test", we use the term actually contained in the record of the investigations, namely, the "standard deviation test". On the other hand, because the United States does not object to the use of the term "price gap test", we use the term "price gap test" as suggested by China.

[44] In this regard, we note that China's expert submits that the purpose of the standard deviation test was to determine whether there was a pattern of price differences for comparable merchandise (i.e. specific CONNUMs sold by an exporter) between the alleged target and non-targets and that the purpose of the price gap test was to determine whether the price differences identified under the standard deviation test were significant. (See, e.g. First expert statement by Lisa Tenore (Lisa Tenore's first statement), (Exhibit CHN-2) (BCI), paras. 16 and 20). The United States, on its part, comments that this understanding of the specific objectives of the standard deviation test and the price gap test is "generally correct". (United States' response to Panel question No. 92, para. 1).

[45] See, e.g. United States' first written submission, para. 106 (referring to *Coated Paper* OI, Final Targeted Dumping Memorandum, (Exhibit CHN-3) (BCI), p. 4).

[46] United States' first written submission, para. 106 (referring to *Steel Cylinders* OI, Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd, (Exhibit USA-23) (BCI), Attachment 4, pp. 138 and 158).

[47] United States' first written submission, para. 106 (referring to *OCTG* OI, Post Preliminary Determination Analysis of Targeted Dumping: Results for Tianjin Pipe (Group) Co., (Exhibit CHN-6) (BCI), p. 3).

[48] United States' first written submission, paras. 184-186.

group".[49] This was the explanation provided by the USDOC in relation to its obligations under the explanation clause of Article 2.4.2 of the Anti-Dumping Agreement. The USDOC did not provide a separate explanation as to whether the significantly differing pricing pattern could be taken into account appropriately under the T-T methodology.[50]

7.7. Having considered that the conditions for the use of the WA-T methodology were met, the USDOC applied the WA-T methodology to all export transactions of the Chinese exporters involved in the three challenged investigations.[51]

7.8. The USDOC used zeroing when calculating the margins of dumping through the WA-T methodology. In this context, the USDOC first calculated multiple annual average normal values for different CONNUMs (i.e. models).[52] Then each export transaction was compared individually to the relevant, comparable normal value.[53] This exercise generated numerous individual comparison results, some of which were positive, i.e. when the export price was lower than the comparable weighted average normal value, and the others negative, i.e. when the export price was higher than the comparable weighted average normal value.[54] The USDOC aggregated these intermediate comparison results and, while doing so, treated the negative intermediate results as zero.[55] The USDOC then divided the aggregate amount of dumping by the aggregate value of all export sales to the United States made by the exporter concerned during the period of investigation (POI) to arrive at the weighted average dumping margin.[56]

7.9. China presents four claims under the second sentence of Article 2.4.2 in connection with the USDOC's use of the WA-T methodology in the *OCTG*, *Steel Cylinders* and *Coated Paper* investigations. First, China claims that the USDOC acted inconsistently with the pattern clause of Article 2.4.2. Second, China claims that the USDOC acted inconsistently with the explanation clause of Article 2.4.2. Third, China claims that the USDOC acted inconsistently with the second sentence of Article 2.4.2 because it applied the WA-T methodology to all export transactions instead of limiting it to those individual export transactions that were found to form the relevant export price pattern. Fourth, China claims that the USDOC acted inconsistently with the second sentence of Article 2.4.2 because it used zeroing under the WA-T methodology. We will address China's claims in this same order.

7.1.3 China's claim under the pattern clause of Article 2.4.2 of the Anti-Dumping Agreement

7.10. China's claim under the pattern clause of Article 2.4.2 concerns the USDOC's alleged failure to properly find "a pattern of export prices which differ significantly" among different purchasers or different time periods, in the three challenged investigations. This claim raises three sets of issues with the Nails test, namely, quantitative issues, qualitative issues, and the use of purchaser or time period averages, as opposed to all individual export transaction prices to purchasers or time periods which made up those averages.[57]

[49] United States' first written submission, para. 187 (quoting *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 24); see also *Coated Paper* OI, Issues and Decision Memorandum, (Exhibit CHN-64), pp. 23-24; and *OCTG* OI, Issues and Decision Memorandum, (Exhibit CHN-77), Comment 2.

[50] United States' response to Panel question No. 18, para. 35.

[51] China's first written submission, paras. 98-104 (citing *OCTG* OI, Issues and Decision Memorandum, (Exhibit CHN-77), Comment 2; *Coated Paper* OI, Issues and Decision Memorandum, (Exhibit CHN-64), pp. 24-25; and *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 24).

[52] United States' response to Panel question No. 23(b), para. 46. In this regard, we note that in the three challenged investigations, the USDOC used the term CONNUMs to refer to different models of the product under consideration.

[53] United States' response to Panel question No. 23(b), para. 46.

[54] United States' response to Panel question No. 23(b), para. 46.

[55] United States' response to Panel question No. 23(b), para. 46.

[56] United States' response to Panel question No. 23(b), para. 46.

[57] In this regard, we use the term "purchaser average" to refer to the weighted average of all individual export transaction prices to a particular purchaser and "time period average" to refer to the weighted average of all individual export transaction prices in a particular time period.

7.1.3.1 Main arguments of the parties

7.1.3.1.1 China

7.11. Regarding the quantitative[58] issues with the Nails test, China contends that the USDOC failed to properly find 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. China presents two factual bases for its arguments. China first identifies four quantitative flaws with the Nails test, which allegedly affected its application in the three challenged investigations. China then refers to two SAS programming errors which allegedly distorted the application of the Nails test in the *OCTG* and *Coated Paper* investigations (but not the *Steel Cylinders* investigation).

7.12. The first alleged quantitative flaw concerns the application of the standard deviation test. In this regard, China contends that the Nails test depended on the assumption that the export price data in the examined CONNUM were, in a statistical sense, normally distributed or at least, single-peaked and symmetric around the mean (single peaked and symmetric). Specifically, China submits that the Nails test depended on this assumption because if the export price data were not distributed in this manner, the USDOC's use of a one standard deviation below mean threshold (one standard deviation threshold), under the standard deviation test, would be "meaningless, or at best arbitrary".[59] However, the USDOC failed to confirm whether this assumption was correct with respect to the export data to which this test was applied in the three challenged investigations.[60] Because the manner in which the USDOC made its finding under the pattern clause of Article 2.4.2 was arbitrary, and hence not objective, in China's view, the USDOC acted inconsistently with this provision.

7.13. The second alleged quantitative flaw concerns the USDOC's use of a one standard deviation threshold under the standard deviation test. In China's view, prices that are just one standard deviation below the mean are not considered, in statistical conventions, to be significantly different from the mean.[61] Instead, statistical conventions require the use of a higher standard deviation threshold, such as 1.96 standard deviations.[62] Therefore, according to China, the USDOC acted inconsistently with the pattern clause of Article 2.4.2 by using a one standard deviation threshold, rather than a higher threshold, to find whether differences in export prices forming the relevant pattern were significant in a quantitative sense.

7.14. The third alleged quantitative flaw concerns the operation of the price gap test. In this regard, China notes that, under the price gap test, the USDOC compared the alleged target price gap, in a CONNUM, which was based on purchaser or time period averages located at the "tail" of the distribution of the export price data, with the weighted average non-target price gap, in the same CONNUM, which was based on a comparison of purchaser or time period averages, located nearer to the "peak" of that distribution. The USDOC found that the differences between the alleged target price and the non-target prices were significant when the alleged target price gap was wider than the weighted average non-target price gap. China finds this approach to be statistically flawed because the differences found through such a comparison were attributable to the "inherent feature of every peaked distribution with tails" and did not show that differences in export prices forming the relevant pattern were significant in a quantitative sense, as required under the pattern clause of Article 2.4.2.[63] In China's view, in any peaked distribution with tails, the gap between any two given prices, which are located at the tail of the distribution, will necessarily be wider than those at the peak of the distribution of the data.

7.15. Concerning the fourth alleged quantitative flaw, China contends that by calculating the weighted average non-target price gap only on the basis of the individual gaps between the weighted average export prices to each of the non-targets (non-target prices[64]) which were higher

[58] The issues raised by China are both of a quantitative and statistical nature. For ease of reference, however, we refer to them as "quantitative issues".
[59] China's response to Panel question No. 6(a), para. 37.
[60] China's second written submission, para. 35.
[61] China's second written submission, para. 39.
[62] China's first written submission, paras. 243-245.
[63] China's second written submission, para. 43. (emphasis omitted)
[64] In this regard, when we refer to a non-target price, we mean the price which is the weighted average of all individual export transaction prices to a particular non-targeted purchaser or in a particular non-targeted time period. Similarly, when we refer to an alleged target price, we mean the price which is the weighted

than the weighted average export price to the alleged target (alleged target price) and disregarding those that were lower, the USDOC arbitrarily reduced the average size of the weighted average non-target price gap.[65] According to China, this increased the likelihood that the alleged target price gap would be wider than the weighted average non-target price gap, and consequently, that the price gap test would be passed.[66] Therefore, because of this arbitrary application of the price gap test, the USDOC failed to objectively find that the differences in export prices forming the relevant pattern were significant in a quantitative sense, and thereby acted inconsistently with the pattern clause of Article 2.4.2.

7.16. In relation to both of the two SAS programming errors, China argues that these errors show that in the *OCTG* and *Coated Paper* investigations the USDOC failed to identify a significantly differing pricing pattern, based on an unbiased and objective evaluation of properly established facts within the meaning of Article 17.6(i) of the Anti-Dumping Agreement.[67] With specific regard to the first SAS programming error, China observes that due to this programming error, instead of comparing the alleged target price gap with the weighted average non-target price gap, in the examined CONNUM, the USDOC, under the price gap test, incorrectly compared the alleged target price gap with the individual non-target price gaps which made up that weighted average non-target price gap.[68] China asserts that as a result of this SAS programming error, it became more likely that the USDOC would find that the differences in the export prices forming the relevant pattern were significant. Therefore, in China's view, the USDOC failed to objectively find that the differences in export prices forming the relevant pattern were significant in a quantitative sense, and thereby acted inconsistently with the pattern clause of Article 2.4.2. With specific regard to the second SAS programming error, China submits that this error distorted the calculation of the weighted average non-target price gap. China acknowledges, however, that this error made it less likely rather than more likely that the USDOC would find the differences in the pattern of export prices to the alleged target were significant.[69] China nevertheless challenges this error because as a result of this error the Nail test did not do what it was supposed to do.[70]

7.17. In relation to the qualitative issues with the Nails test, China contends that the USDOC failed to consider whether the differences in export prices forming the relevant pattern were significant in a qualitative sense. Noting that the ordinary meaning of "significant" is "sufficiently great or important to be worthy of attention" or "appropriate" to convey a meaning, China emphasizes that differences cannot be worthy of attention or appropriate to convey a meaning if they depend only on the numerical amount of the difference. Instead, the pattern clause of Article 2.4.2 requires an investigating authority to focus on the nature of the differences or the reason why the differences exist and whether those differences are unconnected with targeted dumping.[71]

7.18. With reference to the *Steel Cylinders* investigation, China notes that the Chinese exporter BTIC specifically submitted that the differences which the USDOC found in the prices of steel cylinders over time periods were attributable to the increases in the price of its input, i.e. steel, over the POI.[72] China contends that by failing to provide a reasoned and adequate explanation as to why the observed differences in the export prices forming the relevant pattern could not be attributed to the reasons provided by BTIC, the USDOC acted inconsistently with the pattern clause of Article 2.4.2.[73] In this regard, China contends that the USDOC, in its role as the investigating authority, and in light of the exporter's plausible explanation of the observable price fluctuations in the steel market, could easily have requested BTIC to supplement the record with

average of all individual export transaction prices to an allegedly targeted purchaser or in an allegedly targeted time period. This should not be confused with the use of the terms "purchaser averages" or "time period averages", which we use to refer more generally to the methodology adopted by the USDOC to aggregate the individual export transaction prices to each purchaser or in each time period to arrive at a single weighted average price for each purchaser or time period.

[65] China's first written submission, para. 239.
[66] China's first written submission, para. 239.
[67] China's second written submission, para. 26.
[68] China's first written submission, para. 78.
[69] See, e.g. China's response to Panel question No. 91(a), paras. 5-6.
[70] China's response to Panel question No. 91(b), para. 9.
[71] China's first written submission, para. 140; and response to Panel question No. 11, para. 77.
[72] China's first written submission, paras. 252-255.
[73] China's response to Panel question No. 10(a), para. 64.

evidence necessary to make an informed determination regarding this critical issue.[74] China considers that the USDOC was obliged, as a matter of WTO law, to do so, in light of the Appellate Body's statement in *US – Anti-Dumping and Countervailing Duties (China)* that "investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner."[75] With reference to the *Coated Paper* and *OCTG* investigations, China does not dispute that the interested parties made no submissions concerning the possible reasons why the export prices differed among different purchasers or time periods. China nevertheless contends that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 by failing to adopt a methodology to filter out price variations that stem from normal economic behaviour and/or exogenous factors independent of the information made available by the interested parties.[76]

7.19. Regarding the use of purchaser or time period averages under the Nails test, China submits that the use of such averages was inconsistent with the textual requirements under the pattern clause of Article 2.4.2.[77] China asserts that by using the weighted average of individual export transaction prices to purchasers or time periods, the USDOC ignored the within-purchaser and within-time period variances, thereby creating a "systematic bias" towards finding a significantly differing pricing pattern.[78] China submits that if the standard deviation calculated under the Nails test was calculated on the basis of individual export transaction prices, as opposed to purchaser or time period averages, the USDOC would not have found a pattern in the *OCTG* and *Coated Paper* investigations[79] and would have found a pattern in [[BCI]] CONNUMs instead of [[BCI]] CONNUMs in the *Steel Cylinders* investigation.[80]

7.1.3.1.2 United States

7.20. The United States rejects all three issues identified by China in support of its claim that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations.

7.21. In relation to the alleged quantitative issues with the Nails test, the United States disputes each of the four alleged quantitative flaws with the Nails test and rejects China's contention that the two SAS programming errors which occurred in the *OCTG* and *Coated Paper* investigations led to violations of the pattern clause of Article 2.4.2.

7.22. With regard to the first alleged quantitative flaw with the Nails test, the United States rejects China's assertion that this test depended on the assumption that the examined export price data were normally distributed or at least single-peaked and symmetric. Further, the United States clarifies that the USDOC itself also made no such assumption regarding the distribution of the export price data in the three challenged investigations.[81] Therefore, there was, in the United States' view, no need to confirm that the export price data were indeed distributed in this manner and the USDOC did not act inconsistently with the pattern clause of Article 2.4.2 by not doing so.

7.23. As regards the second alleged quantitative flaw with the Nails test, the United States contends that China's argument that the use of a one standard deviation threshold is contrary to statistical conventions is irrelevant because the USDOC simply did not use that threshold to make statistical inferences.[82] Further, the United States notes that the higher standard deviation thresholds proposed by China would limit the pattern to random and aberrational outliers, and contends that the text of Article 2.4.2 does not require that a pattern be limited to such outliers.[83] The United States also asserts that the objective of unmasking targeted dumping may be

[74] China's response to Panel question No. 10(a), para. 63.
[75] China's response to Panel question No. 10(a), para. 64 (citing Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 344).
[76] China's response to Panel question No. 10(b), para. 66.
[77] China's second written submission, para. 60.
[78] China's second written submission, para. 60; and response to Panel question No. 14, para. 96.
[79] China's first written submission, para. 268. In this regard, China asserts that in the *OCTG* and *Coated Paper* investigations, had the standard deviation been correctly calculated, the volume of sales represented by CONNUMs in which the alleged target price was lower than the threshold price would have been less than 33% of total sales by volume to the alleged target.
[80] China's first written submission, para. 268.
[81] United States' comments on China's response to Panel question No. 94(d), para. 10.
[82] See, e.g. United States' first written submission, para. 135.
[83] United States' first written submission, para. 133.

compromised if the pattern is limited to outliers because low-priced exports may be targeted even when such export prices are not outliers.[84]

7.24. With respect to the third alleged quantitative flaw with the Nails test, which is based on China's understanding that it is an inherent feature of every peaked distribution with tails that there will be wider gaps in the tail of the distribution, compared to gaps at the peak, the United States submits that the USDOC made no assumptions concerning the probability distribution of the export price data.[85] Therefore, such statistical arguments which are based on the nature of probability distribution have no merit. Further, the United States notes that while China's argument is premised on the existence of a distribution with a tail, China has not demonstrated that the actual export price data examined under the Nails test in the three challenged investigations even had a tail.[86]

7.25. Regarding the fourth alleged quantitative flaw with the Nails test, concerning the USDOC's decision to disregard non-target prices which were lower than the alleged target price, the United States asserts that the USDOC was right in not taking such prices into account because it had already found the alleged target price to be low as it was one standard deviation below the CONNUM-specific weighted average export price.[87] Therefore, according to the United States, considering that the USDOC used the Nails test to identify a pattern of low prices to the alleged target in relation to other higher export prices, it was logical that the USDOC would compare the low-priced exports to an alleged target with higher-priced exports to non-targets.[88]

7.26. Regarding China's arguments concerning the two SAS programming errors, the United States argues that China has not shown how these two errors violated any specific provision of the Anti-Dumping Agreement.[89] Further, the United States disagrees that these two errors show that the USDOC failed to make an unbiased and objective evaluation of properly established facts within the meaning of Article 17.6(i) of the Anti-Dumping Agreement. The United States asserts that programming errors are simply mistakes, and do not show that the USDOC failed to establish facts properly or evaluate them in an unbiased and objective manner.[90]

7.27. With respect to the alleged qualitative issues with the Nails test, the United States agrees with China's argument that the word "significant" has a quantitative as well as a qualitative dimension.[91] However, the United States disagrees with China's understanding of a qualitative analysis and submits that the pattern clause of Article 2.4.2 requires an investigating authority to examine how export prices differ and not why they differ.[92] The United States also asserts that China's argument regarding this issue fails in light of the facts on the records of the three challenged investigations. With respect to the *Steel Cylinders* investigation, the United States notes that the Chinese exporter BTIC argued that increases in steel prices had led to an increase in the prices of the investigated product but that the USDOC rejected this argument because it lacked any evidentiary basis.[93] With reference to the *OCTG* and *Coated Paper* investigations, the United States submits that China has not shown that the Chinese exporters presented arguments on why there were significant differences in the export prices forming the relevant pattern found by the USDOC.[94]

7.28. As regards the issue concerning the use of purchaser or time period averages under the Nails test, the United States disagrees with the interpretation of the pattern clause of Article 2.4.2 which underlies China's arguments. The United States notes that while describing the WA-T methodology, the second sentence of Article 2.4.2 states that the weighted average normal value

[84] United States' second written submission, para. 27.
[85] United States' first written submission, para. 123.
[86] United States' comments on China's response to Panel question Nos. 99 (a), (b), (c), and (d), para. 39.
[87] United States' first written submission, para. 126.
[88] United States' response to Panel question No. 101(c), para. 29.
[89] United States' response to Panel question No. 4(c), para. 6.
[90] United States' response to Panel question No. 4(c), para. 7.
[91] United States' first written submission, para. 69 (referring to Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 1272).
[92] See, e.g. United States' first written submission, paras. 69 and 73.
[93] United States' first written submission, para. 144 (citing *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 32).
[94] United States' first written submission, para. 143.

is to be compared with individual export transaction prices. However, when setting out the first condition for its use, the pattern clause of Article 2.4.2 refers to a "pattern of export prices" and not individual export transaction prices.[95] According to the United States, this textual difference shows that the pattern clause of Article 2.4.2 does not require the use of individual export transaction prices when finding a significantly differing pricing pattern.[96] Further, the United States emphasizes that the pattern clause of Article 2.4.2 requires an investigating authority to focus on the differences "among" different purchasers, regions or time periods and not within the export prices to such purchasers, regions or time periods.[97]

7.1.3.2 Main arguments of the third parties[98]

7.1.3.2.1 Brazil

7.29. Brazil contends that while the pattern clause of Article 2.4.2 did not require the USDOC to use any particular methodology, the methodology that it chose, namely the Nails test, should have allowed for an unbiased and objective evaluation of the relevant facts under investigation.[99] Regarding China's argument that an investigating authority is required to consider whether differences in export prices are significant in a qualitative sense, Brazil considers that an investigating authority may need to consider whether differences in export prices are quantitatively as well as qualitatively significant, but notes that nothing in the Anti-Dumping Agreement compels an investigating authority to consider why export prices differ.[100]

7.1.3.2.2 Canada

7.30. Canada agrees with China's argument concerning the fourth alleged quantitative flaw in the Nails test that the USDOC distorted the price gap test by disregarding non-target prices which were lower than the alleged target price.[101] Canada also agrees with China that the USDOC was required, under the pattern clause of Article 2.4.2, to use individual export transaction prices to each purchaser or time period, rather than purchaser or time period averages.[102] In this regard, Canada submits that through the use of purchaser and time period averages, the USDOC concealed whether or not there was a form or sequence to export prices and failed to identify a pattern in the differences in export prices.[103]

7.1.3.2.3 European Union

7.31. Regarding the alleged quantitative issues with the Nails test, the European Union argues that the issue before the Panel is not whether the USDOC found differences in export prices that were statistically significant.[104] The issue is whether the USDOC made an unbiased and objective evaluation of facts, as required under Article 17.6(i) of the Anti-Dumping Agreement, in finding whether the differences in the relevant export prices were significant, as required under the pattern clause of Article 2.4.2.[105] In regard to the alleged qualitative issues with the Nails test, the European Union asserts that the terms "pattern" and "significantly" in the pattern clause of Article 2.4.2 can be understood quantitatively.[106] The European Union also agrees with the United States' narrower understanding of what qualitatively significant differences mean.[107] The European Union further submits that the reason why the relevant pattern exists may be pertinent under the explanation clause of Article 2.4.2, but not under the pattern clause of Article 2.4.2.[108] With reference to the alleged issue concerning the use of purchaser or time period averages under the

[95] United States' first written submission, para. 58.
[96] United States' first written submission, para. 58.
[97] United States' first written submission, para. 147.
[98] India, Russia, the Kingdom of Saudi Arabia, Chinese Taipei and Ukraine made no submissions to the Panel.
[99] Brazil's third-party submission, paras. 6-7.
[100] Brazil's third-party submission, paras. 8-9.
[101] Canada's third-party submission, para. 13.
[102] Canada's third-party submission, para. 11.
[103] Canada's third-party submission, paras. 11-12.
[104] European Union's third-party submission, para. 29.
[105] European Union's third-party submission, para. 29.
[106] European Union's third-party submission, para. 33.
[107] European Union's third-party submission, para. 33.
[108] European Union's third-party submission, para. 33.

Nails test, the European Union maintains that, since comparisons involving a large number of individual export transaction prices may be difficult, a practical approach would be needed.[109]

7.1.3.2.4 Japan

7.32. With respect to the alleged quantitative issues with the Nails test, Japan agrees with China that the USDOC should have examined the nature of distribution of the export price data before applying the one standard deviation threshold.[110] To illustrate this point, Japan refers to the USDOC's *Steel Cylinders* investigation wherein the USDOC noted that 16% of all export prices would "*typically*" fall one standard deviation below the weighted average mean, "*assuming a normal distribution of prices*".[111] According to Japan, this statement implies that the USDOC perceived that when more than 16% of export sales fell below that threshold, it was suggestive of "atypical" pricing behaviour or targeted dumping.[112] However, this perception was wholly based on the USDOC's assumption of normal distribution which contradicts the United States' position before the Panel that normal or any kind of probability distribution cannot be assumed *ex ante*.[113] Therefore, in Japan's view, the Nails test was statistically flawed. With respect to the alleged qualitative issues with the Nails test, Japan argues that the use of the words "pattern" and "significantly" shows that the drafters did not want to use purely quantitative thresholds under the pattern clause of Article 2.4.2 to determine targeted dumping.[114] Japan asserts that the qualitative evaluation of differences in export prices must be guided by the object of the second sentence of Article 2.4.2 to unmask targeted dumping, therefore requiring investigating authorities to show that export prices differ significantly in a way that they can be conceived to be targeted.[115] Japan also states that when comparing the prices to certain purchasers, regions or time periods with those to other purchasers, regions or time periods, an investigating authority is required to ensure that the prices at issue are comparable.[116] Therefore, an investigating authority should consider whether factors, such as seasonal trends or changes in input costs over time, affect comparability.[117]

7.1.3.2.5 Korea

7.33. Regarding the fourth alleged quantitative flaw with the Nails test, Korea questions the USDOC's decision to disregard, without explanation, non-target prices which were lower than the alleged target price.[118] Korea contends that because the alleged target was identified by the domestic industry petitioner, such an approach may have allowed the petitioner to cherry pick transactions to pass the Nails test.[119] In relation to the qualitative issues with the Nails test, Korea focuses on the use of the word "significantly" in the pattern clause of Article 2.4.2, which, in Korea's view, requires the demonstration of something other than merely large quantitative differences.[120] Regarding the use of purchaser and time period averages under the Nails test, Korea contends that the use of such averages biased the calculation of standard deviations used as part of the Nails test. In this regard, Korea agrees with China's argument that the pattern clause of Article 2.4.2 requires that a pattern be discerned through a comparison of individual export transaction prices, and not their weighted averages.[121]

7.1.3.2.6 Turkey

7.34. Turkey submits that an investigating authority has discretion in choosing a methodology it considers appropriate to find a significantly differing pricing pattern as long as it acts in an even-

[109] European Union's third-party submission, para. 37.
[110] Japan's third-party statement, para. 14 (citing *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 29). (emphasis added by Japan)
[111] Japan's third-party statement, para. 14 (citing *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 29). (emphasis added by Japan)
[112] See Japan's third-party statement, para. 14.
[113] Japan's third-party statement, para. 14.
[114] Japan's third-party statement, para. 11.
[115] Japan's third-party submission, para. 38.
[116] Japan's third party submission, para. 40.
[117] Japan's third party submission, para. 40.
[118] Korea's third-party submission, para. 28.
[119] Korea's third-party submission, para. 28.
[120] Korea's third-party submission, para. 7.
[121] Korea's third-party submission, para. 27.

handed and unbiased manner.[122] In relation to the need to consider whether the differences in the export prices which form the relevant pattern are qualitatively significant, while Turkey agrees that the word "significantly" under the pattern clause of Article 2.4.2 may have quantitative and qualitative dimensions, it contends that the quantitative aspect of the word is more pronounced than the qualitative one.[123]

7.1.3.2.7 Viet Nam

7.35. Viet Nam agrees with the second alleged quantitative flaw alluded to by China and finds the USDOC's use of a one standard deviation threshold to be too low to find whether a pattern exists or whether it differs significantly.[124] Regarding the alleged qualitative issues with the Nails test, Viet Nam asserts that to ensure an effective interpretation of the term "pattern" under the pattern clause of Article 2.4.2, an investigating authority must consider whether the differences in export prices arise due to standard business practices.[125] With reference to the issue concerning the use of purchaser or time period averages under the Nails test, Viet Nam notes that the pattern clause of Article 2.4.2 refers to a pattern of "export prices" in the plural, and argues that the use of purchaser or time period averages is inconsistent with that requirement.[126]

7.1.3.3 Evaluation by the Panel

7.36. China's claim under the pattern clause of Article 2.4.2 raises three sets of issues regarding the application of the Nails test in the three challenged investigations.

7.37. Before turning to examine those issues, we note that while the pattern clause of Article 2.4.2 specifies *what* an investigating authority should find, namely, a significantly differing pricing pattern, it does not prescribe *how* an investigating authority should make such a finding. Therefore, this clause provides an investigating authority with some discretion in making this particular finding. This does not mean, however, that the authority has a *carte blanche* in this regard. We recall that Article 17.6(i) of the Anti-Dumping Agreement, which sets out the standard of review that applies in disputes arising under this Agreement, states 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." Article 17.6(i) does not impose any independent obligation on a party. But, as stated by the Appellate Body in *US – Hot Rolled Steel*, while couched in terms of an obligation on panels, in effect, this provision defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its establishment and evaluation of the relevant facts.[127] Further, as explained by the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)*, in applying this standard of review under Article 17.6(i), a panel's task is "to assess whether the explanations provided by the authority are 'reasoned and adequate' by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning".[128] Guided by these clarifications by the Appellate Body, in our evaluation of China's claim under the pattern clause of Article 2.4.2, we will evaluate whether the USDOC found a significantly differing pricing pattern consistently with the pattern clause of Article 2.4.2, through an objective and unbiased evaluation of properly established facts.

7.38. We will commence our analysis by providing a brief description of the Nails test applied by the USDOC in the three challenged investigations and the two SAS programming errors which occurred in the *OCTG* and *Coated Paper* investigations. Thereafter, we will examine each of the three sets of issues raised by China's claim under the pattern clause of Article 2.4.2, namely, the quantitative issues, the qualitative issues and the use of purchaser or time period averages.

[122] Turkey's third-party submission, para. 7.
[123] Turkey's third-party submission, para. 9.
[124] Viet Nam's third party submission, para. 12.
[125] Viet Nam's third-party submission, para. 15.
[126] Viet Nam's third-party submission, para. 13.
[127] Appellate Body Report, *US – Hot-Rolled Steel,* para. 56.
[128] See, e.g. Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

7.1.3.3.1 Nails test

7.39. The Nails test applied by the USDOC consisted of two sequential stages, which we refer to in these proceedings as (a) the standard deviation test and (b) the price gap test. These stages were sequential because if the requirements of the standard deviation test were not met, the USDOC did not proceed to the second stage of the Nails test, namely the price gap test.

7.40. In the three challenged investigations, following the requirements of the Nails test, the USDOC first required the domestic industry petitioner to make an allegation of targeted dumping against an exporter, and to identify the alleged target.[129] Purchasers or time periods, as the case may have been, which were not identified by the petitioner as an alleged target were considered to be non-targets. The USDOC did not test whether the export prices to these presumed non-targets were actually targeted.[130] Second, under both stages of the Nails test (standard deviation test and price gap test), the USDOC made its initial analysis on a CONNUM-specific basis. The USDOC examined only those CONNUMs which were sold to both the alleged target and the non-targets. If a particular CONNUM was sold only to the alleged target, or only to non-targets, that CONNUM was not included in the examination.[131]

Standard deviation test

7.41. Under the standard deviation test, there was a two-step process pursuant to which the USDOC first identified whether the weighted average export price to the alleged target, which we refer to as the "alleged target price", was one standard deviation below the weighted average export price to all purchasers (or time periods) in the examined CONNUM (CONNUM-specific weighted average price).[132] We refer to this price as the "threshold price". To illustrate the operation of this test, let us assume that in CONNUM X, examined under the standard deviation test, the weighted average export price to purchasers A, B, C, D, E, and F by exporter Z were USD 5, 6, 10, 15, 16, and 17, respectively.[133] For simplicity, let us further assume that the quantity sold to each of these purchasers was 1 unit and that the domestic industry petitioner alleged that exporter Z was targeting purchaser B. Hence, in this case, the USDOC would consider purchaser B to be the alleged target, and all other purchasers to be non-targets. The CONNUM-specific weighted average export price (i.e. the mean price[134]), which is essentially the weighted average of all export transaction prices in CONNUM X, or put differently, the weighted average export price to all purchasers in that CONNUM, is USD 11.5.

$$\text{CONNUM-specific weighted average export price (M)} = \frac{(5*1)+(6*1)+(10*1)+(15*1)+(16*1)+(17*1)}{6\ (\text{Total Quantity})} = \text{USD } 11.5$$

7.42. The numerical value of one standard deviation for the data used in our illustration is 4.78.[135] This figure was obtained through the calculations shown in the table below:

[129] United States' first written submission, para. 86.
[130] United States' first written submission, para. 86.
[131] United States' response to Panel question Nos. 109 (a), (b), and (c), paras. 49-51; China's response to Panel question No. 109(c), para. 72; and Lisa Tenore's first statement, (Exhibit CHN-2) (BCI), para. 8.
[132] United States' first written submission, para. 97; and China's first written submission, para. 68.
[133] Whereas our illustration relates to the application of the Nails test to identify a pattern of export prices which differ significantly among different purchasers, exactly the same methodology was applied by the USDOC when identifying a pattern of export prices which differed significantly among different time periods.
[134] In this regard, we note that "mean" is a statistical concept, which simply refers to the average of a given data set. In the specific context of the standard deviation test, the mean is the weighted average of the export price of all export transactions in the examined CONNUM, which we refer to as the CONNUM-specific weighted average export price. In this report, we have used the term "mean" to describe the statistical basis of China's argument, and the term "CONNUM-specific weighted average export price" when describing the application of this statistical basis to the Nails test.
[135] In this regard, we note that the numerical value of one standard deviation depends on the numerical values in the examined data and hence will change if data with different numerical values are used. We also

CONNUM X					
Purchaser	Weighted average price to each purchaser (P)	Sales quantity [in kilograms] (Q)	Weighted average export price to a purchaser* sales quantity (P*Q)	The difference between the weighted average export price to a purchaser and the CONNUM-specific weighted average export price (M) of USD 11.5 (M-P)	(Square of the difference between the weighted average export price to a purchaser and the CONNUM-specific weighted average export price of USD 11.5)* sales quantity ($[M-P]^2$ *Q)
A	5	1	5	6.5	42.25
B (Alleged target)	6	1	6	5.5	30.25
C	10	1	10	1.5	2.25
D	15	1	15	-3.5	12.25
E	16	1	16	-4.5	20.25
F	17	1	17	-5.5	30.25
Total sum		**6**	**69**		**137.5**

Weighted standard deviation = Square Root of [{Total sum of $[M-P]^2$ *Q}/Q]= Square root of 137.5/6 = 4.78

7.43. Therefore, the threshold price is the CONNUM-specific weighted average price minus one standard deviation, i.e. USD 11.5 − 4.78 = USD 6.72. The USDOC would examine whether the alleged target price to B was below this threshold price of USD 6.72. Considering that the alleged target price to B was USD 6, i.e. less than USD 6.72, the USDOC would find that the requirements of the standard deviation test were met insofar as CONNUM X was concerned.

7.44. After repeating this exercise across all examined CONNUMs, the USDOC would consider whether 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.[136] In calculating the total volume of the exporter's sales to the alleged target, the USDOC would not include sales volumes pertaining to CONNUMs that were not sold to both the alleged target and a non-target.[137] Therefore, in our illustration, assuming that the volume of sales in CONNUM X to purchaser B was 40 units, that CONNUM X was the only CONNUM where the alleged target price was below the CONNUM-specific weighted average export price, and the total volume of sales in all CONNUMs to purchaser B examined under the Nails test was 100 units, the standard deviation test would be passed. This is because the volume of sales in CONNUM X would be 40% of the total sales volume to purchaser B and hence higher than 33%. The USDOC would then move on to the price gap test.

Price gap test

7.45. Under the price gap test, the USDOC calculated, again on a CONNUM-specific basis, an alleged target price gap, which was the difference between the alleged target price and the next higher non-target price.[138] The USDOC also calculated for that same CONNUM a weighted average non-target price gap, on the basis of the individual gaps between non-target prices that were higher than the alleged target price.[139] In calculating this weighted average non-target price gap,

note that in the three challenged investigations the USDOC calculated a weighted standard deviation under the standard deviation test. For ease of reference, we refer to this as "standard deviation".

[136] United States' first written submission, para. 100; and China's first written submission, para. 72.
[137] United States' response to Panel question No. 109(a), para. 51.
[138] United States' first written submission, para. 101; and China's first written submission, para. 76.
[139] United States' first written submission, para. 101; and China's first written submission, para. 76.

the USDOC disregarded non-target prices which were lower than the alleged target price.[140] The USDOC then compared the alleged target price gap with the weighted average non-target price gap in order to find which one was wider. Therefore, in our illustration above, the USDOC would not consider, under the price gap test, the non-target price to purchaser A because that price was lower than the alleged target price to purchaser B.

7.46. In this illustration, the alleged target price gap is the difference between the alleged target price to purchaser B, which is USD 6 and the next higher non-target price, which is the price of USD 10 to purchaser C. Therefore, the alleged target price gap is USD 4 (10 − 6).

Purchaser	Weighted Average Price to each purchaser (USD)	Quantity	Individual Gaps (USD)	Weight associated with individual gaps
~~A~~	~~5~~	~~1~~		
B	6	1		
C	10	1		
D	15	1	5 (Gap between C&D)	2 (1+1)
E	16	1	1 (Gap between D&E)	2 (1+1)
F	17	1	1 (Gap between E&F)	2 (1+1)

7.47. The weighted average non-target price gap is USD 2.33. This is calculated by multiplying each individual non-target price gap with its associated weight and dividing the total by the total associated weight, as shown in the equation below.

$$\frac{(5*2)+(1*2)+(1*2)}{6 \text{ (Total Quantity)}} = \text{USD } 2.33$$

7.48. Since the alleged target price gap of USD 4 is wider than the weighted average non-target price gap of USD 2.33, the USDOC would consider the requirements of the price gap test to be also met, insofar as CONNUM X was concerned. The USDOC would repeat this exercise across all CONNUMs examined under the price gap test. But if a CONNUM did not pass the standard deviation test, that CONNUM would not be examined under the price gap test. 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 exporter's sales to the alleged target, the USDOC would conclude that the exporter had passed the price gap test.[141] As under the standard deviation test, the USDOC did not include, in the total volume of the exporter's sales to the alleged target, sales volume in those CONNUMs which were sold only to the alleged target but not to a non-target.[142] This way, through the standard deviation test and the price gap test, the USDOC sought to establish whether there was "a pattern of export prices which differ[ed] significantly among different purchasers, regions or time periods", as required under the pattern clause of Article 2.4.2.

[140] United States' first written submission, para. 101; and China's first written submission, para. 76.
[141] *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 23; *Coated Paper* OI, Issues and Decision Memorandum, (Exhibit CHN-64), p. 22; and *OCTG* OI, Issues and Decision Memorandum, (Exhibit CHN-77), Comment 2.
[142] United States' response to Panel question No. 109(b), para. 50.

7.1.3.3.1.1 SAS programming errors

7.49. China challenges two SAS programming errors which occurred in the *OCTG* and *Coated Paper* investigations only. Both of these errors occurred in the calculation of the weighted average non-target price gap under the price gap test. The description of the two SAS programming errors, which we provide below, is based on China's factual characterization of such errors which the United States agrees with.[143]

First SAS programming error

7.50. The 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.[144] The USDOC found the "significant difference" requirements of the price gap test to be met, in the examined CONNUM, when the alleged target price gap was wider than any of these individual non-target price gaps, even the smallest one.[145] To illustrate this, let us assume that in a given CONNUM, examined under the price gap test, the weighted average export price to purchasers B, C, D, E, and F were USD 7, 10, 11, 16, and 22 respectively; the total unit sold to each of these purchasers was 1 unit; and that purchaser B was the alleged target. In this case, the alleged target price gap would be USD 3, i.e. the difference between the alleged target price to B and the next higher non-target price to C. The individual non-target price gaps between C and D, D and E, and E and F, would be USD 1, 5, and 6 respectively. The weighted average non-target price gap, based on these individual non-target price gaps would be USD 4. Under the price gap test, considering that the alleged target price gap of USD 3 is lower than the weighted average non-target price gap of USD 4, the requirement of the price gap test would not be met in the examined CONNUM. However, because of this SAS programming error, the price gap test was passed when the alleged target price gap was wider than any of the individual non-target price gaps. Since one of the individual non-target price gaps in our illustration is USD 1, and hence lower than the alleged target price gap of USD 3, the requirements of the price gap test would erroneously be met as a result of the first SAS programming error.

Second SAS programming error

7.51. As mentioned above, 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 (i.e. quantity) and dividing the total by the total weight associated with those gaps. The second SAS programming error occurred in the multiplication of each individual gap with its associated weight. Put in mathematical terms, this error occurred in the calculation of the numerator and not the denominator, which remained constant. The difference in the correct formula and the formula used as a result of the SAS programming error is provided in the table below.[146] In response to our questions, China also provided hypothetical calculations to describe the effect of this error.[147] In this hypothetical calculation, China assumes that the individual non-target price gaps 1, 2 and 3 are USD 2, 4, and 3 respectively. The associated weight of these price gaps are 5, 6 and 8 units respectively. These hypothetical calculations are also provided in Table A along with the formula.

Table A

Description	
Correct formula for calculating the numerator of the weighted average non-target price gap	(price gap 1* weighting factor 1) + (price gap 2* weighting factor 2) + (price gap 3* weighting factor 3)

[143] United States' response to Panel question No. 4(c), para. 4.
[144] China's first written submission, para. 78.
[145] China's first written submission, para. 78.
[146] See, e.g. Appendix to Lisa Tenore's first statement, (Exhibit CHN-2) (BCI), para. 2.
[147] China's visual aid presented at second substantive meeting with parties, (Exhibit CHN-520).

Description	
Hypothetical calculation based on correct formula	(2* 5) + (4* 6) + (3*8) = 58
Correctly-calculated weighted average non-target price gap	58/19=3.05
Incorrect formula used as a result of the SAS programming error	(price gap 1* weighting factor 1) + ((price gap 1 + price gap 2)* weighting factor 2) + ((price gap 1+ price gap 2 + price gap 3)* weighting factor 3)
Hypothetical calculation based on incorrect formula used due to second SAS programming error	(2 * 5) + ((2 + 4) * 6) + ((2 + 4 + 3) * 8) = 10 + 36 + 72 = 118
Incorrectly-calculated weighted average non-target price gap	118/19=6.21

7.52. Because the numerator increased and the denominator remained constant, the weighted average non-target price gap increased as a result of this error. Considering that the USDOC concluded that an exporter had met the requirements of the price gap test when the alleged target price gap was wider than the weighted average non-target price gap, as a result of the erroneous increase in the latter, it became less likely that the USDOC would find that the exporter had passed the price gap test. Consequently, it became less likely that the USDOC would find that the differences in the pattern of export prices to the alleged target were significant.

7.1.3.3.2 Quantitative issues with the Nails test

7.53. China presents two factual bases for its arguments regarding the quantitative issues with the Nails test. First, China contends that due to four quantitative flaws in the Nails test, the USDOC failed to find in the three challenged investigations, through an unbiased and objective evaluation of properly established facts, that the differences in export prices forming the relevant pattern were significant in a quantitative sense. Therefore, China submits that as a result of these four quantitative flaws, the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations. Second, China argues that because of two SAS programming errors, which distorted the application of the Nails test in the *OCTG* and *Coated Paper* investigations, the USDOC failed to find in these two investigations, through an unbiased and objective evaluation of properly established facts, that the differences in export prices forming the relevant pattern were significant in a quantitative sense. For this reason also, according to China, the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in these two challenged investigations. We will first examine the four alleged quantitative flaws with the Nails test which according to China affected all three challenged investigations and then proceed to the two SAS programming errors which occurred in the *OCTG* and *Coated Paper* investigations.

7.1.3.3.2.1 Four alleged quantitative flaws with the Nails test

7.54. China relies on the phrase "differ significantly" in the pattern clause of Article 2.4.2 to contend that because of the four alleged quantitative flaws with the Nails test, the USDOC failed to find, in an objective and unbiased manner, a pattern of export prices which "differ[ed] significantly" among different purchasers or time periods, in a quantitative sense. Two of these flaws concern the USDOC's application of the first stage of the Nails test, namely the standard deviation test, whereas the other two concern the application of the second stage of the Nails test, namely the price gap test.

7.55. In this regard, we note that an investigating authority may find export prices which "differ significantly" within the meaning of the pattern clause of Article 2.4.2 only through a comparison of high and low export prices which differ significantly from each other. In explaining the operation of the standard deviation test, the USDOC stated that it sought to establish, through this test, a "pattern of low [export] prices" concerning targeted sales, i.e. a pattern of low export prices to the

alleged target.[148] This shows that the USDOC examined, under the standard deviation test, whether "low" export prices to the alleged target "differ[ed]" from higher export prices to non-targets, and under the price gap test, whether these differences were "significant". It follows, in our view, that if the USDOC failed to properly identify, under the standard deviation test, that the alleged target price was low, it may have affected the USDOC's ultimate determination that the pattern of low export prices to the alleged target differed significantly from export prices to non-targets. Therefore, in specifically examining the two alleged quantitative flaws which concern the application of the standard deviation test, we will examine whether the USDOC failed to properly find that export prices to the alleged target were low such that it affected the USDOC's ultimate determination that the pattern of export prices differed significantly within the meaning of the pattern clause of Article 2.4.2. In relation to the two alleged quantitative flaws concerning the application of the price gap test, we will evaluate whether the USDOC failed to find a pattern of export prices which "differ significantly" within the meaning of the pattern clause of Article 2.4.2. With this in mind, we now turn to examine each of the four alleged quantitative flaws with the Nails test.

First alleged quantitative flaw with the Nails test: The USDOC's application of the one standard deviation threshold under the standard deviation test on the basis of an alleged assumption that the examined export price data were normally distributed or single-peaked and symmetric

7.56. With respect to the first alleged quantitative flaw with the Nails test, China contends that the Nails test "depend[ed] 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, which means that there were approximately as many prices above the mean as there were below it.[149] China submits that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 by applying the Nails test without confirming whether this assumption was correct, or in other words, without verifying that the export price data in the three challenged investigations were indeed normally distributed or at least single peaked and symmetric. The United States does not dispute that the USDOC did not test the export price data to confirm whether it was normally distributed or single-peaked and symmetric.[150] However, the United States asserts that the pattern clause of Article 2.4.2 imposes no obligation on an investigating authority to examine how export prices are distributed in a given investigation.[151]

7.57. We note that China's contention that the Nails test depended on the assumption that the examined export price data were either normally distributed or single-peaked and symmetric is not based on any statement by the USDOC, as reflected in its determinations in the three challenged investigations.[152] Instead, for China, such an assumption is implicit and based on the fact that the USDOC's use of a one standard deviation threshold under the standard deviation test would be "meaningless, or at best arbitrary" if the export prices were not distributed in this manner.[153] It would be arbitrary because in China's view, the USDOC used the one standard deviation threshold to identify whether the alleged target price was unusually or sufficiently low, as is, in China's view, required under the pattern clause of Article 2.4.2. But the one standard deviation threshold is not, according to China, an appropriate statistical tool to identify whether the alleged target price is unusually or sufficiently low unless the export price data are normally distributed or single-peaked and symmetric.

[148] See, e.g. *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 31. In this regard, we note that while the USDOC made this specific statement in the *Steel Cylinders* investigation, the USDOC did so in the context of explaining the general operation of the standard deviation test, which was applied in the same manner in the *OCTG* and *Coated Paper* investigations. Therefore, this explanation shows that the USDOC used the standard deviation test to establish a pattern of low export prices to the alleged target in all three challenged investigations.

[149] China's comments on the United States' response to Panel question No. 93, para. 3. (emphasis added)

[150] See, e.g. United States' response to Panel question No. 94(c), para. 15.

[151] United States' response to Panel question No. 94(b), para. 10.

[152] China's response to Panel question No. 94(d), para. 18; and comments on the United States' response to Panel question No. 94(c), para. 12.

[153] China's response to Panel question No. 6(c), para. 45; see also response to Panel question No. 6(a), para. 36.

7.58. China asserts that, statistically speaking, when a given data set is normally distributed or single-peaked and symmetric, 50% of the data points will fall below the mean. Further, when data are normally distributed, only 15.87% of the data points will fall one standard deviation below the mean.[154] In contrast, when data are not normally distributed or single-peaked and symmetric, a large mass of data points, sometimes more than 50%, may fall one standard deviation below the mean.[155] Similarly, when the relevant data are export price data, as in the case of the USDOC's determinations under the pattern clause of Article 2.4.2 in the three challenged investigations, China argues that a large number of export transactions (i.e. data points) may be at prices which are one standard deviation below the CONNUM-specific weighted average price (i.e. the mean), when the export price data are not normally distributed or single-peaked and symmetric.[156] China finds this problematic because if a large number of export transactions are at prices which are one standard deviation below the CONNUM-specific weighted average price, such prices would reflect the dynamics of the relevant market and would not be unusually or sufficiently low. Therefore, in China's view, the USDOC could not have concluded, through the use of a one standard deviation threshold, that the price to the alleged target was unusually or sufficiently low so as to form a pattern of export prices which differ significantly within the meaning of the pattern clause of Article 2.4.2 unless the export price data were normally distributed or single peaked and symmetric.

7.59. The issue that this alleged flaw raises is twofold and requires us to determine whether or not, as China argues, 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 if so, whether the USDOC verified that the export price data in the three challenged investigations were of that nature.

7.60. Turning to the first aspect of this issue, as noted above, China's argument that the Nails test could only be used if the export price data were normally distributed is based on the use of the one standard deviation threshold within this test. China contends that if the export price data are not normally distributed, applying the one standard deviation will lead to a large number of export transactions falling below the threshold price, which is one standard deviation below the CONNUM-specific weighted average export price. When a large number of transactions are made at export prices which are below the threshold price, in China's view, those export prices cannot be considered to be unusually or sufficiently low, so as to form a pattern of export prices which "differ significantly" within the meaning of the pattern clause of Article 2.4.2.

7.61. In this regard, we note that the pattern clause of Article 2.4.2 does not use phrases such as "unusually low" or "sufficiently low" which are used by the parties in these proceedings to highlight the legal requirements under that clause. The United States specifically objects to the use of the phrase "unusually low", noting that in statistics the term "unusually low" is used to describe outliers.[157] Therefore, when China argues that the USDOC should have identified whether the alleged target price was unusually low, the United States understands this to mean that the USDOC should have found whether the alleged target price was a random or aberrational outlier, which in its view is not required under the pattern clause of Article 2.4.2. The United States contends that the USDOC used the one standard deviation threshold to identify whether the alleged target price was sufficiently low rather than unusually low. China, on its part, clarifies that it does not argue that an investigating authority should limit the pattern to random and aberrational outliers and that its reference to unusually low prices was only a short-hand reference for the requirements under the pattern clause of Article 2.4.2.[158] China submits that its argument regarding this flaw would hold good even if the USDOC sought to identify whether the alleged target price was sufficiently low rather than unusually low. To the extent China's reference to

[154] See, e.g. First expert statement by Dr. Peter Egger (Dr. Egger's first statement), (CHN-1) (BCI), para. 44. In this regard, China states that when a distribution is single-peaked and symmetric but not normally distributed, the data points which are one standard deviation below the mean may be "much smaller or larger" than 15.87%. (China's response to Panel question No. 93, para. 16).

[155] China's comments on the United States' response to Panel question No. 94(a), para. 9.

[156] In its comments on the United States' response to our questions, for instance, China states that "whenever there is *a large mass of data points (here, export transactions)* below the threshold of a single standard deviation", the one-standard-deviation threshold will fail to function as a meaningful test, and will instead wrongly identify as sufficiently low prices that may in fact be quite typical of the relevant market for the CONNUM being tested. (China's comments on the United States' response to Panel question No. 94(a), para. 9). (emphasis added)

[157] United States' comments on China's response to Panel question No. 97(a), para. 17.

[158] China's response to Panel question No. 97(a), paras. 21-22.

unusually low prices means that only random and aberrational outliers among export prices can form part of a pattern, we disagree. We do not see any textual basis in Article 2.4.2 to limit a pattern to such outliers. Further, in our assessment, we do not find it necessary to discuss the difference, if any, between the phrases "unusually low" export prices and "sufficiently low" export prices which are used by the parties. Instead, in line with our interpretation of the phrase "differ significantly" and our understanding of the objective of the standard deviation test in paragraph 7.55 above, we will assess whether the USDOC failed to properly find that export prices to the alleged target were low, under the standard deviation test, such that it affected the USDOC's ultimate determination that the differences in the export prices forming the relevant pattern were significant, within the meaning of the pattern clause of Article 2.4.2.

7.62. The only reason provided by China as to why the USDOC could not have used the one standard deviation threshold to identify whether the export prices to the alleged target were, as China puts it, unusually or sufficiently low, is that when export price data are not normally distributed or single-peaked and symmetric, a large number of export transactions, sometimes more than 50% of all export transactions, will be one standard deviation below the CONNUM-specific weighted average price. In our view, it cannot be said that an export price is not low or sufficiently low, just because a large number of export transactions are made at such low level of prices. It is entirely possible, for instance, that an exporter makes repeated low priced sales to its targeted purchaser. Such sales may be made in terms of a large number of export transactions or large quantities of sales through fewer export transactions. The same rationale applies in cases where the exporter makes repeated low-priced sales in targeted regions or time periods. Therefore, the fact that a large number of export transactions are made at low prices would not necessarily preclude an investigating authority from finding that such low prices differ significantly from other higher prices.

7.63. To support its argument, China submitted evidence to show that in the three investigations at issue a large number of export transactions fell below the threshold price.[159] The United States has not confirmed the factual veracity of this evidence because the USDOC did not engage in this type of analysis in the three challenged investigations.[160] In any case, China does not show how the fact that in many situations a large number of export price transactions fell one standard deviation below the CONNUM-specific weighted average export price undermined the USDOC's finding in the three challenged investigations that the differences in the export prices forming the relevant pattern were significant. Instead, China appears to find the mere presence of a large number of export price transactions at such low prices to be, in and of itself, a ground for finding that the USDOC failed to properly find such significant differences. We disagree. Accordingly, we do not agree with China's contention that where a large number of export transactions are made at prices that are one standard deviation below the CONNUM-specific weighted average price, such prices cannot form the relevant pattern within the meaning of the pattern clause of Article 2.4.2.

7.64. In addition, we note that in the three challenged investigations the USDOC applied the one standard deviation threshold under the standard deviation test to a data set which consisted of purchaser or time period averages, to identify whether the alleged target price, i.e. the weighted average export price to the allegedly targeted purchaser or time period, was lower than the CONNUM-specific weighted average export price. The 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. Therefore, we see 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. For this reason also, we find no merit in China's argument that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 because the Nails test depended on the assumption that the export price data were normally distributed or single-peaked and symmetric.

[159] China's response to Panel question No. 94(b), para. 17 (referring to Second expert statement by Lisa Tenore (Lisa Tenore's second statement), (Exhibit CHN-497) (BCI), Tables 1-3).

[160] United States' response to Panel question No. 94(b), para. 12.

7.65. Before concluding, however, we wish to make an observation regarding the USDOC's determination in the *Steel Cylinders* investigation. In the Issues and Decision Memorandum published by the USDOC in that investigation, the USDOC stated as follows:

> [T]he use of one standard deviation limits the number of sales that could be considered targeted because no more than 16 percent of all prices would typically be found to be more than one standard deviation below the mean, *assuming a normal distribution of prices*.[161] (emphasis added)

7.66. We also find similar references to the assumption of normal distribution in other parts of that Memorandum. We asked the United States to clarify why such references to an assumption of normal distribution did not suggest that the USDOC did, in fact, assume that the examined export price data were normally distributed. The United States argues that this statement was made in response to Chinese exporter BTIC's statistical arguments and that, in presenting those arguments, it was BTIC rather than the USDOC that assumed that the export price data were normally distributed.[162] We note that the record of the *Steel Cylinders* investigation supports the explanation made by the United States.[163] China does not question this explanation by the United States. In fact, China explicitly states that it does not rely on these USDOC statements in the *Steel Cylinders* investigation in support of its argument that the Nails test depended on the assumption that export prices were normally distributed or single-peaked and symmetric.[164] Therefore, we find it unnecessary to examine whether the USDOC's statements in the *Steel Cylinders* investigation suggested that the USDOC assumed that the export price data were normally distributed in that investigation.

7.67. For the reasons discussed above, we find that China has 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. Therefore, the fact that the USDOC did not verify whether the export price data in the three challenged investigations were normally distributed or single-peaked and symmetric becomes irrelevant to our assessment of this alleged quantitative flaw. We therefore reject China's claim under the pattern clause of Article 2.4.2 in respect of the first alleged quantitative flaw with the Nails test.

Second alleged quantitative flaw with the Nails test: The USDOC's use of a "one" standard deviation threshold under the standard deviation test to find that export prices forming the relevant pattern differed significantly

7.68. The second alleged quantitative flaw is that the USDOC used a "one" standard deviation threshold under the standard deviation test which, according to China, was contrary to established statistical conventions, which require the use of a higher threshold, such as 1.96 standard deviations.[165] China contends that, in the field of statistics, a threshold of one standard deviation is "universally regarded as being insufficient to show that a given price difference is significant, in a quantitative sense".[166] China adds that prices that are just one standard deviation above or below the mean, are not significantly different from the mean in a statistical sense.[167] The United States, on its part, asserts that the USDOC did not use the one standard deviation threshold to make statistical inferences.[168] Hence, according to the United States, whether or not the USDOC's use of one standard deviation threshold was regarded as sufficient in the field of statistics to show that a

[161] *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 29.
[162] United States' response to Panel question No. 94(c), para. 13.
[163] In this regard, we note that in its submission to the USDOC, BTIC questioned the use of a one standard deviation threshold, arguing that "[o]ne standard deviation is defined mathematically to capture only 68% of the data points of any data set". (Case Brief of BTIC to USDOC in the *Steel Cylinders* OI, (Exhibit USA-126), p. 37). The statement that the one standard deviation threshold captures only 68% of data points is a statistical fact, which holds true only for normal distribution. This statistical fact is also presented in China's expert's first statement. (Dr. Egger's first statement, (Exhibit CHN-1) (BCI), para. 35).
[164] China's response to Panel question No. 94(d), para. 18; and comments on the United States' response to Panel question No. 94(c), para. 12.
[165] China's first written submission, paras. 243-245.
[166] China's response to Panel question No. 95, para. 20.
[167] China's second written submission, para. 39.
[168] United States' second written submission, para. 24 (citing *OCTG* OI, Issues and Decision Memorandum, (Exhibit CHN-77), Comment 2; and *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), Comment IV).

given price difference was significant in a quantitative sense is not relevant to the issue of whether the USDOC's use of this threshold was consistent with the pattern clause of Article 2.4.2. Further, the United States asserts that a price which is 1.96 or two standard deviations below the mean is an outlier which is highly unlikely to be observed.[169] The United States notes that the pattern clause of Article 2.4.2 does not require an investigating authority to identify only export prices which are outliers and that even when low-priced sales are not outliers, they may be targeted.[170]

7.69. In this regard, we note that China has clarified that it does not argue that only random and aberrational outliers can form part of a pattern of export prices which "differ significantly" within the meaning of the pattern clause of Article 2.4.2.[171] We have also stated, in paragraph 7.61 above, that the pattern clause of Article 2.4.2 does not require an investigating authority to limit a pattern to such outliers. China does not rebut the United States' argument that the use of higher standard deviation thresholds such as 1.96 or two standard deviations proposed by China would limit the pattern to such outliers. Instead, China argues that even if it were true that export prices which were two or more standard deviations below the mean price would be highly unlikely to be observed and would be outliers, "that fact would not affect the validity of the generally recognized statistical conventions for showing that prices differ significantly in a quantitative sense".[172]

7.70. The issue raised by this second alleged quantitative flaw with the Nails test is whether the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations by using a one standard deviation threshold to identify whether the differences in the export prices forming the relevant pattern were significant in a quantitative sense.

7.71. We recall that Article 2.4.2 does not prescribe a particular methodology for the identification of a significantly differing pricing pattern. Further, we find it important to recall that the Nails test, which was used by the USDOC in the three challenged investigations to find such a pattern, consisted of the standard deviation test, which sought to establish a "pattern of export prices which differ" and the price gap test, which sought to establish whether those differences were significant. The one standard deviation threshold was applied as part of the standard deviation test, not the price gap test. China's argument, however, is that by applying the one standard deviation threshold the USDOC failed to find that the pattern of low export prices to the alleged target differed "significantly" in a quantitative sense within the meaning of the pattern clause of Article 2.4.2. Thus, China's argument under the second alleged quantitative flaw with the Nails test seems to target the wrong component of that test. In fact, China itself acknowledges this confusion in its first written submission when it presents the following arguments regarding the use of the one standard deviation threshold under the standard deviation test, which China refers to as the pattern test in its submissions:

> China notes that USDOC does not appear to use its Pattern Test in order to determine whether prices "differ significantly" in the sense of Article 2.4.2. Nevertheless, for the sake of completeness, China notes that the statistical tool of the standard deviation and the "confidence intervals" that can be derived from standard deviations are frequently used to measure statistical significance. However, as China will demonstrate in the following, USDOC's threshold of one standard deviation below the mean, as applied by USDOC in the three challenged determinations as part of the Pattern Test, is not an appropriate measure of whether certain prices are significantly different from other prices, in a statistical sense. In other words, the Pattern Test, as applied by USDOC in the three challenged determinations, is not able to demonstrate – whether deliberately or inadvertently – that AT prices "differ significantly" from NT prices.[173] (footnotes omitted)

7.72. Thus, China is challenging the use of a one standard deviation threshold on the ground that "in the field of statistics, a threshold of merely a single standard deviation is universally regarded as being insufficient for showing that a given price difference is significant in a quantitative sense" even though China agrees that the USDOC did not use the one standard threshold to find whether

[169] See, e.g. United States' first written submission, para. 133.
[170] United States' second written submission, paras. 26-27.
[171] China's response to Panel question No. 97(a), para. 21.
[172] China's response to Panel question No. 8, para. 53.
[173] China's first written submission, para. 242.

the identified price differences were significant in a quantitative sense.[174] Therefore, we find no basis to conclude that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 by failing to find, through the one standard deviation threshold used under the standard deviation test, that the differences in export prices forming the relevant pattern were significant in a quantitative sense.

7.73. However, we find it important to note, as we acknowledged in paragraph 7.55 above, that it is entirely possible that the USDOC's determination under the standard deviation test affected its ultimate determination in the three challenged investigations, that the pattern of low export prices to the alleged target "differ[ed] significantly" from export prices to non-targets. China, however, has not shown that the USDOC's use of a one standard deviation threshold was of such a nature that it affected the USDOC's ultimate finding in relation to a pattern of export prices which "differ significantly" among different purchasers or time periods. In other words, China has not shown how the use of the one standard deviation threshold under the standard deviation test vitiated the USDOC's ultimate conclusions under the pattern clause of Article 2.4.2. Instead, China relies on statistical conventions to show that the one standard deviation threshold was insufficient, in and of itself, to measure quantitative significance. We disagree. Therefore, we reject China's argument that the one standard deviation threshold was insufficient to show that the pattern of export prices differed significantly in a quantitative sense.

7.74. Accordingly, we reject China's claim under the pattern clause of Article 2.4.2 in respect of the second alleged quantitative flaw with the Nails test.

Third alleged quantitative flaw with the Nails test: The USDOC's attribution of "significance" to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean

7.75. The third alleged quantitative flaw concerns the USDOC's application of the price gap test. Specifically, this flaw relates 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. We recall that under the price gap test, the USDOC examined, on a CONNUM-specific basis, whether the alleged target price gap was wider than the weighted average non-target price gap and found the significant difference requirement to be met, in the examined CONNUM, when this was the case. China argues that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations by applying this method under the price gap test because when the export price data were normally distributed, "by definition", the alleged target price gap would be based on prices located at the "tail" of the distribution whereas the weighted average non-target price gap would be based on prices located closer to the peak of the distribution.[175] China asserts that, in terms of statistics, in case of any peaked distribution with tails, the gap between any two given prices, which are located at the tail of the distribution, are inherently wider than those at the peak of the distribution of the data. China submits that this feature of inherently larger gaps at the tails of a distribution as compared to the peak holds true for "any peaked distribution with tails", and not just for normal or single-peaked and symmetric distributions.

7.76. Therefore, in China's view, when in the three challenged investigations the USDOC found the alleged target price gap, which was based on prices located at the tail of the distribution, 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".[176] This did not show that the pattern of export prices to the alleged target differed significantly from the export prices to the non-targets, in a quantitative sense. Therefore, according to China, the USDOC did not properly find, in the three challenged investigations, that the pattern of export prices "differ[ed] significantly" in a quantitative sense and as a result acted inconsistently with the pattern clause of Article 2.4.2 in these investigations.

7.77. The United States denies that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations because of this third alleged quantitative flaw and questions the factual premise on which China's argument regarding this flaw is based. Specifically, the United States notes that while China's argument is premised on the existence of a

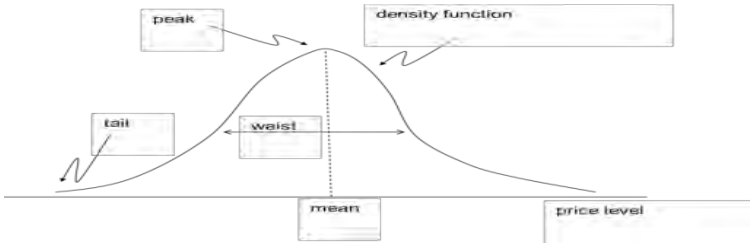
[174] China's response to Panel question No. 95, para. 20.
[175] China's first written submission, para. 234.
[176] China's second written submission, para. 43. (emphasis omitted)

distribution with a tail, China has not demonstrated that the actual export price data examined under the Nails test in the three challenged investigations even had a tail.[177]

7.78. The issue raised by this alleged flaw is two-fold. First, we note 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. Therefore, we have to first verify whether this assumption is factually correct. Second, if we find this assumption to be factually correct, we will 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.

7.79. Before proceeding to an assessment of these issues, we find it useful to explain the statistical basis of China's arguments, specifically the concepts of "peak" and "tails" of a distribution. We note that data which are normally distributed, when graphically represented, take the shape of a bell.[178] This is the bell curve, which has certain identifiable characteristics. It has a single "peak" and two "tails", one on the left and one on the right. Figure 1 below, taken from the first statement of China's expert, contains a graphical representation of this bell curve with its associated "peak" and "tails".

Figure 1



7.80. Furthermore, another feature of normal distribution is that the weighted average of all prices (i.e. the mean) contained in this distribution is at the peak of the distribution.[179] Also, most of the prices are concentrated towards the peak of the distribution, which is in the middle of the bell curve, whereas fewer prices are located at the tail of the distribution. Therefore, the peak is denser than the tails in terms of the distribution of prices. Both 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.[180] However, it is also possible that actual distribution of data is neither normal nor single-peaked and symmetric. Specifically, the distribution may be one which has two or more peaks with tails, and hence is not single-peaked, or may even be a distribution which does not have a tail.

7.81. Turning to the first aspect of the issue, we recall that China argues that if the export price data were normally distributed in the three challenged investigations, the alleged target price, examined under the price gap test, would by definition be located at the tail of the distribution. This is because under the price gap test, the USDOC would have only examined the alleged target price if that price was one standard deviation below the CONNUM-specific weighted average export price and hence located at the tail of the distribution. Because the alleged target price gap was based on a comparison of the alleged target price with a higher non-target price, this gap could be

[177] United States' comments on China's response to Panel question Nos. 99 (a), (b), (c) and (d), para. 39.
[178] United States' response to Panel question No. 93, para. 3; and Dr. Egger's first statement, (Exhibit CHN-1) (BCI), para. 30.
[179] Dr. Egger's first statement, (Exhibit CHN-1) (BCI), para. 62.
[180] Dr. Egger's first statement, (Exhibit CHN-1) (BCI), para. 62; and United States' response to Panel question No. 99(e), para. 23.

based on prices located at the tail of the distribution.[181] However, China itself presented evidence in these proceedings showing that in the three challenged investigations, the export price data were not actually normally distributed or even single-peaked and symmetric.[182] Considering that the export price data in the three challenged investigations were not normally distributed, we cannot conclude that the alleged target price was by definition located at the tail of the distribution of that data. In such a situation, it would be for China to show that in the three challenged investigations the alleged target price gap was based on export prices located at the tail of the data distribution.

7.82. China does 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. Therefore, we find that China has 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.

7.83. Further, in its response to our questions following the second substantive meeting, China qualified its argument regarding this flaw, by stating that this flaw would apply in all cases where the first alleged quantitative flaw did not apply. That is to say, China's argument regarding this flaw would apply in "instances involving a distribution that is single-peaked and symmetric around the mean and thus has a left hand tail" whereas the first alleged quantitative flaw would apply in situations where the export price data were not distributed in this manner.[183] We note, however, that China does not identify "instances" in the three challenged investigations where the export price data were "single-peaked and symmetric around the mean and thus ha[d] a left hand tail". After the second substantive meeting with the parties, we asked China whether China was arguing that in each of the three challenged investigations, the alleged target price gap (which according to China was based on prices from the tail of the price distribution) was always found to be wider than the individual non-target price gaps at the peak of the price distribution. In response, China stated that "there [was] no specific evidence in the record to which the Panel could usefully refer when examining this aspect of China's argument."[184] Therefore, again, China does not demonstrate that the assumption on which the third alleged quantitative flaw rests is factually correct. Accordingly, we also reject this argument by China.

7.84. Having found that China has 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, we need not, and do not, proceed to an assessment of the second aspect of the issue raised by this flaw.[185] We

[181] In this regard, it is not clear from China's submissions whether the next higher non-target price with which the alleged target price was compared to calculate the alleged target price gap was also based on prices located at the tail of the distribution of the export price data, when the export price data were normally distributed.

[182] See, e.g. Third expert statement by Dr. Peter Egger (Dr. Egger's third statement), (Exhibit CHN-522) (BCI), para. 3 and Figures 1-12.

[183] See, e.g. China's response to Panel question No. 100, para. 53.

[184] China's response to Panel question No. 99(c), para. 45.

[185] We find it useful to note, however, that China has not been consistent in presenting its arguments regarding the second aspect of this issue. Specifically, it is not clear to us whether China questions the comparison of prices located at the tail of the distribution with those located nearer to the peak because it only confirmed an (a) inherent feature of a normal distribution or (b) an inherent feature of a single-peaked and symmetric distribution or (c) an inherent feature of every peaked distribution with tails, which maybe a distribution with two or more peaks. For instance, in its opening statement at the first substantive meeting, China argued that "it was inappropriate, in the three challenged determinations, for USDOC to attribute 'significance' to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean, because this is an *inherent feature* of every normal distribution." (China's opening statement at the first meeting of the Panel, para. 18). (emphasis original). In response to our questions pursuant to the first substantive meeting, however, China stated that the third quantitative flaw applied whenever the export price data in the three challenged investigations had single-peaked and symmetric distributions and not just when the data were normally distributed. (China's response to Panel question No. 6(c), para. 46). In contrast, in its response to our questions pursuant to the second substantive meeting, China confirmed that its argument regarding the third alleged quantitative flaw applied in case of "all distributions with tails, including distributions with two or more peaks" and not just when the export price data were normally distributed or single-peaked and symmetric. (China's response to Panel question No. 99(a) and (b), paras. 42-43; see also first written submission, paras. 231-232). In another part of that same submission, however, China stated that its argument in relation to this flaw was that the USDOC treated as significant something which was "inherent

therefore reject China's claim under the pattern clause of Article 2.4.2 in respect of the third alleged quantitative flaw with the Nails test.

Fourth alleged quantitative flaw with the Nails test: The USDOC's decision to disregard non-target prices which were lower than the alleged target price, under the price gap test

7.85. The fourth alleged quantitative flaw also concerns the USDOC's application of the price gap test. Specifically, this flaw relates to the manner in which the USDOC calculated the weighted average non-target price gap under this test in the three challenged investigations. In this regard, we recall that when calculating this weighted average non-target price gap, the USDOC disregarded individual gaps between non-target prices which were found to be lower than the alleged target price. China argues that because the USDOC did not take into account these non-target prices in the calculation of the weighted average non-target price gap, it failed to objectively determine, through the price gap test, that the pattern of low export prices to the alleged target "differ[ed] significantly" from export prices to the non-targets, in a quantitative sense and thereby acted inconsistently with the pattern clause of Article 2.4.2. The United States rejects China's arguments, noting that the USDOC applied the Nails test to identify a specific type of pattern, namely, a pattern of sufficiently low export prices in relation to other higher export prices.[186] Therefore, in the United States' view, it was "logical" that the price gap test would compare the export prices to an alleged target with higher export prices to non-targets and that the USDOC did not act inconsistently with the pattern clause of Article 2.4.2 by doing so.[187]

7.86. Turning to the relevant facts, we note that in the *OCTG* investigation, [[BCI]] of the [[BCI]] CONNUMs examined under the price gap test had non-target prices which were lower than the alleged target price.[188] In the *Coated Paper* investigation, [[BCI]] of the [[BCI]] CONNUMs had non-target prices which were lower than the alleged target price.[189] In both investigations, the USDOC disregarded, under the price gap test, these non-target prices which were lower than the alleged target price in calculating the weighted average non-target price gap.[190] Further, the United States agrees with China's assertion that, under the specific facts of these two investigations, the inclusion of these lower non-target prices would have increased the weighted average non-target price gap which in turn would have decreased the likelihood of the price gap test being passed.[191] However, in the *Steel Cylinders* investigation, the alleged target price was the lowest price in all the examined CONNUMs. Hence, there were no non-target prices which were lower than the alleged target price and the question of disregarding non-target prices lower than the alleged target price did not arise in this particular investigation.[192] Therefore, while China raises this flaw with respect to all three challenged investigations, we find no factual basis to make a determination in relation to the *Steel Cylinders* investigation in this regard. Our findings with respect to the fourth alleged quantitative flaw with the Nails test will therefore relate only to the *OCTG* and *Coated Paper* investigations.

7.87. The question that this alleged flaw raises is whether or not by disregarding non-target export prices which were lower than the alleged target price from the scope of export prices used to determine the weighted average non-target price gap, the USDOC failed to make an objective and unbiased determination regarding the existence of a pattern of export prices which differed significantly in a quantitative sense, consistently with the requirements of the pattern clause of Article 2.4.2.

7.88. By disregarding the non-target prices which were lower than the alleged target price in calculating the weighted average non-target price gaps, the USDOC found that the pattern of export prices to the allegedly targeted purchaser (or time period) differed significantly among different purchasers (or among different time periods), on the basis of export prices to some but not all different purchasers (or time periods). We recall that the purpose of the price gap test that

in distributions that are *single-peaked* and symmetric around the mean". (China's response to Panel question No. 100, para. 53). (emphasis added)

[186] United States' response to Panel question No. 101(c), para. 29.
[187] United States' response to Panel question No. 101(c), para. 29.
[188] United States' response to Panel question No. 101(a), para. 25.
[189] United States' response to Panel question No. 101(a), para. 25.
[190] United States' response to Panel question No. 101(a), para. 25.
[191] United States' response to Panel question No. 101(a), para. 26.
[192] China's response to Panel question No. 101(b), para. 55.

the USDOC applied in the challenged investigations was to find whether the differences in the pattern of export prices were significant, within the meaning of the pattern clause of Article 2.4.2. In our view, it is possible that when an investigating authority compares the export prices to an allegedly targeted purchaser with the export prices to some or even most other purchasers, the differences between them may appear significant. However, when that investigating authority compares the export prices to that same allegedly targeted purchaser with the export prices to all purchasers, such differences may no longer appear significant. The same rationale holds when the investigating authority compares the export prices to an alleged targeted time period with export prices to other time periods. Therefore, we consider that an unbiased and objective investigating authority would not have rejected, without justification, evidence on record pertaining to the weighted average export prices to some non-targeted purchasers or time periods, as the case may have been, which were lower than the alleged target price. This is particularly because such evidence may bring into question an investigating authority's finding that the pattern of export prices to the alleged target differs significantly from export prices to non-targets.

7.89. In this context, we note the United States' argument that because the USDOC applied the Nails test to identify a specific type of pattern, namely, a pattern of sufficiently low export prices in relation to other higher export prices, it was "logical" that the price gap test would compare the export prices to an alleged target to higher export prices to non-targets. We are not persuaded by this argument for two reasons. First, the pattern clause of Article 2.4.2 does not permit an investigating authority to conclude that the pattern of export prices to the alleged target differs significantly from those to non-targets by considering only the export prices to non-targeted purchasers or time periods which are higher than those to the alleged target. In our view, for export prices to the alleged target to be low, they have to be low relative to export prices to all other non-targets. The USDOC found export prices to the alleged target to be low, under the standard deviation test, because they were one standard deviation below the CONNUM-specific weighted average export price. However, if the export prices to a number of non-targeted purchasers or non-targeted time periods are below that one standard deviation threshold and below the alleged target price, this may require an investigating authority to question whether the export prices to the alleged target are indeed low relative to the prices to these non-targeted purchasers or time periods. Faced with such a situation, an unbiased and objective investigating authority would be expected to take such lower non-target prices into consideration and evaluate whether the presence of such prices casts doubt on its finding of a pattern of export prices which differ significantly, within the meaning of the pattern clause of Article 2.4.2. However, the USDOC chose to disregard, without explanation, data on the record pertaining to such lower non-target prices. That, in our view, is neither an objective nor an unbiased evaluation of record evidence.

7.90. Second, we recall that there is an element of subjectivity in the identification of the alleged target under the Nails test. In the challenged investigations, the domestic industry petitioner identified the alleged target before the USDOC applied the Nails test. Consequently, which purchaser or which time period would be the alleged target, and which would be the non-targets, was determined before the USDOC applied the Nails test. As the United States itself acknowledges, the petitioner's identification of the alleged target influenced which non-target prices would be considered under the price gap test and which would not be.[193] To illustrate this, let us assume that the weighted average export prices to purchasers A, B, C, and D are found to be one standard deviation below the CONNUM-specific weighted average export price. Let us also assume that the weighted average export prices to A, B, C, and D are USD 2, USD 3, USD 4, and USD 5, respectively. In this case, if the petitioner had identified purchaser D as the alleged target, the USDOC would not have considered the weighted average export price to purchasers A, B and C under the price gap test. In contrast, if the petitioner had identified purchaser A as the alleged target, the USDOC would not have disregarded any of the prices to the non-targets from the computation of the weighted average non-target price gap. Therefore, we do not consider that, in the three challenged investigations, the USDOC determined, as the United States puts it, a pattern of sufficiently low export prices in relation to other higher export prices, on the basis of a purely objective examination of the export price data given that the alleged target was initially identified by the petitioner.

7.91. We also note that the records in the *OCTG* and *Coated Paper* investigations do not contain any explanation as to why such lower prices were excluded from the scope of the calculation of the weighted average non-target price gap. The United States contends that because no interested

[193] United States' response to Panel question No. 9(b), para. 13.

party raised any questions in this regard, there was no reason for the USDOC to discuss this in its determinations.[194] However, in such a situation, one would have expected an unbiased and objective investigating authority to provide an explanation for its decision to disregard export price data on the record which could have affected its determination even in the absence of any objection or inquiry by an interested party.[195] There is no such explanation in the USDOC's records in the *OCTG* and *Coated Paper* investigation. Because the USDOC disregarded, without explanation, non-target prices which were lower than the alleged target price in the *OCTG* and *Coated Paper* investigations, we consider that the USDOC failed to find, in an objective and unbiased manner, a pattern of export prices which differ significantly among different purchasers or among different time periods, as required under the pattern clause of Article 2.4.2.

7.92. The United States also argues that even if the USDOC had not disregarded, in the *OCTG* and *Coated Paper* investigations, the non-target prices which were found to be lower than the alleged target price, that would not have changed the outcome of the USDOC's determinations under the pattern clause of Article 2.4.2. Specifically, the United States argues that whereas the weighted average non-target price gap would have increased in the *OCTG* and *Coated Paper* investigations if non-target prices lower than the alleged target price were taken into account in its calculation, the price gap test would still have been passed in these investigations.[196] We have already found, in paragraph ‍7.87, that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 because it disregarded, without explanation, non-target prices which were lower than the alleged target price. We do not consider the fact that the outcome of the price gap test would not have changed, even if the USDOC acted consistently with the pattern clause of Article 2.4.2, or that the error which we have found in the USDOC's determinations was harmless to be of any relevance to our determination. We find support for this view in the panel report in *EC – Salmon (Norway)*, where the panel found that in evaluating an investigating authority's determination it was not required to take cognizance of an argument of harmless error.[197] Therefore, we also reject this argument by the United States.

7.93. In light of the above, we conclude that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the *OCTG* and *Coated Paper* investigations, by failing to find, in an objective and unbiased manner, a pattern of export prices which differed significantly, within the meaning of the pattern clause of Article 2.4.2. We therefore uphold China's claim under the pattern clause of Article 2.4.2 in respect of the fourth alleged quantitative flaw with the Nails test insofar as the *OCTG* and *Coated Paper* investigations are concerned. We reject China's claim under the pattern clause of Article 2.4.2 in respect of the fourth alleged quantitative flaw with the Nails test insofar as the *Steel Cylinders* investigation is concerned.

7.1.3.3.2.2 SAS programming errors

First SAS programming error

7.94. The first SAS programming error occurred in the application of the price gap test in the *OCTG* and *Coated Paper* investigations. We recall that as a result of the first SAS programming error, instead of comparing the alleged target price gap in a given CONNUM with the weighted average non-target price gap in that CONNUM, the USDOC compared the alleged target price gap with the individual non-target price gaps which made up the overall weighted average non-target price gap. The USDOC found the "significant difference" requirement of the price gap test to be met, in the examined CONNUM, when the alleged target price gap was greater than any of these non-target price gaps taken individually, even the smallest one.[198] China contends that as a result

[194] United States' response to Panel question No. 101(c), para. 30.

[195] In this regard, we note the United States' argument that in the *Steel Cylinders* investigation the USDOC explained the reasons for rejecting non-target prices which were lower than the alleged target price, by stating that the Chinese exporter BTIC had not demonstrated why the significant difference requirement could only be met by taking into account all non-target prices, including those that were lower than the alleged target price. (United States' response to Panel question No. 101(c), para. 29 (citing *Steel Cylinders*, Issues and Decision Memorandum, (Exhibit CHN-66), p. 30)). Since we have found that there was no non-target prices lower than that the alleged target price in this particular investigation, we do not make findings on the adequacy of the USDOC's explanation.

[196] United States' response to Panel question No. 101(a), para. 26.

[197] Panel Report, *EC - Salmon (Norway)*, fn 763. See also Panel Reports, *Argentina – Ceramic Tiles*, para. 6.103; and *EC – Fasteners (China)*, fn 732.

[198] China's first written submission, para. 78.

of this SAS programming error, it became more likely that the USDOC would find that the exporter had passed the price gap test and that the USDOC would conclude that the "significant difference" requirement under the pattern clause of Article 2.4.2 was met.[199] Therefore, in China's view, as a result of this error, the USDOC failed to find, in an objective and unbiased manner, a pattern of export prices which differed significantly, in a quantitative sense, as required under the pattern clause of Article 2.4.2.[200] We recall that the United States agrees that this error occurred in the *OCTG* and *Coated Paper* investigations and also agrees with China's factual characterization of this error. However, the United States contends that China has not shown how this error led to a violation of any specific provision of the Anti-Dumping Agreement.

7.95. The facts show that in the *OCTG* and *Coated Paper* investigations the USDOC found the significant difference requirement in the examined CONNUM to be met when the alleged target price gap was wider than any individual gap between two non-targeted purchasers or time periods. Even if inadvertently, the USDOC failed to consider, due to this error, the record evidence on all non-target prices which made up the weighted average non-target price gap, and did not provide any explanation for this approach. In our view, this shows that the USDOC's finding that there was a pattern of export prices which differed significantly among different purchasers or time-periods in the *OCTG* and *Coated Paper* investigations lacked an adequate factual basis.

7.96. In light of the above, we conclude that, because of the first SAS programming error, the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the *OCTG* and *Coated Paper* investigations, by failing to find, in an objective and unbiased manner, a pattern of export prices which differed significantly, within the meaning of the pattern clause of Article 2.4.2. We therefore uphold China's claim under the pattern clause of Article 2.4.2 in respect of the first SAS programming error insofar as the *OCTG* and *Coated Paper* investigations are concerned.

Second SAS programming error

7.97. The second SAS programming error also occurred in the application of the price gap test in the *OCTG* and *Coated Paper* investigations. Specifically, this error relates to the calculation of the weighted average non-target price gap, under the price gap test. The specific nature of this error is presented in paragraphs 7.51 through 7.52 above. In particular, we recall that as a result of this error, the weighted average non-target price gap erroneously became wider than what it would otherwise have been.

7.98. We note that China changed its factual characterization of this error during our second substantive meeting with the parties. Initially, China challenged the second SAS programming error, along with the first SAS programming error, because in China's view, this error increased the likelihood that the alleged target price gap would pass the price gap test.[201] Therefore, according to China, this second SAS programming error, along with the first one, "biased the Nails test" towards finding that the differences in export prices forming the relevant pattern were significant.[202] In response to our questions following the second substantive meeting, however, China clarified that as a result of this error, the weighted average non-target price gap in the examined CONNUMs increased rather than decreased. Because the requirements of the price gap test were met in an examined CONNUM when the alleged target price gap was wider than the weighted average non-target price gap, as a result of this increase, it became less, not more, likely that the alleged target price gap would be wider than the weighted average non-target price gap. Therefore, contrary to what China stated earlier in the proceedings, China subsequently clarified that the second SAS programming error decreased rather than increased the likelihood that the price gap test would be passed in the *OCTG* and *Coated Paper* investigations.[203]

7.99. Factually, it is clear that, as a result of the second SAS programming error, it became less likely rather than more likely that the USDOC would find in the *OCTG* and *Coated Paper* investigations that the pattern of export prices differed significantly, in a quantitative sense, within the meaning of the pattern clause of Article 2.4.2. China nevertheless continues to challenge this error because for China the relevant legal issue raised by this error is that the price gap test "did

[199] See, e.g. China's first written submission, para. 78; and response to Panel question No. 90, para. 3.
[200] See, e.g. China's second written submission, para. 26.
[201] China's response to Panel question No. 4(a), para. 21.
[202] China's response to Panel question No. 4(a), para. 21.
[203] China's response to Panel question No. 91(a), paras. 6-7.

not do what [it was] supposed to do according to USDOC's own description of the way in which the Price Gap Test operates".[204] China also contends that because there was a mismatch between the USDOC's explanation of how the price gap test would operate and how it actually operated as a result of this error, the USDOC failed to "provide the required reasoned and adequate explanation showing compliance of the Price Gap Test with the requirements of the Anti-Dumping Agreement".[205]

7.100. In our view, the issue is not whether the USDOC acted inconsistently with the price gap test, or whether the price gap test "did not do what [it was] supposed to do" but whether this admitted error rendered the USDOC's determination inconsistent with the pattern clause of Article 2.4.2. We acknowledge that the second SAS programming error caused the Nails test to operate in a way different from how it should have operated in the two investigations at issue. However, we cannot conclude on this basis alone that the USDOC's findings were inconsistent with the pattern clause of Article 2.4.2. China's argument does not go beyond the acknowledged fact that the Nails test did not do what it was supposed to do in these two investigations. China has not shown that the second SAS programming error led to a violation of the pattern clause of Article 2.4.2 in the *OCTG* and *Coated Paper* investigations.

7.101. In addition, we find it important to underline the fact that the second SAS programming error made it less likely for the USDOC to find a pattern of export prices that differed significantly. We also recall that in the two investigations at issue, the USDOC concluded that there was a pattern of export prices which differed significantly among different purchasers or time periods. Therefore, the absence of the second SAS programming error would only have strengthened the USDOC's finding that the differences in export prices forming the relevant pattern were significant within the meaning of the pattern clause of Article 2.4.2.

7.102. Taking into account the particular circumstances of these two investigations and the nature of the second SAS programming error, we conclude that China has not shown that the second SAS programming error led to a finding that was inconsistent with the requirements of the pattern clause of Article 2.4.2 in the *OCTG* and *Coated Paper* investigations. We therefore reject China's claim under the pattern clause of Article 2.4.2 in respect of the second SAS programming error insofar as the *OCTG* and *Coated Paper* investigations are concerned.

7.1.3.3.2.3 Conclusion

7.103. Based on the foregoing, we find that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG* and *Coated Paper* investigations, as a result of the fourth quantitative flaw with the Nails test and the first SAS programming error. We however reject China's claim under the pattern clause of Article 2.4.2 in relation to the first, second, and third alleged quantitative flaws with the Nails test and the second SAS programming error insofar as the *OCTG* and *Coated Paper* investigations are concerned.

7.104. We reject China's claim under the pattern clause of Article 2.4.2 in relation to all four alleged quantitative flaws with the Nails test insofar as the *Steel Cylinders* investigation is concerned.

7.1.3.3.3 Qualitative issues with the Nails test

7.105. China argues that when an investigating authority seeks to find whether the pattern of export prices "differ significantly" within the meaning of the pattern clause of Article 2.4.2, it should not just focus on how large the quantitative or numerical differences in export prices are but also examine whether those differences are qualitatively significant. Relying on the ordinary meaning of the word "significant" as "sufficiently great or important to be worthy of attention" or "appropriate" to convey a meaning, China emphasizes that differences cannot be worthy of attention or appropriate to convey a meaning if they depend only on the numerical amount of the difference. Instead, in China's view, an investigating authority must also focus on the nature of the differences or the reason why the differences exist.[206] Further, noting that the object and purpose of the second sentence of Article 2.4.2 is to deal with targeted dumping, China submits that when

[204] China's response to Panel question No. 91(b), para. 9.
[205] China's response to Panel question No. 91(b), para. 10.
[206] China's first written submission, para. 140.

quantitative differences in export prices are unconnected with targeted dumping, they are unlikely to be significant within the meaning of the pattern clause of Article 2.4.2.[207] Therefore, an investigating authority should consider the reasons for the price differences to examine if that is the case in a given investigation. China submits that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations because it 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. The United States agrees with China that the word "significant" has a quantitative as well as a qualitative dimension. However, in the United States' view, to examine whether the differences in export prices are qualitatively significant, an investigating authority is required to assess how export prices differ and not why they differ.[208] The United States explains that in assessing how export prices differ, the USDOC will do case-specific analyses with due regard the nature of the product under investigation or the industry at issue.[209] However, according to the United States, the USDOC was not required to consider, in the three challenged investigations, the commercial reasons or market explanations for differences in export prices, as part of its qualitative analysis, as those factors pertain to why export prices differ and not how they differ.[210]

7.106. Regarding the factual basis of this alleged flaw, insofar as the *OCTG* and *Coated Paper* investigations are concerned, it remains undisputed that no interested party made submissions to the USDOC as to the reasons for the identified differences in export prices forming the relevant pattern. Insofar as the *Steel Cylinders* investigation is concerned, BTIC argued before the USDOC that the differences that it found in export prices over different time periods were attributable to changes in the price of the input used to manufacture steel cylinders, namely steel, in the course of the POI. The USDOC rejected this argument because it found that it had no evidentiary value.[211]

7.107. With respect to the legal requirements under the pattern clause of Article 2.4.2, we find no explicit requirement in this clause to consider the reasons for the identified differences in export prices forming the relevant pattern. China, however, contends that such reasons need to be considered when an investigating authority examines whether the differences in export prices are qualitatively significant. In this regard, both parties agree that "significant" means "[s]ufficiently great or important to be worthy of attention".[212] In our view, this term can also be defined as "important, notable; consequential".[213]

7.108. We note that under the pattern clause of Article 2.4.2, the differences that are sought to be identified are the differences in the levels of various export prices. We therefore consider that in examining whether such differences are "sufficiently great or important to be worthy of attention" or "important, notable; consequential", an investigating authority would first take into account the size of the numerical differences. In other words, whether or not the differences in export prices are significant is an enquiry concerning the magnitude of such differences and how such prices differ, rather than the reasons for such differences. Indeed, we see no textual basis in Article 2.4.2 to suggest that an investigating authority is required to examine the reasons for the differences in export prices forming the relevant pattern.

7.109. In this regard, we note China's argument that when quantitative differences are unconnected with targeted dumping, they are unlikely to be significant within the meaning of the pattern clause of Article 2.4.2. It is important to recall that the phrase "targeted dumping" is neither used nor defined in the second sentence of Article 2.4.2 nor in any other part of the Anti-Dumping Agreement. Instead, the second sentence of Article 2.4.2 requires an investigating authority to find "a pattern of export prices which differ significantly among different purchasers, regions or time-periods". The text does not impose any additional condition on an investigating authority to find whether the quantitatively significant differences found under the pattern clause of Article 2.4.2 are unconnected with targeted dumping. Therefore, we disagree with China's

[207] China's response to Panel question No. 11, para. 77; see also first written submission, para. 148.
[208] United States' first written submission, para. 73.
[209] See, e.g. United States' second written submission, para. 47.
[210] United States' response to Panel question No. 104, para. 40.
[211] United States' response to Panel question Nos. 103(a) and (b), para. 35 (referring to *Steel Cylinders* OI Issues and Decision Memorandum, (Exhibit CHN-66), p. 32).
[212] China's first written submission, para. 138 (referring to Oxford English Dictionary Online, access 4 February 2015, (Exhibit CHN-92)); and United States' first written submission, para. 45.
[213] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2833.

argument that an investigating authority is required to examine whether the quantitatively significant differences in export prices examined under the pattern clause of Article 2.4.2 are unconnected with targeted dumping.

7.110. This does not mean, however, that numerical or quantitative differences alone can, in all factual circumstances, lead to the conclusion that the identified differences in export prices are significant within the meaning of the pattern clause of Article 2.4.2. In this regard, we agree with the parties 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. Thus 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. However, we do not agree with China that to consider whether such differences are qualitatively significant, an investigating authority is required to consider why export prices differ.

7.111. Instead, in our view, 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. When 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. For example, an investigating authority may find a small difference in the prices of industrial machinery to not be "significant" when that same difference in the prices of apples may be significant. In this regard, we note that China relied on the panel report in *US – Upland Cotton* in support of its view that the word "significant" has a quantitative as well as qualitative dimension, and that purely numerical or quantitative differences cannot always be significant.[214] We recall that in those parts of the *US – Upland Cotton* panel report referred to by China, the panel was examining the meaning of "significance" in the context of Article 6.3(c) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which speaks of "significant price suppression".[215] However, a closer reading of that report shows that that report supports our view, rather than China's view, as to how an investigating authority is required to examine whether differences in prices are qualitatively significant. In this regard, we find it useful to refer to the following paragraphs of the panel report in *US – Upland Cotton*:

> The "significance" of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance. Other considerations, *including the nature of the "same market" and the product under consideration may also enter into such an assessment, as appropriate in a given case.*
>
> *We cannot believe that what may be significant in a market for upland cotton would necessarily also be applicable or relevant to a market for a very different product*. We consider that, for a basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices could be significant because, for example, profit margins may ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes traded on the markets experiencing the price suppression.[216] (emphasis added; footnotes omitted)

7.112. We do not read these findings as supporting China's argument that under the pattern clause of Article 2.4.2 an investigating authority is required to examine why export prices differ. The panel in *US – Upland Cotton* stated that numerical differences alone may not lead to the conclusion that the differences in question are significant, and that an assessment of whether they are must be made after taking into consideration the relevant market and the specific nature of the product at issue. Such an assessment concerns how the prices differ, and not why they differ. The panel did not examine, for instance, the reasons for the price suppression at issue in that

[214] See, e.g. China's first written submission, fn 211 (referring to Panel Report, *US – Upland Cotton*, para. 7.1329).
[215] Panel Report, *US – Upland Cotton*, para. 7.1329.
[216] Panel Report, *US – Upland Cotton*, paras. 7.1329-7.1330.

case. Similarly, we do not consider that under the pattern clause of Article 2.4.2 an investigating authority is required to consider the reasons for the differences in the export prices forming the relevant pattern in order to determine whether those differences are qualitatively significant.

7.113. Finally, we note that the panel in *US – Washing Machines* examined the same issue that is before us, and concluded that there is no requirement under the pattern clause of Article 2.4.2 to examine the reasons for the quantitatively large differences in export prices forming the relevant pattern, as part of an enquiry into whether such differences are qualitatively significant.[217] In particular, that panel stated that an authority may properly find that certain prices differ significantly, within the meaning of the pattern clause of Article 2.4.2 if they are notably greater, in purely numerical terms, irrespective of the reasons for those differences.[218] However, that panel recognized that in examining how export prices differ, in certain cases, the investigating authority may have to examine the numerical size of the price difference in light of the prevailing factual circumstances regarding the nature of the product or relevant market at issue, before it concludes that those differences are significant.[219] We agree with these findings and note that they are consistent with our interpretation of the pattern clause of Article 2.4.2 in this particular regard.[220]

7.114. On the basis of the foregoing, we find 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. We therefore reject 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.

7.1.3.3.4 Use of purchaser or time period averages under the Nails test

7.115. We recall that under the Nails test applied in the three challenged investigations, the USDOC aggregated the individual export transaction prices to each of the purchasers or time periods to calculate a weighted average price per purchaser or time period, which we refer to in our report as a purchaser or time period average. In both stages of the Nails test, namely, the standard deviation test and the price gap test, the USDOC examined, on the basis of these purchaser or time period averages, whether there was a significantly differing pricing pattern, within the meaning of the pattern clause of Article 2.4.2. China submits that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations by making its determination under the Nails test on the basis of purchaser or time period averages instead of the individual export transaction prices which made up those averages.

7.116. China presents two arguments in support of this issue. First, China contends that the text of the pattern clause of Article 2.4.2 proscribes the use of purchaser or time period averages in the identification of a significantly differing pricing pattern.[221] Second, China argues that the use of purchaser or time period averages created a systematic bias in the USDOC's pattern determinations in the three challenged investigations because it precluded the USDOC from taking into account price variations within purchasers or time periods in identifying the significantly differing pricing pattern under the pattern clause of Article 2.4.2.

[217] Panel Report, *US – Washing Machines*, para. 7.51 (citing Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1272).
[218] Panel Report, *US – Washing Machines*, para. 7.48.
[219] Panel Report, *US – Washing Machines*, paras. 7.49-7.50.
[220] We note that the panel in *US – Washing Machines* concluded that while an investigating authority is not required to consider the reasons for the differences in the export prices forming the relevant pattern, as part of its enquiry under the pattern clause of Article 2.4.2 as to whether such differences are significant, an investigating authority may be required to consider such reasons, as part of its enquiry under the explanation clause of Article 2.4.2 that the significant differences in export prices forming the relevant pattern cannot be taken into account appropriately under the WA-WA or T-T methodology. (Panel Report, *US – Washing Machines*, para. 7.48). In these proceedings, China has not claimed that the USDOC acted inconsistently with the explanation clause of Article 2.4.2 because it failed to consider the reasons for the differences in export prices forming the relevant pattern. Therefore, we are not required to consider in these proceedings whether an investigating authority is required, under the explanation clause of Article 2.4.2, to consider the reasons for the differences in export prices forming the relevant pattern.
[221] China's second written submission, para. 60.

7.117. The United States argues that there is no legal requirement under the pattern clause of Article 2.4.2 to find the relevant pattern on the basis of individual export transaction prices instead of purchaser or time period averages. Specifically, the United States rejects China's argument that the USDOC was required to consider the within-purchaser or within-time period variances in export prices, noting that the pattern clause of Article 2.4.2 requires an investigating authority to find differences in export prices "among" different purchasers or time periods rather than within them. The United States asserts that purchaser or time period averages in fact allowed the USDOC to ignore within-purchaser or within-time period variances and focus on finding differences "among" them, as required under the pattern clause of Article 2.4.2.

7.118. In our assessment of this issue, we will first examine China's argument based on the text of the pattern clause of Article 2.4.2. If we find that such text requires, as China argues, that a pattern determination be based on an assessment of individual export transaction prices, we will find for China. If we find no such textual requirement, we will proceed to China's second argument to evaluate whether the Nails test suffered from a systematic bias because it stopped the USDOC from taking into consideration price variations within purchasers or time periods in the identification of the relevant pattern in the three challenged investigations.

7.119. Turning to the textual requirements under the pattern clause of Article 2.4.2, we note that this clause requires an investigating authority to find "a pattern of export prices" which "differ significantly" among different purchasers, regions or time periods. The text does not, however, explain how such a determination is to be made. Importantly, it does not clarify whether an investigating authority should rely on individual export transaction prices or purchaser or time period averages thereof in such a determination. We find no explicit prohibition in this text on the use of purchaser or time period averages to find such a significantly differing pricing pattern. We note that the use of the phrase "differ significantly among different purchasers, regions or time periods" in the pattern clause of Article 2.4.2 suggests that the relevant enquiry under that clause is whether there are differences in the export prices that an exporter charges to different purchasers or regions or in different time periods, and whether those differences are significant. We do not see how this provision can be interpreted, as China argues, as prohibiting the use of purchaser or time period averages. China presents three reasons in support of its argument. We disagree with these reasons, on the grounds explained below.

7.120. First, China argues that the use of individual export transaction prices in a pattern determination would ensure parallelism between the method used for that determination and the actual application of the WA-T methodology.[222] In other words, China contends that since the second sentence of Article 2.4.2 explicitly states that the WA-T methodology has to be applied on the basis of the "prices of individual export transactions", the pattern determination should also be made on the same basis. However, we see nothing in the text of Article 2.4.2 that requires such parallelism. In our view, if the text required such parallelism, it would have said so. The second sentence of Article 2.4.2 explicitly states that the WA-T methodology is to be applied on the basis of the "prices of individual export transactions". However, in that same sentence, when describing the requirements of the pattern clause of Article 2.4.2, the text is silent as to whether an investigating authority is required to use the prices of individual export transactions to find the relevant pattern. This strengthens our view that Article 2.4.2 does not necessarily require that a finding regarding the relevant pattern be made on the basis of a comparison of the prices of individual export transactions. We acknowledge that the silence in a treaty text in relation to a requirement may mean that that requirement was intended to be included by implication in the text.[223] However, we do not consider that to be the case here. Instead, the silence in the pattern clause of Article 2.4.2 with respect to whether an investigating authority has to use individual export transaction prices in its findings under that clause makes sense in the context of what this provision seeks to achieve. Specifically, this clause is concerned with the identification of a significantly differing pricing pattern, whereas the WA-T methodology is, as elaborated below, concerned with the application of the WA-T methodology to individual export transaction prices which fall within that pattern. The pattern clause of Article 2.4.2 is structured in a way that provides an investigating authority with discretion in identifying this pattern. Hence, the text does not mandate the use of individual export transaction prices to identify the relevant pattern. Even

[222] China's first written submission, paras. 133 and 258.

[223] See, e.g. Appellate Body Report, *US – Carbon Steel*, para. 65. In this regard, the Appellate Body stated in this case, that the silence of a text in prescribing a requirement does not exclude the possibility that that requirement was intended to be included by implication.

though the relevant pattern is identified through the use of purchaser or time period averages, the pattern itself, such as a pattern of low export prices to a targeted purchaser or time period, as was the case in the three challenged investigations, will consist of one or more individual export transactions. When the WA-T methodology is applied to the pattern that methodology will have to be applied to the individual export transactions which make up the pattern. Therefore, we find no merit in China's reasoning that an investigating authority is required to ensure parallelism between the tool adopted to examine whether the WA-T methodology may be used and the actual application of the WA-T methodology itself.

7.121. Second, China refers to the Appellate Body report in *US – Zeroing (Japan)*, where the Appellate Body read the phrase "individual export transactions" in the second sentence of Article 2.4.2 as referring to "the transactions that fall within the relevant pricing pattern".[224] According to China, this statement by the Appellate Body indicates that in order to identify a meaningful pattern, an investigating authority must assess such a pattern by observing the prices of individual export transactions.[225] We do not agree with China's reading of this statement by the Appellate Body. The Appellate Body made this observation in the context of how the WA-T methodology is to be applied, rather than how the conditions under the pattern clause of Article 2.4.2 are to be met.[226] We have already stated that when the WA-T methodology is applied, it has to be applied to the individual export transactions forming the relevant pattern. However, as explained above, that does not mean that the relevant pattern cannot be identified through the use of purchaser or time period averages, as the USDOC did in the three challenged investigations.

7.122. Third, China contends that the use of the word "pattern" in the second sentence of Article 2.4.2 suggests that an investigating authority is required to discern an "intelligible form or arrangement" from amongst a "sufficient number of events".[227] We understand China to argue that the use of a purchaser or time period average reduces the number of events from which an "intelligible form or arrangement" can be discerned. Hence, it undermines an investigating authority's ability to discern a pattern from the multiple export prices charged by an exporter.[228] China also finds support for this view in the phrase "such difference*s*" in the second sentence of Article 2.4.2, i.e. significant differences in export prices forming the relevant pattern. China argues that when multiple export transaction prices to a purchaser or time period are aggregated to calculate a single purchaser or time period average, an investigating authority reduces the nature and extent of overall differences in the export price data.[229] This, in China's view, undermines an investigating authority's ability to determine whether the differences in export prices forming the relevant pattern are significant.[230] China also finds additional textual support for this view in the fact that the pattern clause of Article 2.4.2 uses the plural tense to refer to a pattern of "export prices".

7.123. We consider that China's argument in this regard is based on a wrong understanding of the objective of the pattern clause of Article 2.4.2. This clause requires an investigating authority to examine whether there are significant differences in export prices to different purchasers, regions or time periods. An exporter may make multiple export transactions to a particular purchaser, region or time period, and there may be differences or variations in the prices of those export transactions. However, we do not find anything in the text of the pattern clause of Article 2.4.2 which would suggest that an investigating authority is required to take into account those differences within the export prices to a particular purchaser, region or time period. Put differently, we do not consider, as China argues, that the pattern clause of Article 2.4.2 requires an investigating authority to consider the within-purchaser or within-time period variances in export prices. Nor do we consider that the use of the plural tense in the pattern clause of Article 2.4.2, in referring to a pattern of "export prices" to be dispositive on this issue. The text refers to a pattern of export prices "which differ significantly among different purchasers, regions or time periods" and thus underlines the differences between the export prices to different purchasers, regions or time periods, and not the differences within the prices to a given purchaser, region or time period.

[224] China's response to Panel question No. 13, para. 84 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 135).
[225] China's response to Panel question No. 13, para. 85.
[226] See, e.g. Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[227] China's first written submission, para. 134.
[228] See, e.g. China's first written submission, para. 134.
[229] See, e.g. China's first written submission, para. 134.
[230] China's first written submission, para. 134.

7.124. On the basis of the foregoing, we disagree with China's first argument that the text of the pattern clause of Article 2.4.2 precludes an investigating authority from finding a significantly differing pricing pattern on the basis of purchaser or time period averages. In our view, the pattern clause of Article 2.4.2 provides investigating authorities with discretion with respect to whether a pattern determination is to be based on individual export transaction prices to purchasers or time periods or purchaser or time period averages. An authority can choose either of these approaches provided that it makes an objective and reasoned determination on the basis of properly established facts. This takes us to China's second argument, namely that the USDOC's pattern determinations in the three challenged investigations were inconsistent with the pattern clause of Article 2.4.2 because the use of purchaser or time period averages created a systematic bias in those determinations by precluding the USDOC from taking into account price variations within purchasers or time periods.

7.125. Under the second argument, as we noted above, China argues that the Nails test suffered from a systematic bias because it stopped the USDOC from taking into consideration price variations within purchasers or time periods in the identification of the relevant pattern in the three challenged investigations. Specifically, China's allegation of a systematic bias relates to the manner in which the USDOC calculated the numerical value of one standard deviation under the standard deviation test, in the three challenged investigations, and the manner in which the USDOC calculated the threshold price based on that numerical value. China submits that the numerical value of one standard deviation which is calculated on the basis of individual export transaction prices, as a matter of statistical certainty, "cannot be smaller" but will "usually be larger" than the numerical value of one standard deviation calculated on the basis of purchaser or time period averages.[231] When the numerical value of one standard deviation is larger, the threshold price which is one standard deviation below the CONNUM-specific average export price is lower. Because the USDOC found the requirements of the standard deviation test to be met in the examined CONNUM when the alleged target price was lower than the threshold price, a low threshold price increased the likelihood that the alleged target price would be above this threshold price and similarly, a high threshold price decreased that likelihood.

7.126. To illustrate this, as explained in paragraph 7.42 above, when the value of one standard deviation used in our example was 4.78, the threshold price was USD 11.5 − 4.78 (CONNUM-specific weighted average export price − one standard deviation) which is equal to USD 6.72. Because the alleged target price in our example was USD 6, it was lower than this threshold price of USD 6.72 and the standard deviation test requirement in the examined CONNUM was met. However, if the value of one standard deviation had been higher, such as 6 instead of 4.78, the threshold price would have been USD 5.5 (USD 11.5 − 6) instead of USD 6.72, and the alleged target price would not have been found to be lower than this lower threshold price. In that situation, the standard deviation test requirement in the examined CONNUM would not have been met. China presents evidence to show that in the *OCTG* and *Coated Paper* investigations, if the USDOC had calculated the standard deviation on the basis of individual export transaction prices, the requirements of the standard deviation test would not have been met.[232] In the *Steel Cylinders* investigation, China contends that the USDOC would have found a pattern in only [[BCI]] instead of [[BCI]] CONNUMs.[233] The United States does not confirm the factual veracity of this evidence submitted by China.[234]

7.127. We recall 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. We have already found, in paragraph 7.123, that there is no requirement under the pattern clause of Article 2.4.2 to consider such within-purchaser or within-time period variances in export prices. Further, we have also found, in paragraph 7.124, that the pattern clause of Article 2.4.2 gives the investigating authority the discretion to choose between individual export transaction prices and purchaser or time period averages in finding the relevant pattern. The USDOC chose to make its pattern determination on the basis of purchaser or time period averages. Even if it is true that, in the three challenged investigations, the numerical value of one standard deviation would have been

[231] Dr. Peter Egger's first statement, (Exhibit CHN-1) (BCI), para. 77.
[232] China's first written submission, para. 268.
[233] China's first written submission, para. 268.
[234] United States' response to Panel question No. 105, para. 45.

higher if it had been calculated on the basis of individual export transaction prices rather than purchaser or time period averages we cannot find that the USDOC's determination was biased on that basis. When the pattern clause of Article 2.4.2 provided the USDOC with the discretion to use either of these two methods in its pattern determination, we do not consider that the USDOC's determination in the three challenged investigations could be consider biased, simply because the method that it chose led to an outcome which was less favourable to the exporters than the other.

7.128. On the basis of the foregoing, we find that the USDOC did not act inconsistently with the pattern clause of 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. We therefore reject China's claim under the pattern clause of Article 2.4.2 in the three challenged investigations insofar as it relates to the USDOC's use of purchaser or time period averages under the Nails test in these investigations.

7.1.4 China's claim under the explanation clause of Article 2.4.2 of the Anti-Dumping Agreement

7.1.4.1 Main arguments of the parties

7.1.4.1.1 China

7.129. China claims that the explanations provided by the USDOC in the three challenged investigations as to why the WA-T methodology had to be used to calculate the dumping margins were inconsistent with the explanation clause of Article 2.4.2. China identifies two issues in this regard. First, China maintains that the USDOC's explanations were qualitatively insufficient to discharge its obligations under the explanation clause of Article 2.4.2. Second, China contends that the USDOC acted inconsistently with the explanation clause of Article 2.4.2 by failing to explain why the T-T methodology could not appropriately take into account the significant differences in the relevant export prices, within the meaning of that clause.

7.130. Regarding the first issue, China argues that the USDOC's explanations in the three challenged investigations were qualitatively insufficient to meet its obligations under the explanation clause of Article 2.4.2, for two reasons. First, China notes that the USDOC's explanations in the three challenged investigations that the WA-WA methodology masked targeted dumping whereas the WA-T methodology unmasked it, were based on the fact that the dumping margin obtained through the WA-T methodology, with zeroing, was higher than that obtained through the WA-WA methodology, without zeroing. China asserts that the USDOC's explanations in these investigations were based on an erroneous legal premise that Article 2.4.2 permits the use of zeroing under the WA-T methodology.[235] Second, China contends that the USDOC's explanations were remarkably brief, offered no analysis, and did not consider any of the characteristics of the relevant export price pattern.[236]

7.131. With respect to the second issue, China asserts that the explanation clause of Article 2.4.2 requires an investigating authority to provide an explanation as to why the WA-WA *as well* as the T-T methodology cannot take into account appropriately the significant differences in the relevant export prices. China submits that the USDOC acted inconsistently with that clause in the three challenged investigations by failing to provide an explanation with respect to the T-T methodology.[237]

7.1.4.1.2 United States

7.132. In relation to the first issue, the United States disagrees with China's assertion that the USDOC's explanations were based on an erroneous legal premise that Article 2.4.2 permitted the use of zeroing under the WA-T methodology, arguing that zeroing is indeed permitted under the WA-T methodology set forth in Article 2.4.2.[238] With respect to China's argument challenging the quality of the USDOC's explanation, the United States submits that a brief explanation is sufficient to discharge an investigating authority's obligation under the explanation clause of Article 2.4.2

[235] See, e.g. China's second written submission, paras. 85-86.
[236] China's first written submission, para. 280.
[237] China's first written submission, para. 282.
[238] United States' second written submission, para. 63.

when the comparison of dumping margins obtained through one of the normal methodologies and the WA-T methodology makes it clear that the normal methodology masks dumping to a material or meaningful degree.[239] The United States insists that it is only through the kind of comparison that the USDOC did in the three challenged investigations that an investigating authority can examine which of the two methodologies can more appropriately take into account the significant differences in the relevant export prices.[240]

7.133. In regard to the second issue identified by China, the United States contends that the explanation clause of Article 2.4.2 does not require an investigating authority to provide an explanation with respect to both the WA-WA and the T-T methodologies. In this regard, relying on the Appellate Body report in *US – Softwood Lumber V (Article 21.5 – Canada)*, the United States asserts that the WA-WA and the T-T methodologies are supposed to yield systematically similar results.[241] Therefore, in the United States' view, there is no purpose in requiring an investigating authority to explain why both of these two methodologies cannot be used to take into account appropriately the significant differences in the relevant export prices.[242] Further, the United States submits that in investigations concerning non-market economies, such as China, normal value is not based on transaction-specific home market prices, and hence the T-T methodology cannot be used in these investigations.[243] It follows that, in such investigations, an investigating authority is not required, under the explanation clause of Article 2.4.2, to explain why the significant differences in the relevant export prices cannot be taken into account appropriately by the T-T methodology.

7.1.4.2 Main arguments of the third parties

7.1.4.2.1 Brazil

7.134. Brazil agrees with China that Article 2.4.2 requires an explanation as to why the WA-WA as well as the T-T methodology cannot be used by an investigating authority to take into account appropriately the significant differences in the relevant export prices, before an investigating authority resorts to the WA-T methodology.[244] Brazil also finds the USDOC's explanations in the three investigations at issue to be qualitatively deficient. In particular, Brazil considers that the mathematical differences observed in the dumping margins obtained though the WA-WA and the WA-T methodologies were attributable to the intrinsic characteristics of the operation of each of these methodologies.[245] Brazil finds the USDOC's explanations which were premised on these observed differences to be circular.[246]

7.1.4.2.2 European Union

7.135. The European Union notes that the USDOC's explanations made no reference to the possible use of the T-T methodology.[247] The European Union, however, does not express a specific view on whether the omission of such an explanation leads to a violation of the explanation clause of Article 2.4.2.[248]

7.1.4.2.3 Japan

7.136. Japan argues that an investigating authority's explanation under the explanation clause of Article 2.4.2 must be with respect to the WA-WA as well as the T-T methodology, and not just one of them.[249] Japan refers to the USDOC's *Steel Cylinders* investigation to highlight this point. In Japan's view, when, as suggested by the concerned exporter in that investigation, the changes in export prices were attributable to changes in input costs, such a situation could be addressed

[239] United States' first written submission, para. 171.
[240] United States' second written submission, para. 61.
[241] United States' first written submission, paras. 173-174 (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93).
[242] United States' first written submission, para. 174.
[243] United States' response to Panel question No. 16, para. 28.
[244] Brazil's third-party submission, para. 14.
[245] Brazil's third-party statement, para. 12.
[246] Brazil's third-party statement, para. 12.
[247] European Union's third-party submission, para. 40.
[248] European Union's third-party submission, para. 40.
[249] Japan's third-party submission, para. 60.

through the contemporaneous comparison of normal value and export price under the T-T methodology.[250] In such a situation, the investigating authority could have used the T-T methodology to take into account appropriately the significant differences in the relevant export prices, instead of resorting to the WA-T methodology.

7.1.4.2.4 Korea

7.137. Korea questions the USDOC's explanations in the three challenged investigations, noting that the differences which the USDOC found in the dumping margins obtained through the WA-WA methodology and the WA-T methodology arose only due to the use of zeroing under the WA-T methodology.[251] Further, Korea submits that the explanation clause of Article 2.4.2 requires an explanation covering the T-T methodology, which the USDOC failed to provide.[252]

7.1.4.2.5 Turkey

7.138. Turkey considers the explanation clause of Article 2.4.2 to be a "procedural obligation" which requires an investigating authority to respect the "due process" rights of interested parties.[253]

7.1.4.2.6 Viet Nam

7.139. Viet Nam maintains that the scope of the explanation clause of Article 2.4.2 covers both the WA-WA and the T-T methodology.[254] Viet Nam also questions the USDOC's explanations which were based on the higher dumping margin obtained through the WA-T methodology, with zeroing, as compared to the WA-WA methodology, without zeroing, noting that a dumping margin will always be higher when zeroing is used.[255]

7.1.4.3 Evaluation by the Panel

7.140. China's claim under the explanation clause of Article 2.4.2 of the Anti-Dumping Agreement raises two issues, namely whether or not the USDOC's explanations in the three challenged investigations were qualitatively insufficient to meet the requirements of the explanation clause of Article 2.4.2, and whether the USDOC acted inconsistently with the explanation clause of Article 2.4.2 by not explaining in these investigations why the significant differences in the relevant export prices could not be taken into account appropriately by the use of the T-T methodology.

7.1.4.3.1 Quality of the USDOC's explanations in the three challenged investigations

7.141. We recall that the USDOC provided similar explanations in all of the three challenged investigations. In the *Coated Paper* investigation, the USDOC provided the following explanation:

> [T]he Department finds that the pattern of price differences identified cannot be taken into account using the standard average-to-average methodology because the average-to-average methodology conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Thus, the Department finds, pursuant to section 777A(d)(1)(B) of the Act, that application of the standard average-to-average comparison methodology would result in the masking of dumping that would be unmasked by application of the alternative average-to-transaction comparison method to all of APP-China's sales.[256]

[250] Japan's third-party submission, para. 60.
[251] Korea's third-party submission, para. 17.
[252] Korea's third-party submission, para. 16.
[253] Turkey's third-party submission, paras. 6 and 11.
[254] Viet Nam's third-party submission, para. 16.
[255] Viet Nam's third-party submission, para. 16.
[256] *Coated Paper* OI, Issues and Decision Memorandum, (Exhibit CHN-64), pp. 23-24.

7.142. The USDOC's explanations in the *OCTG* and *Steel Cylinders* investigations were similar to this explanation provided in the *Coated Paper* investigation.[257]

7.143. China presents two arguments challenging the quality of these explanations by the USDOC justifying the use of the WA-T methodology in the three challenged investigations. First, China argues that the USDOC's explanations were based on the erroneous legal premise that Article 2.4.2 permits the use of zeroing under the WA-T methodology. Second, China contends that the USDOC's explanations were remarkably brief, offered no analysis and did not consider any of the characteristics of the relevant export price pattern.

7.144. With respect to China's first argument, we note that the explanation clause of Article 2.4.2 does not prescribe a particular manner in which an investigating authority should provide its explanation as to why the significant differences in the relevant export prices cannot be taken into account appropriately by the use of a WA-WA or T-T methodology. Therefore, we find that an investigating authority has discretion in deciding how this explanation is to be made. In our view, however, in making this explanation and choosing the methodology to be used in its dumping determinations, an investigating authority has to make a decision based on determinations that are consistent with the relevant provisions of the Anti-Dumping Agreement.

7.145. In the three challenged investigations, the USDOC based its explanation justifying the use of the WA-T methodology on the fact that the dumping margin obtained through the WA-T methodology, with zeroing, was higher than the dumping margin obtained through the WA-WA methodology, without zeroing. The USDOC concluded on the basis of these observed mathematical differences in dumping margins obtained through the WA-WA and the WA-T methodology that the WA-WA methodology concealed differences in price patterns and masked dumping, which was unmasked by the use of the WA-T methodology. We note that the observed mathematical differences in the dumping margins obtained through the WA-WA and the WA-T methodology in these investigations were attributable to the fact that the USDOC used zeroing under the WA-T methodology and did not do so under the WA-WA methodology.[258] In this regard, we recall that if zeroing was not used under either the WA-WA or the WA-T methodology, the dumping margin obtained through the WA-T methodology in the three challenged investigations would have been mathematically equivalent to that obtained through the WA-WA methodology.[259] This shows that the only reason why the USDOC found in the three challenged investigations that the dumping margin obtained through the WA-T methodology was higher than that obtained through the WA-WA methodology was because it used zeroing under the WA-T methodology.

7.146. As explained in paragraph 7.220 below, we are of the view that the use of zeroing under the WA-T methodology is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Because the USDOC's explanations were premised on the use of the WA-T methodology with zeroing, we find that such explanations were based on an erroneous legal basis. Such an explanation cannot, in our view, be consistent with the explanation clause of Article 2.4.2.

7.147. On this basis, we find that the USDOC's explanations in the three challenged investigations were inconsistent with the explanation clause of Article 2.4.2. In light of this finding, we do not find it necessary to assess China's second argument, namely, whether the USDOC's explanations were also inconsistent with Article 2.4.2 because they were remarkably brief, offered no analysis, and did not consider any of the characteristics of the relevant export price pattern.

7.1.4.3.2 USDOC's failure to provide an explanation with respect to the T-T methodology

7.148. Factually, it is uncontested that in the three challenged investigations the USDOC did not provide an explanation as to whether the significant differences in the relevant export prices could

[257] *OCTG* OI, Issues and Decision Memorandum, (Exhibit CHN-77), Comment 2; and *Steel Cylinders* OI, Issues and Decision Memorandum, (Exhibit CHN-66), p. 24.

[258] In this regard, in response to our question as to whether the observed differences in dumping margins obtained through the WA-WA methodology and the WA-T methodology were attributable partly or wholly to the fact that the USDOC used zeroing under the WA-T methodology and did not use zeroing under the WA-WA methodology, the United States did not deny that this was the case. (United States' response to Panel question No. 15, paras. 24-25).

[259] United States' first written submission, paras. 266-272.

be taken into account appropriately through the T-T methodology.[260] Instead, in the three challenged investigations, as we noted above, the USDOC provided similar explanations as to why the significant differences in the relevant export prices could not be taken into account appropriately by the use of the WA-WA methodology. The USDOC did not explain in these investigations why the T-T methodology could not be used for this purpose.

7.149. The parties disagree as to whether the explanation clause of Article 2.4.2 contains such a requirement. The issue before us is therefore one of legal interpretation, namely whether the explanation clause of Article 2.4.2 requires an investigating authority to provide an explanation with respect to either the WA-WA methodology or the T-T methodology or whether it requires an explanation with respect to both of these two methodologies. In this regard, we recall that Article 2.4.2 reads as follows:

> 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. (emphasis added)

7.150. The first sentence of Article 2.4.2 refers to two methodologies to calculate the dumping margin that shall apply "normally", i.e. the WA-WA methodology and the T-T methodology. It is well established that the first sentence provides an investigating authority with discretion to choose between either of the two normal methodologies in comparing the normal value with the export price.[261] The second sentence allows an investigating authority to use the WA-T methodology in exceptional circumstances, provided, *inter alia*, the authority explains why the significant differences in the relevant export prices, "cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison".[262] The WA-T methodology has been recognized in past Appellate Body reports as an "exception" to the normal methodologies.[263]

7.151. We recall that, faced with the same legal question, the panel in *US – Washing Machines* found that the use of the indefinite article "a" in the explanation clause of Article 2.4.2, combined with the disjunctive "or", and the use of the term "comparison" in the singular ("a comparison"), shows that the requisite explanation needs to be provided only in respect of one type of comparison methodology, be it the WA-WA "or" the T-T methodology.[264] That panel found further support for its view in the context provided by the first sentence of Article 2.4.2 which provides an investigating authority with the discretion to choose between either of the two normal methodologies, depending on which of the two was most suitable in a particular investigation.[265] According to that panel, having made a choice, in light of the particularities of the investigation, to use either the WA-WA or the T-T methodology, it would be anomalous to expect the investigating authority to provide an explanation why both of these methodologies, rather than the normal methodology which it decided to use, could not take into account the significant differences in the relevant export prices. [266] However, for the reasons provided below, we disagree with the panel in *US – Washing Machines*, and find that the explanation clause of Article 2.4.2 requires an investigating authority to provide an explanation with respect to both the WA-WA and the T-T methodology, and not either of them.

---

[260] United States' response to Panel question No. 18, para. 35.
[261] See, e.g. Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.
[262] Emphasis added.
[263] See, e.g. Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97; and *US – Zeroing (Japan)*, para. 131.
[264] Panel Report, *US – Washing Machines*, para. 7.79.
[265] Panel Report, *US – Washing Machines*, para. 7.80.
[266] Panel Report, *US – Washing Machines*, para. 7.80.

7.152. Firstly, we are of the view that the use of "or" in the explanation clause of Article 2.4.2 does not necessarily suggest that it is sufficient to provide an explanation which engages with only one of the two normal methodologies. This is because the use of the conjunction "and" instead of "or" would have made no grammatical sense in the context of the explanation clause of Article 2.4.2. If the explanation clause of Article 2.4.2 stated that an investigating authority needs to explain why the significant differences in the relevant export prices cannot be taken into account appropriately through "a WA-WA *and* T-T comparison", this would incorrectly suggest that an investigating authority needs to adopt a mixed methodology consisting of the WA-WA and the T-T methodology to take into account the significant differences in the relevant export prices. Secondly, the reference to "a … comparison" in the singular and particularly the use of the indefinite article "a" in the English text does not, in our view, mean that an explanation with regard to one of the two normal methodologies would satisfy the requirements of the explanation clause of Article 2.4.2. We find support for this view in the French text of the Anti-Dumping Agreement. The French text does not use the indefinite article "une", the equivalent of the article "a" in English, but uses the French definitive article "les".[267]

7.153. Our interpretation is informed by the context of the explanation clause of Article 2.4.2 and the object and purpose of the Anti-Dumping Agreement as reflected in that provision. We find the first sentence of Article 2.4.2 to provide immediate "context" to the explanation clause of Article 2.4.2 which appears in the second sentence. In this regard, as we noted earlier, the WA-T methodology under the second sentence of Article 2.4.2 has been recognized by the Appellate Body as an exception to the normal methodologies set forth in the first sentence of Article 2.4.2. We find this characterization persuasive and also consider that the WA-T methodology is an exception to both of the normal methodologies, and not just to one of them. Therefore, when an investigating authority resorts to this exceptional methodology, it must explain why neither of the two normal methodologies can take into account appropriately the significant differences in the relevant export prices. We find support for this interpretation in the following observation of the Appellate Body in *US – Zeroing (Japan)*:

> [A]n "explanation" [needs to] be provided as to why such differences in export prices cannot be taken into account appropriately by the use of either of the two *symmetrical* comparison methodologies set out in the first sentence of Article 2.4.2. The second requirement thus contemplates that there may be circumstances in which targeted dumping could be adequately addressed through the normal symmetrical comparison methodologies. The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be used.[268] (italics original; underlining added)

7.154. The Appellate Body's observation that an investigating authority needs to explain why the differences in export prices cannot be taken into account by the use of either of the two

---

[267] The French text of the second sentence of Article 2.4.2 states as follows:

> Une valeur normale établie sur la base d'une moyenne pondérée pourra être comparée aux prix de transactions à l'exportation prises individuellement si les autorités constatent que, d'après leur configuration, les prix à l'exportation diffèrent notablement entre différents acheteurs, régions ou périodes, et si une explication est donnée quant à la raison pour laquelle il n'est pas possible de prendre dûment en compte de telles différences en utilisant les méthodes de comparaison moyenne pondérée à moyenne pondérée ou transaction par transaction. (emphasis added)

In this regard, we note that the Spanish text, like the English text, uses the indefinite article ("una") in the explanation clause of Article 2.4.2. The text of the second sentence of Article 2.4.2 in Spanish is as follows:

> Un valor normal establecido sobre la base del promedio ponderado podrá compararse con los precios de transacciones de exportación individuales si las autoridades constatan una pauta de precios de exportación significativamente diferentes según los distintos compradores, regiones o períodos, y si se presenta una explicación de por qué esas diferencias no pueden ser tomadas debidamente en cuenta mediante una comparación entre promedios ponderados o transacción por transacción. (emphasis added)

In this regard, we note that under Article 33.1 of the Vienna Convention on the Law of Treaties (VCLT), when a treaty has been authenticated in two or more languages, as is the case with the WTO Agreement, the text is equally authoritative in each language unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. The WTO Agreement does not suggest that the English or Spanish text is more authoritative than the French text. We also note that Article 33.3 of the VCLT states that the terms of the treaty are presumed to have the same meaning in each authentic text.

[268] Appellate Body Report, *US – Zeroing (Japan)*, para. 131.

symmetrical comparison methodologies set out in the first sentence of Article 2.4.2 suggests that the explanation needs to be provided with respect to both of the normal methodologies. Further, we are of the view that this interpretation properly takes account of those situations where one of the "normal" methodologies may "appropriately" take into account the significant differences in the relevant export prices. Therefore, it preserves the object of the second sentence of Article 2.4.2, which is to permit the use of the WA-T methodology as an "exception" rather than as the norm.

7.155. In this regard, we disagree with the United States' argument, based on the Appellate Body's finding in *US – Softwood Lumber V (Article 21.5 – Canada)*, that because the WA-WA and the T-T methodologies are supposed to yield systematically similar results, there is no purpose in requiring an investigating authority to provide an explanation with respect to both of these two methodologies. We note that the United States' argument is based on an incomplete reading of that Appellate Body report. In the cited case, the Appellate Body clearly recognized that the WA-WA and the T-T methodologies are "distinct".[269] Further, the Appellate Body stated that these two methodologies are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two".[270] In other words, the two methodologies are equivalent only because the first sentence of Article 2.4.2 provides an investigating authority with discretion to choose between these two normal methodologies, and not because they yield similar mathematical results. Indeed, the United States itself acknowledges in the context of its arguments in response to China's zeroing claim that the T-T and the WA-WA methodologies need not yield the same mathematical results.[271] That the dumping margins obtained through the T-T methodology and the WA-WA methodology may be mathematically different strengthens our view that an investigating authority is required to examine and explain why neither of these methodologies can take into account appropriately the significant differences in the relevant export prices. Therefore, we disagree with this argument presented by the United States.

7.156. Further, in relation to the United States' argument that the T-T methodology cannot be used in investigations involving NMEs like China because in such investigations, normal value is not based on transaction-specific home market prices, we asked the United States to refer to the relevant parts of the USDOC's determinations in the three challenged investigations where the USDOC stated that it could not use the T-T methodology for this particular reason. The United States has not shown any such finding by the USDOC.[272] This argument therefore represents an *ex post facto rationalization* which we cannot take into account.[273]

7.157. We therefore find that the USDOC acted inconsistently with the explanation clause of Article 2.4.2 in the three challenged investigations because it failed to provide an explanation as to why neither the WA-WA nor the T-T methodology could take into account appropriately the significant differences in the relevant export prices, within the meaning of that clause.

7.1.4.3.3 Conclusion

7.158. On the basis of the foregoing, we conclude that the USDOC acted inconsistently with the explanation clause of Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG*, *Coated Paper* and *Steel Cylinders* investigations.

[269] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.
[270] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.
[271] United States' second written submission, para. 103.
[272] United States' response to Panel question No. 106, para. 46.
[273] In this regard, we note that we are required pursuant to Article 17.5(ii) of the Anti-Dumping Agreement to examine the matter before us based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member."

7.1.5 China's claim under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement with respect to the USDOC's application of the WA-T methodology to *all* export transactions in the three challenged investigations

7.1.5.1 Main arguments of the parties

7.1.5.1.1 China

7.159. China argues that when the conditions prescribed in the second sentence of Article 2.4.2 for use of the WA-T methodology are met, the second sentence permits an investigating authority to apply that methodology only to those export transactions which fall within the "pattern of export prices" which differ significantly among different purchasers, regions or time periods. China submits that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the three challenged investigations by applying the WA-T methodology to all export transactions, instead of limiting it to those transactions that fell within this pattern.

7.160. China recalls that the USDOC used the Nails test to identify the relevant pattern in the three challenged investigations. Noting that the USDOC made its analysis under the Nails test on a CONNUM-specific basis, China asserts that the USDOC found a pattern by reference to purchasers or time periods, as well as by reference to CONNUMs.[274] In China's view, the relevant pattern in the three challenged investigations contained only the export transactions to the targeted purchaser or time period in CONNUMs which passed both stages of the Nails test, i.e. the standard deviation test and the price gap test. It follows that the USDOC should have limited the application of the WA-T methodology to those export transactions.[275]

7.161. China presents three main arguments in support of its view. First, noting that the WA-T methodology requires comparison of a normal value established on a weighted-average basis with prices of "individual export transactions", China states that, as indicated by the Appellate Body in *US – Zeroing (Japan)*, such individual export transactions are transactions that fall within the relevant pricing pattern.[276] In this regard, China also notes the Appellate Body's observation in that case that the "universe of export transactions" subject to the WA-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".[277] China considers that these observations support its view that the WA-T methodology can only be applied to the more limited export transactions falling within the relevant pattern and not to all export transactions.

7.162. Second, China asserts that the second sentence of Article 2.4.2 permits an investigating authority to use the WA-T methodology only to the extent the use of one of the normal methodologies is not "appropriate" to take into account the significantly differing pricing pattern.[278] In China's view, the application of the WA-T methodology to export transactions falling outside such a pattern is unreasonable and hence not appropriate.[279]

7.163. Third, China submits that the WA-T methodology is an exception to the general rule which requires the use of the WA-WA or the T-T methodology.[280] Therefore, as an exception, the WA-T methodology replaces the general rule of using the normal methodologies only to the extent it is necessary to take into account appropriately the pattern of export prices which differ significantly.[281] However, for export transactions falling outside the pattern, the exception does not apply, which means that the investigating authority must use one of the two normal methodologies for export transactions falling outside the pattern.[282]

---

[274] See, e.g. China's response to Panel question No. 22(a), para. 110.
[275] See, e.g. China's response to Panel question No. 110(b), paras. 75-76.
[276] China's first written submission, paras. 179-180 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 135).
[277] China's first written submission, para. 181 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 135).
[278] China's first written submission, paras. 182 and 193.
[279] China's first written submission, para. 193.
[280] China's first written submission, para. 194.
[281] China's first written submission, para. 197.
[282] See, e.g. China's first written submission, para. 199.

7.1.5.1.2 United States

7.164. The United States rejects all three main arguments presented by China in support of its view that the second sentence of Article 2.4.2 did not permit the USDOC to apply the WA-T methodology to all export transactions in the three challenged investigations, and submits that all these arguments are based on China's erroneous understanding of the meaning of a pattern of export prices under that sentence.[283] In this regard, the United States disagrees with China's contention that the relevant pattern identified by the USDOC in the three challenged investigations comprised export sales made in those CONNUMs to the alleged targeted purchaser or time period, which passed the pattern and the price gap tests. The United States asserts that, contrary to China's argument, the relevant pattern identified by the USDOC in these investigations consisted of all export transactions made by the concerned exporter, and not just those made to the targeted purchaser or in the targeted time period.[284] The United States also rejects China's assertion that in these investigations, the USDOC found a pattern in relation to certain but not all CONNUMs sold to the targeted purchaser or time period, and hence should have limited the WA-T methodology to export transactions made in those CONNUMs.

7.165. Firstly, regarding its assertion that in the investigations at issue, the USDOC found the relevant pattern to comprise all export transactions, the United States submits that "a pattern" within the meaning of the second sentence of Article 2.4.2 consists of high export prices as well as low export prices, which "differ significantly" from each other.[285] The United States submits that low export prices cannot differ significantly from other low export prices, and hence low export prices alone cannot form the relevant pattern of export prices which differ significantly.[286] In the context of the three challenged investigations, the United States asserts that the USDOC found the relevant pattern to contain low export prices to the targeted purchaser or in the targeted time period, identified through the Nails test, as well as the high export prices of other sales.[287] Because the pattern identified by the USDOC consisted of all export transactions, in the view of the United States, the USDOC did not act inconsistently with the second sentence of Article 2.4.2 by applying the WA-T methodology to all export transactions.[288]

7.166. The United States presents two additional arguments questioning China's contention that the WA-T methodology should be limited to low export prices to the targeted purchaser or in the targeted time period. The United States maintains that the WA-T methodology may be used to unmask targeted dumping only if that methodology is applied to high export prices, which are used to mask low export prices, and not if it is limited to low export prices, as argued by China.[289] Further, the United States contends that the WA-T methodology cannot be limited to certain transactions falling within the relevant pattern or those transactions for which targeted dumping is found, because targeted dumping cannot exist for certain transactions alone, considering that dumping exists for the product as a whole and not in respect of certain transactions only.[290]

7.167. Secondly, the United States rejects China's argument that the USDOC found a pattern on a CONNUM-specific basis in the three challenged investigations, noting that while the USDOC made its initial analysis on a CONNUM-specific basis, the USDOC did not find a pattern for certain CONNUMs. Instead, under the Nails test, the USDOC found a pattern on the basis of purchasers, time periods or regions.[291] The United States also considers China's argument that the pattern existed for certain models to be contrary to the Appellate Body's observation in *EC – Bed Linen* that the second sentence of Article 2.4.2 speaks of dumping that is targeted to certain purchasers, regions or time periods, and not certain models.[292]

[283] United States' first written submission, para. 205.
[284] United States' response to Panel question No. 107, para. 47.
[285] United States' first written submission, para. 202.
[286] United States' response to Panel question No. 20(a), para. 37.
[287] United States' first written submission, para. 203.
[288] United States' first written submission, para. 203.
[289] United States' first written submission, para. 204.
[290] United States' first written submission, para. 206.
[291] United States' second written submission, para. 78.
[292] United States' first written submission, para. 208 (citing Appellate Body Report, *EC – Bed Linen*, para. 62).

7.1.5.2 Main arguments of the third parties

7.1.5.2.1 European Union

7.168. The European Union disagrees with China's argument that Article 2.4.2 requires the WA-T methodology to be limited to export transactions falling within the pattern, finding such an approach to be incompatible with the objective of unmasking targeted dumping.[293]

7.1.5.2.2 Japan

7.169. Japan disagrees with the United States' argument that the WA-T methodology can be applied to all export transactions once the conditions for its use are met. In this regard, Japan disagrees particularly with the United States' view that a pattern includes both high-priced and low-priced sales, and, like China, finds such a view to be incompatible with the Appellate Body's reasoning in *US – Zeroing (Japan)*.[294] Japan asserts that the scope of application of the WA-T methodology must be assessed carefully in light of the objective of the second sentence of Article 2.4.2 to unmask targeted dumping, rather than on the basis of the United States' understanding of the term "pattern".[295]

7.1.5.2.3 Korea

7.170. Korea finds the United States' view that the WA-T methodology may be applied to all export transactions because a pattern includes both high-priced and low-priced sales to be self-contradictory.[296] This is because the USDOC did not test whether the high-priced sales in the three challenged investigations were also targeted.[297] In this regard, Korea notes that the USDOC itself found a pattern only in relation to a subset of all export prices, i.e. export prices to the targeted purchaser or time period.[298]

7.1.5.2.4 Viet Nam

7.171. Viet Nam submits that the WA-T methodology must be limited to export prices which differ significantly, or in other words, export prices which fall within the pattern.[299] Either of the two normal methodologies must be applied to export transactions which fall outside this pattern.[300]

7.1.5.3 Evaluation by the Panel

7.172. It is factually undisputed that in the three challenged investigations the USDOC applied the WA-T methodology to all export transactions. The parties disagree over whether such an application of this methodology is permitted under the second sentence of Article 2.4.2.

7.173. The second sentence of Article 2.4.2 reads:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

7.174. We note that the second sentence of Article 2.4.2 is composed of three parts. The first part describes the WA-T methodology as one requiring comparison of a normal value established on a weighted average basis with the prices of individual export transactions. The second part describes the first condition for use of the WA-T methodology, namely that an investigating authority should

[293] European Union's third-party submission, para. 46.
[294] Japan's third-party statement, para. 8.
[295] Japan's third-party statement, para. 8.
[296] Korea's third-party submission, para. 25.
[297] Korea's third-party submission, para. 25.
[298] Korea's third-party submission, para. 25.
[299] Viet Nam's third-party submission, para. 17.
[300] Viet Nam's third-party submission, para. 17.

find a pattern of export prices which differ significantly among different purchasers, regions or time periods. The third part sets out the second condition for the use of the WA-T methodology, namely that the investigating authority should provide an explanation as to why such differences cannot be taken into account appropriately by the use of a WA-WA or T-T methodology.

7.175. We recall that this is not the first WTO dispute in which this legal issue has been raised. In *US – Washing Machines* where the same issue was raised, the panel expressed the view that the use of the term "individual" in the first part of the second sentence of Article 2.4.2 suggests that the WA-T methodology will not cover all export transactions of the exporter at issue, but will rather apply to certain export transactions that will be identified individually.[301] Regarding how these individual export transactions are to be identified by the investigating authority that panel found guidance in the second part of the second sentence of Article 2.4.2. Specifically, the panel found that the only textual basis for individual identification of export transactions to be used in the WA-T methodology is that they form the pattern referred to in the second part of the second sentence.[302]

7.176. That panel found further support for this view in the third part of the second sentence of Article 2.4.2. In particular, it found that the phrase "such differences" in the third part refers to the significant price differences identified under the second part of that sentence.[303] This textual connection between the second and third parts of the second sentence of Article 2.4.2 suggested to that panel that the third part requires an explanation as to why it would not be appropriate to apply the WA-WA or T-T comparison methodology to export transactions which fall within the relevant pattern.[304] The panel inferred that the third part requires an explanation only in relation to the export transactions which fall within the relevant pattern precisely because it is only those export transactions which could be subject to the WA-T methodology in case an investigating authority explains that the WA-WA or T-T methodology cannot be used with respect to those transactions.[305] On this basis, the panel found that the WA-T methodology may be applied only to those export transactions which fall within the relevant pattern identified under the pattern clause of Article 2.4.2.

7.177. We share this understanding of the panel in *US – Washing Machines* regarding the requirements of the second sentence of Article 2.4.2. Like that panel, we are also of the view that the use of the word "individual" in that sentence suggests that the WA-T methodology will apply only to certain "individual export transactions" and not all export transactions. Similarly, we are of the view that the second part of this sentence, which speaks of a "pattern of export prices" which "differ significantly", clarifies that the individual export transactions to which the WA-T methodology shall apply will fall within that pattern. In other words, the first part of the second sentence of Article 2.4.2 indicates that the WA-T methodology may only be applied with respect to individual export transactions, as opposed to all export transactions, whereas its second part clarifies that the individual export transactions to which that methodology applies are those transactions that fall within the pattern identified by the investigating authority.

7.178. As regards the identification of the individual export transactions falling within the relevant pattern, the United States contends that in the three challenged investigations, all export transactions fell within the relevant pattern because all export transactions formed the relevant pattern. We disagree. We note that the dictionary definition of the word "pattern" is "a regular and intelligible form or sequence discernible in certain actions or situations" and that both parties agree with this definition.[306] We recall that the pattern clause of Article 2.4.2 speaks of "a pattern of export prices" which "differ significantly among different purchasers, regions or time periods". Firstly, the use of the words "a pattern" suggests that a subset of export prices, i.e. a "pattern", has to be discerned from a larger universe, namely, the entirety of the export sales of the relevant exporter. Therefore, export prices which form part of that discernible group form the relevant "pattern" rather than the larger universe of export prices from which that group is discerned or distinguished. Secondly, we are of the view that in the context of the pattern clause of Article 2.4.2, that pattern is discernible because the export prices falling within the pattern will

[301] Panel Report, *US – Washing Machines*, para. 7.22.
[302] Panel Report, *US – Washing Machines*, para. 7.22.
[303] Panel Report, *US – Washing Machines*, para. 7.23.
[304] Panel Report, *US – Washing Machines*, para. 7.23.
[305] Panel Report, *US – Washing Machines*, para. 7.23.
[306] China's first written submission, para. 128 (quoting Oxford English Dictionary Online, accessed 4 February 2015, (Exhibit CHN-90)); and United States' first written submission, para. 40.

"differ significantly among different purchasers, regions or time periods". This suggests to us that the relevant "pattern" is a pattern of export prices to one or more purchasers (or regions or time periods) which differ significantly from export prices to other purchasers (or regions or time periods) which fall outside the pattern. We find support for our view in the following observation of the Appellate Body in *US – Zeroing (Japan)*:

> As regards the relationship between the T-T comparison methodology and the W-T comparison methodology of the second sentence of Article 2.4.2, the Panel's reasoning appears to assume that the universe of export transactions to which these two comparison methodologies apply is the same, and that these two methodologies differ only in that, under the W-T comparison methodology, a normal value is established on a weighted average basis, while it is established on a transaction-specific basis under the T-T comparison methodology. Thus, according to the Panel, if zeroing is permitted under the W-T comparison methodology in the second sentence of Article 2.4.2, it should logically be permitted under the T-T comparison methodology as well.[307] (emphasis added; footnote omitted)
>
> We disagree with the assumption underlying the Panel's reasoning. The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs[308] significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions 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. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.[309] (italics original; underlining added)

7.179. The Appellate Body has thus made it clear that the export prices falling within the pattern found under the second sentence of Article 2.4.2 will have to differ from other export prices and that therefore the reference to "individual export transactions" in the first part of that sentence describes the export transactions that fall within the pattern found.

7.180. The United States contends that because the Appellate Body in *US – Zeroing (Japan)* observed that an investigating authority "may" limit the application of the WA-T methodology to prices of export transactions falling within the relevant pricing pattern, the Appellate Body did not consider that the application of the WA-T methodology is necessarily limited to export transactions which fall within the relevant export price pattern. However, we find that reading that statement in its context leaves no doubt that the Appellate Body said the opposite of what the United States argues in this regard. In the first of the two paragraphs quoted above, the Appellate Body starts by noting that the panel in that dispute assumed that the scope of application of the T-T and the WA-T methodologies would be the same. In the following paragraph, which in its last sentence also contains the word "may" on which the United States bases its argument, the Appellate Body disagrees with that assumption. Importantly, the Appellate Body states clearly that the scope of application of the WA-T methodology would necessarily be narrower than that of the T-T methodology. We consider that this reasoning lends support to our view, rather than that of the United States.

7.181. Finally, we recall that the United States presents two additional arguments in support of its contention that the WA-T methodology may be applied to all export sales rather than to the sales to the targeted purchaser or in the targeted time period. Firstly, the United States argues that the WA-T methodology may be used to unmask targeted dumping only if that methodology is applied to high export prices, which are used to mask low export prices, and not if it is limited to low

[307] Appellate Body Report, *US – Zeroing (Japan)*, para. 134.

[308] In this regard, we note, as also underlined by the United States, that the text of the pattern clause of Article 2.4.2 uses the word "differ" and not "differs".

[309] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; see also Appellate Body *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 166.

export prices, as China suggests.[310] However, we note that this argument is premised on the United States' view that it can apply zeroing under the WA-T methodology to unmask targeted dumping.[311] We find below that the second sentence of Article 2.4.2 does not permit the use of zeroing under the WA-T methodology. We therefore also disagree with this argument presented by the United States which is based on the assumption that zeroing is allowed under the WA-T methodology.

7.182. Secondly, the United States argues that the WA-T methodology cannot be limited to certain export transactions falling within the relevant pattern or those transactions for which targeted dumping is found, because targeted dumping cannot exist for certain transactions alone, considering that dumping exists for the product as a whole and not in respect of certain transactions only. We are aware of the established principle in WTO jurisprudence that the results of transaction-specific comparison results are not, in themselves, margins of dumping.[312] Our finding that the WA-T methodology should only apply to the export transactions falling within the relevant pattern does not conflict with this principle. We recall that China's claim concerns the application of the WA-T methodology in the three challenged investigations. Looking at the facts of these investigations, we note that the USDOC applied the WA-T methodology to all export transactions, as opposed to the pattern found. It did not apply the WA-T methodology to the pattern and some other methodology to the other export transactions. Therefore, in resolving this claim, we do not need to express a view on how an investigating authority will treat the export transactions outside the pattern in finding a margin of dumping for the investigated product as a whole. Importantly, we do not suggest that such transactions should be excluded from the investigating authority's dumping calculations. An investigating authority may use another methodology with respect to the export transactions falling outside the pattern provided it complies with Article 2.4.2 and other relevant provisions of the Anti-Dumping Agreement.[313]

7.183. Based on the foregoing, we consider that the USDOC acted inconsistently with the second sentence of Article 2.4.2 by applying the WA-T methodology to all export transactions, instead of limiting it to export transactions to the targeted purchaser or in the targeted time period that formed the relevant pattern of export prices which differed significantly among different purchasers or different time periods.

7.184. We note that China also argues that the relevant pattern identified by the USDOC in the three challenged investigations did not consist of all export transactions to the targeted purchaser or in the targeted time period but a subset thereof. Specifically, China argues that the relevant pattern only contained CONNUMs which passed the standard deviation test and the price gap test. In China's view, only those CONNUMs in which the alleged target price was found to be lower than the CONNUM-specific weighted average export price, under the standard deviation test, and in which the alleged target price gap was found to be wider than the weighted average non-target price gap, under the price gap test, formed the relevant pattern. In this regard, China argues that an investigating authority is permitted under the second sentence of Article 2.4.2 to find a pattern by reference to models, and does not understand the Appellate Body's findings in *EC – Bed Linen* to suggest that an investigating authority cannot find a pattern in such a manner.[314] China asserts that in the three challenged investigations, using the Nails test, the USDOC found a pattern by reference to CONNUMs or models, and contends that having found a pattern by reference to CONNUMs, the USDOC should have limited the use of the WA-T methodology to those CONNUMs.

[310] United States' first written submission, para. 204.

[311] See, e.g. United States' first written submission, para. 204. In this regard, in presenting its argument as to why the WA-T methodology has to be applied to high-priced export transactions to unmask targeted dumping, the United States argues that targeted dumping is unmasked only by ensuring that high-priced sales do not "offset dumping" through lower priced export sales. We understand from this that in the United States' view, an investigating authority needs to use zeroing to ensure that high-priced sales do not "offset dumping" through lower priced ones.

[312] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 - Canada)*, para. 87.

[313] In this regard, we note that in the *US – Washing Machines* case, the panel examined a new methodology used by the USDOC to meet its obligations under the second sentence of Article 2.4.2, namely the Differential Pricing Methodology (DPM). Under the DPM, the USDOC applied in certain situations the WA-T methodology to export transactions falling within the relevant pattern, and the WA-WA methodology to export transactions falling outside it. (Panel Report, *US – Washing Machines*, para. 7.161 and fn 226).

[314] China's response to Panel question No. 22(a), para. 111; and response to Panel question No. 22(c), para. 117.

We disagree with China's argument and consider it to be based on an erroneous legal and factual basis.

7.185. In this regard, we find no textual basis in the second sentence of Article 2.4.2 to suggest that an investigating authority is required or permitted to find a pattern for specific CONNUMs or models of the product under consideration. That sentence speaks of a pattern of export prices which differ significantly among different "purchasers, regions or time periods", rather than models. We find support for our view in the Appellate Body report in *EC – Bed Linen*. In that case, noting that the purpose of the second sentence of Article 2.4.2 is to address targeted dumping, the Appellate Body observed that the second sentence only addresses dumping that targets certain purchasers, regions or time periods, and does not speak of dumping that targets certain models of the product under consideration.[315] Therefore, we do not consider that the second sentence of Article 2.4.2 imposed any obligation on the USDOC to limit the application of the WA-T methodology in the three challenged investigations to those CONNUMs sold to the allegedly targeted purchaser or in the allegedly targeted time period which passed the pattern and the price gap tests.

7.186. In any case, we find no factual basis to conclude that in the three challenged investigations, the USDOC found a pattern of export prices which differed significantly among different models, rather than among different purchasers or time periods. In this regard, we recall that, under the Nails test, the USDOC made its initial analysis on a CONNUM-specific basis and examined those CONNUMs which were sold to both the alleged target and the non-targets. Hence, under the Nails test, the USDOC did not examine those CONNUMs which were sold to the alleged target but not to a non-target. However, we note that China does not challenge this aspect of the USDOC's determination. Further, while the USDOC made its initial analysis on a CONNUM-specific basis under both the standard deviation test and the price gap test, it ultimately examined whether the volume of sales in those CONNUMs which met the requirements of the standard deviation and price gap tests exceeded a certain volume of the total sales of the product as a whole to the alleged target. Under the standard deviation test, for instance, the USDOC examined whether the volume of sales in CONNUMs where the alleged target price was one standard deviation below the CONNUM-specific weighted average export price exceeded 33% of "the total volume of a respondent's sale of subject merchandise" to the allegedly targeted purchaser or time period.[316] Under the price gap test, the USDOC examined whether the volume of sales in CONNUMs where the alleged target price gap was wider than the weighted average non-target price gap exceeded 5% of "the total volume of a respondent's sale of subject merchandise" to the allegedly targeted purchaser or time period.[317] In this regard, we note that China has not raised any claim regarding the specifics of the standard deviation test and the price gap test on the basis of which the USDOC made its determination for the investigated product as a whole in the challenged three investigations, and hence we are not making any findings in that regard. The USDOC's description shows that whereas the USDOC made its initial analysis under the standard deviation test and the price gap test on a CONNUM-specific basis, it made its final determination on the basis of the total volume of sales of the subject merchandise to the targeted purchaser or in the targeted time period. Therefore, we find that China's argument is based on an erroneous factual basis.

7.187. On the basis of the foregoing, we conclude that the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG*, *Coated Paper* and *Steel Cylinders* investigations by applying the WA-T methodology to all export transactions.

7.1.6 China's claim under Article 2.4.2 of the Anti-Dumping Agreement concerning the USDOC's use of zeroing in the application of the WA-T methodology

7.188. As we noted above, in the three challenged investigations, in order to calculate the margins of dumping through the WA-T methodology, the USDOC first categorized the product

[315] Appellate Body Report, *EC – Bed Linen*, para. 62.

[316] *Coated Paper* OI, Issues and Decision Memorandum, (CHN-64), p. 22; *Steel Cylinders* OI, Issues and Decision Memorandum, (CHN-66), p. 23; and *OCTG* OI, Issues and Decision Memorandum, (CHN-77), Comment 2.

[317] *Coated Paper* OI, Issues and Decision Memorandum, (CHN-64), p. 22; *Steel Cylinders* OI, Issues and Decision Memorandum, (CHN-66), p. 23; and *OCTG* OI, Issues and Decision Memorandum, (CHN-77), Comment 2.

under consideration into different CONNUMs. The USDOC calculated a weighted average normal value for each CONNUM.[318] The USDOC then compared the relevant CONNUM-specific weighted average normal value with the prices of each relevant individual export transaction, which generated positive or negative intermediate comparison results depending on whether the normal value was higher or lower than the export price.[319] When aggregating the intermediate comparison results to calculate the overall margin of dumping for the relevant CONNUM, the USDOC included the positive intermediate results but treated the negative intermediate results as zero.[320] China claims that the USDOC's decision to disregard negative intermediate results by treating them as zero, that is, its use of zeroing, under the WA-T methodology in the three challenged investigations, was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

7.1.6.1 Main arguments of the parties

7.1.6.1.1 China

7.189. China contends that the USDOC violated Article 2.4.2 of the Anti-Dumping Agreement by calculating the dumping margins through the use of zeroing under the WA-T methodology in the three challenged investigations. In support of its contention that Article 2.4.2 does not permit the use of zeroing under the WA-T methodology, China relies on prior Appellate Body reports. In this regard, China recalls that the Appellate Body has found that the first sentence of Article 2.4.2 does not permit the use of zeroing under the WA-WA and T-T methodologies in original investigations.[321] The Appellate Body has also found that the use of zeroing in anti-dumping duty assessment proceedings violates Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 whereas its use in new shipper reviews violates Article 9.5 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[322] China notes that the Appellate Body's findings in these cases were based on the view that a dumping margin has to be calculated for the investigated product as a whole, and argues that the use of zeroing under the WA-T methodology violates Article 2.4.2 because it prevents the investigating authority from calculating a margin of dumping for the investigated product as a whole.[323] In this regard, China asserts that the second sentence of Article 2.4.2 provides no exception to the requirement to calculate margins of dumping for the investigated product as a whole.[324]

7.1.6.1.2 United States

7.190. The United States disagrees that Article 2.4.2 proscribes the use of zeroing under the WA-T methodology and disputes China's reliance on prior Appellate Body reports in support of that view. The United States acknowledges, as underlined in prior WTO disputes, that the results of transaction-specific comparisons obtained through the WA-T methodology are not "margins of dumping" in and of themselves, and does not request this Panel to depart from this precedent.[325] However, the United States asserts that the specific words or phrases in Article 2.4.2, which were interpreted by the Appellate Body to find the use of zeroing to be impermissible under the WA-WA and T-T methodologies, appear only in the first sentence of this provision and are not found in its second sentence, which is at issue in these proceedings.[326]

7.191. The United States further argues, with the support of hypothetical examples as well as actual price data from the three challenged investigations, that if the use of zeroing is not permitted under the WA-T methodology, the margins of dumping calculated through that methodology will be mathematically equivalent to those calculated through the WA-WA methodology without zeroing.[327] This holds true regardless of whether the investigating authority

[318] United States' response to Panel question No. 23(b), para. 46.
[319] United States' response to Panel question No. 23(b), para. 46.
[320] United States' response to Panel question No. 23(b), para. 46.
[321] China's first written submission, paras. 209-212 (citing Appellate Body Reports, *US – Softwood Lumber V*, para. 98; *US – Softwood Lumber V (Article 21.5 - Canada)*, paras. 87-88; *US – Zeroing (EC)*, para. 100; and *US – Zeroing (Japan)*, para. 120).
[322] China's first written submission, para. 213 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 133; and *US – Zeroing (Japan)*, para. 165).
[323] China's first written submission, paras. 215-216.
[324] China's first written submission, para. 218.
[325] United States' first written submission, para. 217.
[326] United States' second written submission, para. 91.
[327] United States' first written submission, paras. 242-263 and 266-272.

applies the WA-T methodology to all export transactions or uses a mixed methodology wherein it applies the WA-T methodology to export transactions falling within the pattern and the WA-WA methodology to export transactions falling outside it.[328] Such an interpretation, in the United States' view, would render *inutile* the second sentence of Article 2.4.2 which permits the use of the WA-T methodology under certain circumstances. In addition, the United States argues that such mathematical equivalence will frustrate the objective of the WA-T methodology, which is to unmask targeted dumping.[329] Finally, the United States relies on the negotiating history of the Anti-Dumping Agreement to assert that the text of Article 2.4.2 reflects a compromise reached at the Uruguay Round that permitted the use of the WA-T methodology with zeroing to unmask targeted dumping.[330]

7.1.6.2 Main arguments of the third parties

7.1.6.2.1 Brazil

7.192. Brazil does not express a specific view on whether the second sentence of Article 2.4.2 permits the use of zeroing under the WA-T methodology. Brazil notes, however, that bearing in mind the customary rules of treaty interpretation, we should give meaning to all the terms of the treaty, including the WA-T methodology provided in the second sentence of Article 2.4.2.[331]

7.1.6.2.2 Canada

7.193. Canada maintains that just because the use of zeroing under the WA-T methodology will allow that methodology to yield a result that is mathematically different from that obtained under the WA-WA methodology does not mean that its use is permitted.[332] Canada also notes that the Appellate Body has in past cases rejected the mathematical equivalence argument.[333]

7.1.6.2.3 European Union

7.194. The European Union submits that under the WA-T methodology "high priced export transactions would not be allowed to offset the dumping amount".[334] However, the European Union asserts that such an offset mechanism should not be referred to as zeroing.[335]

7.1.6.2.4 Japan

7.195. Japan agrees with China's argument that the use of zeroing under the WA-T methodology is not permissible. Japan refutes the United States' argument concerning mathematical equivalence, noting that this argument would not hold in two situations. First, Japan states that if the normal values under the WA-WA and WA-T methodologies are based on different time-periods, mathematical equivalence will not arise.[336] Second, Japan observes that dumping margins obtained through the T-T methodology will in any case differ from those obtained through the WA-T methodology.[337]

7.1.6.2.5 Korea

7.196. Korea, like China, finds the use of zeroing under the WA-T methodology to be impermissible. In this regard, Korea rejects the United States' argument concerning mathematical equivalence. Korea notes that mathematical equivalence can be avoided by using different time periods for calculating the normal value under the WA-WA and WA-T methodologies.[338] Korea derives supports for this view from the different manner in which the text of Article 2.4.2 describes

[328] United States' first written submission, paras. 242-251, 254-261, 266-272, and 292-304.
[329] United States' first written submission, para. 230.
[330] United States' first written submission, para. 316.
[331] Brazil's third-party statement, para. 17.
[332] Canada's third-party submission, para. 21.
[333] Canada's third-party submission, para. 21.
[334] European Union's third-party submission, para. 46.
[335] European Union's third-party submission, para. 47.
[336] Japan's third-party submission, para. 28.
[337] Japan's third-party submission, para. 28.
[338] Korea's third-party submission, para. 52.

normal value under the WA-WA methodology and the WA-T methodology.[339] Korea also observes that comparison of the prices of individual export transactions with a monthly normal value may allow for a more precise comparison of prices that may be changing over time.[340]

7.1.6.2.6 Norway

7.197. Norway contends that the use of zeroing under the WA-T methodology violates Article 2.4.2 as well as the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement.[341] Norway submits that the United States' mathematical equivalence argument is based on the incorrect assumption that the normal value used under the WA-T and WA-WA methodologies must be based on the same time periods.[342] In this regard, Norway also alludes to the different manner in which normal value is described under the WA-WA methodology and the WA-T methodology in the text of Article 2.4.2, to contend that this text does not support the view that the normal values under both methodologies should be the same.[343]

7.1.6.2.7 Turkey

7.198. Turkey also does not express a specific view on whether the second sentence of Article 2.4.2 permits the use of zeroing under the WA-T methodology. Turkey maintains, however, that applying the legal principles that govern the normal methodologies provided for under the first sentence of Article 2.4.2 to the exceptional WA-T methodology provided for under the second sentence may erode the effectiveness of the results expected from the WA-T methodology.[344]

7.1.6.2.8 Viet Nam

7.199. Viet Nam finds the use of zeroing to be unfair and maintains that while the WA-T methodology is an exception to the normal methodologies provided for in the first sentence of Article 2.4.2, it is not an exception to the fair comparison obligation under Article 2.4.[345] Therefore, in Viet Nam's view, it is equally impermissible to use zeroing under the WA-T methodology as it is under the two normal methodologies.[346]

7.1.6.3 Evaluation by the Panel

7.200. The issue that China's claim raises is whether Article 2.4.2, and specifically the second sentence thereof, permits the use of zeroing under the WA-T methodology. In evaluating this claim, we will first examine whether the use of zeroing under the WA-T methodology violates the second sentence of Article 2.4.2. If we find that it does, we will proceed to an assessment of the United States' mathematical equivalence argument.

7.1.6.3.1 Whether the use of zeroing under the WA-T methodology violates the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

7.201. As we noted above, the first sentence of Article 2.4.2 describes the WA-WA and T-T methodologies as methodologies which "shall normally" apply in an anti-dumping investigation. The WA-WA methodology is described in the first sentence of Article 2.4.2 as a methodology which requires "a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" while the T-T methodology is described as one which requires "a comparison of normal value and export prices on a transaction-to-transaction basis". The second sentence of Article 2.4.2 describes the WA-T methodology, which provides for the comparison of "[a] normal value established on a weighted average basis" with "prices of individual export transactions". As noted in paragraph 7.150 above, this methodology has been recognized in WTO jurisprudence as an exception to the normal methodologies provided for in the first sentence of Article 2.4.2. Even though the WA-T methodology is distinct from the WA-WA and

[339] Korea's third-party submission, para. 51.
[340] Korea's third-party submission, para. 52.
[341] Norway's third-party submission, para. 13.
[342] Norway's third-party statement, para. 4.
[343] Norway's third-party statement, para. 4.
[344] See, e.g. Turkey's third-party submission, para. 15.
[345] Viet Nam's third-party submission, para. 19.
[346] Viet Nam's third-party submission, para. 19.

T-T methodologies in terms of its operation and in terms of being an exception to these normal methodologies, we find it important to note that under Article 2.4.2 all of these three methodologies have a common purpose of finding "the existence of margins of dumping during the investigation phase".

7.202. The text of Article 2.4.2 does not refer to zeroing. We recall, however, that the WTO-consistency of zeroing under the WA-WA and the T-T methodologies has been discussed extensively in past disputes and a consistent line of reasoning has emerged in this regard. Specifically, we recall that the Appellate Body has stated that Article 2.4.2 does not permit an investigating authority to use zeroing in the calculation of dumping margins through the WA-WA and T-T methodologies.[347] The Appellate Body has also found the use of zeroing in duty assessment proceedings, such as US administrative reviews, to be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[348] The Appellate Body's findings in this regard have been based, *inter alia*, on three principles: (a) that the margins of dumping have to be calculated for the investigated product as a whole[349]; (b) that the margins of dumping have to be calculated for an exporter, rather than an importer[350]; and (c) that where the margins of dumping are calculated in two steps, all intermediate results have to be taken into consideration with their mathematical values when they are aggregated to calculate the margin of dumping for the investigated product as a whole.[351] The Appellate Body has found the use of zeroing to be impermissible because it disregards the intermediate comparison results that yield negative margins by treating them as zero.

7.203. Although the Appellate Body in these disputes was not dealing with the permissibility of zeroing in the context of the WA-T methodology, in our view, these principles on which the Appellate Body's findings were based are also relevant to the calculation of dumping margins through the WA-T methodology set forth in the second sentence of Article 2.4.2. Specifically, as we noted above, the WA-T methodology also serves to find the existence of margins of dumping in an anti-dumping investigation. The Appellate Body has clarified that the term "margins of dumping" has the same meaning throughout the Anti-Dumping Agreement.[352] Therefore, as both parties also agree, dumping margins calculated on the basis of the WA-T methodology provided in the second sentence of Article 2.4.2 also have to be calculated for the investigated product as a whole.[353] We note, and parties agree, that by using zeroing under the WA-T methodology in the three challenged investigations, the USDOC disregarded negative intermediate comparison results by treating them as zero in calculating the margin of dumping for the investigated product as a whole.[354] Such margins, in our view, were not calculated for the investigated product as a whole and were therefore inconsistent with the second sentence of Article 2.4.2.

7.204. We note that the United States seeks to distinguish past Appellate Body reports, specifically the ones where the Appellate Body found the use of zeroing under the WA-WA and T-T methodologies to be inconsistent with Article 2.4.2, from the legal question before us in these proceedings. The United States emphasizes that the Appellate Body has found zeroing to be impermissible in these past disputes based on its interpretation of the words and phrases, which appear only in the first sentence of Article 2.4.2 that describes the WA-WA and T-T

[347] Appellate Body Reports, *EC – Bed Linen*, para. 66; *US – Softwood Lumber V*, para. 117; and *US – Softwood Lumber (Article 21.5 – Canada)*, paras. 88 and 122.

[348] See, e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 133.

[349] See, e.g. Appellate Body Reports, *US – Softwood Lumber V*, para. 93; *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 114; and *US – Zeroing (EC)*, para. 127.

[350] See, e.g. Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 112.

[351] Appellate Body Reports, *US – Softwood Lumber V*, para. 98; *US – Softwood Lumber (Article 21.5 – Canada)*, paras. 94 and 122; *US – Zeroing (EC)*, para. 127; *US – Stainless Steel (Mexico)*, para. 103; and *US – Continued Zeroing*, para. 286.

[352] See, e.g. Appellate Body Reports, *US – Stainless Steel (Mexico)*, para. 85; and *US – Continued Zeroing*, para. 286

[353] In this regard, we note that the United States agrees that the results of transaction-specific comparisons generated through the application of the WA-T methodology are not margins of dumping in and of themselves. The United States also refers in parts of its first written submission to the requirement to calculate the margins of dumping under the WA-T methodology for the investigated product as a whole and for a specific exporter. (United States' first written submission, paras. 206 and 217); see also China's first written submission, para. 175.

[354] United States' response to Panel question No. 23(b), para. 46; and China's first written submission, paras. 292-294.

methodologies.[355] Specifically, the United States notes that the Appellate Body relied on the phrase "all" in "all comparable transactions" in the first sentence of Article 2.4.2 to find zeroing to be impermissible under the WA-WA methodology.[356] The Appellate Body relied on the reference to "a comparison" in the singular and the word "basis" to find zeroing to be impermissible under the T-T methodology.[357] The United States argues that because these words and phrases do not appear in the second sentence of Article 2.4.2, which describes the WA-T methodology, there is no similar textual basis in the second sentence to proscribe the use of zeroing under that methodology.[358] We disagree. We consider that reading the long line of Appellate Body reports that have addressed zeroing under different methodologies and in various anti-dumping proceedings makes it clear that the Appellate Body has not found zeroing to be impermissible based solely on an interpretation of the first sentence of Article 2.4.2. Instead, the Appellate Body has found zeroing to be impermissible because it has found its use to be contrary to the obligation to calculate the margins of dumping for the investigated product as a whole. In turn, the Appellate Body's view that the margins of dumping have to be calculated for the investigated product as a whole was based on various contextual considerations, including the context provided by the text of Article 2.1 of the Anti-Dumping Agreement.[359]

7.205. We find particular support for our view in the fact that the Appellate Body has also found the use of zeroing in US administrative or periodic reviews to be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, and its use in new shipper reviews to be inconsistent with Article 9.5 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[360] The words and phrases alluded to by the United States with respect to the first sentence of Article 2.4.2 are not present in the text of Articles 9.3 and 9.5 of the Anti-Dumping Agreement or Article VI:2 of the GATT 1994, just as they are not present in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. This confirms that the Appellate Body did not find zeroing to be impermissible based on its interpretation of the first sentence of Article 2.4.2 alone. Relying particularly on the Appellate Body's finding in *US – Zeroing (EC)*, as an example, we asked the United States to clarify how it reconciled its argument that the Appellate Body has found against zeroing on the basis of its interpretation of the textual elements present in the first sentence of Article 2.4.2, with the fact that the Appellate Body found the use of zeroing in US administrative reviews to be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in that case. The United States responded that the Appellate Body's finding in *US – Zeroing (EC)* is inapposite because the Appellate Body in that case was not reviewing the calculations of the margins of dumping, but was instead reviewing the USDOC's assessment of anti-dumping duties collected from an importer.[361] The United States argues that the Appellate Body found a violation of Article 9.3 in that case because the USDOC used zeroing under the methodology which it adopted to assess the anti-dumping duty liability, and the anti-dumping duty so assessed exceeded the "margin of dumping" calculated through the WA-WA methodology.[362] According to the United States, therefore, the Appellate Body's finding in that dispute does not offer any guidance on whether the use of zeroing is permissible in calculating dumping margins using the WA-T methodology under the second sentence of Article 2.4.2. While it is true that the Appellate Body's finding under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in *US – Zeroing (EC)* concerned duty assessment, as opposed to the calculation of dumping margins, we find it relevant to our inquiry in this dispute because the Appellate Body found zeroing to be impermissible based on grounds other than the words and phrases which are unique to the first sentence of Article 2.4.2. To explain our point, we refer to the following extract from the Appellate Body report in *US – Zeroing (EC)*:

> [W]e recall that, in the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction

[355] United States' second written submission, para. 91.
[356] United States' second written submission, para. 91 (citing Appellate Body Report*, EC – Bed Linen*, para. 55).
[357] United States' second written submission, para. 91 (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87).
[358] United States' second written submission, para. 92.
[359] See, e.g. Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[360] See, e.g. Appellate Body Reports, *US – Zeroing (Japan)*, paras. 165-166; *US – Zeroing (EC)*, para. 133; and *US – Stainless Steel (Mexico)*, para. 103.
[361] United States' response to Panel question No. 111(c), para. 57.
[362] United States' response to Panel question No. 111(c), para. 58.

> made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison. Because results of this type were systematically disregarded, the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[363] (italics original; underlining added)

7.206. Thus, the Appellate Body found zeroing in the context of duty assessment proceedings to be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 on the ground that it led the investigating authority to disregard negative intermediate comparison results. The Appellate Body reached this conclusion without examining the text of the first sentence of Article 2.4.2. Importantly, the Appellate Body recalled in the same report that in finding, in a previous dispute, that the use of zeroing under the WA-WA methodology in original investigations was inconsistent with the first sentence of Article 2.4.2, the Appellate Body had stated unambiguously that the terms "dumping" and "margins of dumping" in Article VI of the GATT 1994 and the Anti-Dumping Agreement applied to the investigated product as a whole.[364] The Appellate Body also stressed that this finding "was based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the *Anti-Dumping Agreement*".[365] Therefore, we do not agree with the United States' argument that the Appellate Body in *US – Zeroing (EC)* found against zeroing based simply on its interpretation of the text of the first sentence of Article 2.4.2, and that the use of zeroing is permissible when these textual elements are absent.

7.207. Furthermore, we disagree with the United States that there is no textual basis in the second sentence of Article 2.4.2 to proscribe the use of zeroing. We recall that the text of the second sentence states that under the WA-T methodology an investigating authority will compare the weighted average normal value with the prices of "individual" export transactions. The word "individual" when used as an adjective, as is the case under the second sentence of Article 2.4.2, can be defined to mean "distinguished from others by qualities of its own".[366] We understand from this that in the context of the WA-T methodology, the price of each export transaction is presumed to possess certain qualities of its own. Hence, an investigating authority needs to have particular regard to the price of each such export transaction, and particularly the intermediate comparison results generated from a comparison of the weighted average normal value with each such transaction, so as to not disregard the "individual" characteristics of the prices of such transactions. We consider that due to zeroing, an investigating authority fails to have proper regard to the "individual" characteristics of the prices of those export transactions which are found to be higher than the normal value. This is because an investigating authority disregards, by treating as zero, the results generated from a comparison of the normal value and those specific export transactions. Importantly, we also do not find anything in the second sentence of Article 2.4.2 which would suggest that the use of zeroing under the WA-T methodology is permissible, even though its use is impermissible in other contexts such as under the WA-WA or the T-T methodology. We recall, in this context, the Appellate Body report in *US – Softwood Lumber V,* where, noting that Article 2.4.2 contains no express language permitting an investigating authority to disregard the results of multiple comparisons at the aggregation stage, the Appellate Body stated that when negotiators sought to permit an investigating authority to disregard certain matters under the Anti-Dumping Agreement, they did so explicitly.[367] Thus, the Appellate Body found the absence of any express language in Article 2.4.2 permitting the use of zeroing to be relevant to its finding that this provision does not permit zeroing under the WA-WA methodology. Similarly, we find the absence of any express language in the text of the second

[363] Appellate Body Report*, US – Zeroing (EC)*, para. 133.
[364] Appellate Body Report*, US – Zeroing (EC)*, para. 126.
[365] Appellate Body Report*, US – Zeroing (EC)*, para. 126. (emphasis original)
[366] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1367.
[367] Appellate Body Report, *US – Softwood Lumber V*, para. 100.

sentence of Article 2.4.2 permitting the use of zeroing under the WA-T methodology to be instructive, and find that this also supports our view that the use of zeroing under this methodology is impermissible.

7.208. We find that our understanding of the obligations under the second sentence of Article 2.4.2 is similar to that of the panel in *US – Washing Machines*, which addressed the same legal question, i.e. whether Article 2.4.2 permits the use of zeroing under the WA-T methodology. Noting that the second sentence of Article 2.4.2 permits the application of the WA-T methodology only to export transactions falling within the relevant pattern, that panel found that an investigating authority should fully take into account each and every export transaction falling within that pattern when applying the WA-T methodology to that pattern.[368] That panel, like us, found support for this view in the fact that the second sentence of Article 2.4.2 describes the WA-T methodology as a methodology which entails the comparison of a weighted average normal value with prices of "individual" export transactions. The panel stated that the use of the word "individual" suggests that an investigating authority is required to consider each export transaction on its own right, and with equal weight, irrespective of whether the export price is above or below the normal value.[369] Further, that panel also found that there is no textual basis in the second sentence of Article 2.4.2 to disregard evidence pertaining to export transactions where the export price is above the normal value.[370] On this basis, the panel concluded that the use of zeroing under the second sentence of Article 2.4.2 is impermissible. We agree with these views of the panel in *US – Washing Machines* and note that they confirm our own understanding of the requirements under the second sentence of Article 2.4.2.

7.209. Based on the foregoing, we are of the view that Article 2.4.2 proscribes the use of zeroing under the WA-T methodology.

7.1.6.3.2 Mathematical equivalence

7.210. The United States contends that if zeroing is found to be impermissible under the WA-T methodology provided for in the second sentence of Article 2.4.2, that provision will be rendered *inutile* because in such a situation the margins of dumping calculated through the WA-T methodology will be mathematically equivalent to those calculated through the WA-WA methodology. Noting that the purpose of the second sentence of Article 2.4.2 is to provide an investigating authority with the means to address targeted dumping, the United States contends that mathematical equivalence in the dumping margins generated through the exceptional WA-T methodology and the normal WA-WA methodology will frustrate that purpose. In this regard, the United States emphasizes that mathematical equivalence will arise regardless of whether the WA-T methodology is applied to all export transactions, or whether the WA-T methodology is applied only to export transactions which fall within the relevant pattern and the WA-WA methodology is applied to export transactions which fall outside it. China disagrees with the United States' arguments and maintains that mathematical equivalence will not arise in two situations: (a) when the investigating authority changes the temporal basis on which normal value is calculated, under the WA-WA or WA-T methodology, or both[371]; and (b) when the investigating authority uses the T-T methodology rather than the WA-WA methodology.[372]

7.211. We recall that the mathematical equivalence argument has been raised in past disputes and has been consistently rejected by the Appellate Body.[373] This argument was first addressed by the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*. In that case, the Appellate Body disagreed with the United States' argument on mathematical equivalence and the panel's acceptance of it for several reasons.[374] One such reason was that the United States had not proved that the WA-WA and the WA-T methodologies would produce the same results in all or at least

[368] Panel Report, *US – Washing Machines*, para. 7.190.
[369] Panel Report, *US – Washing Machines*, para. 7.190.
[370] Panel Report, *US – Washing Machines*, para. 7.190.
[371] China's response to Panel question No. 24, para. 127 (referring to Lisa Tenore's second statement, (Exhibit CHN-497) (BCI), paras. 9-10 and Table 4).
[372] See, e.g. China's opening statement at the first meeting of the Panel, para. 54.
[373] Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 97-100; *US – Zeroing (Japan)*, paras. 135-136; *US – Stainless Steel (Mexico)*, paras. 126-127; and *US – Continued Zeroing*, para. 298.
[374] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 97-99.

most cases.[375] The Appellate Body held that one part of a provision setting forth a methodology is not rendered *inutile* simply because in a "specific set of circumstances" its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision.[376] In *US – Continued Zeroing*, the Appellate Body also concluded, along similar lines, that the fact that under certain circumstances, the application of WA-T methodology could produce results that were equivalent to those obtained through the application of the WA-WA methodology was insufficient to conclude that the second sentence of Article 2.4.2 was thereby rendered ineffective.[377]

7.212. We also recall that, in *US – Softwood Lumber V (Article 21.5 – Canada)* and in certain other disputes where the argument of mathematical equivalence was raised, the Appellate Body addressed specific circumstances where the mathematical equivalence argument would not apply. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body faulted the panel for not considering arguments which showed that the WA-WA and WA-T methodologies would yield the same results only under certain specific assumptions, such as when the normal value used under these two methodologies were the same rather than different.[378] Further, in *US – Stainless Steel (Mexico)*, noting that the United States did not contest in that case that if the normal value under these methodologies was based on different time periods, mathematical equivalence would not arise, the Appellate Body stated that this suggested that mathematical equivalence worked only under a specific set of assumptions.[379]

7.213. We note that the context in which these discussions took place in past disputes is different from the context in which this issue is raised in the present proceedings. More specifically, whereas the mathematical equivalence argument was raised in previous disputes in connection with the issue of whether or not zeroing was permissible under comparison methodologies other than the WA-T methodology, in this dispute it has been presented in connection with the actual application of the WA-T methodology. Despite this difference, however, we are of the view that the nature of the argument before us is the same: we are called upon to consider whether our finding that zeroing is impermissible under the WA-T methodology provided for in the second sentence of Article 2.4.2 renders this provision *inutile* because of the United States' mathematical equivalence argument.

7.214. We recall that the United States argues that mathematical equivalence arises both where the investigating authority applies the WA-WA methodology and the WA-T methodology to the entirety of the export transactions, and also where it applies a mixed methodology wherein it applies the WA-T methodology to the export transactions falling within the pattern and the WA-WA methodology to the export transactions falling outside it. As far as the first situation described by the United States is concerned, we recall our finding above that applying the WA-T methodology to all export transactions is not permitted under the second sentence of Article 2.4.2. Hence we disagree with this aspect of the United States' mathematical equivalence argument.

7.215. With respect to the second situation described by the United States, we observe that the United States' description of the mixed methodology is based on the application of the WA-WA methodology to export transactions falling outside the pattern. However, an investigating authority may also apply the T-T methodology to such sales, in which case mathematical equivalence will not necessarily arise.

7.216. Further, we note that in its description of the mixed methodology, the United States assumes that normal values for both the WA-WA methodology and the WA-T methodology are the same.[380] However, we note that, if the investigating authority bases its normal value determinations on different time periods, mathematical equivalence does not arise. In this regard, we recall that China presented evidence, based on price data from the three challenged investigations, to show that the dumping margins generated through the WA-WA methodology and the WA-T methodology would not be mathematically equivalent if the temporal basis for calculating the normal value was changed. In particular, China presented four alternative scenarios

[375] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.
[376] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.
[377] Appellate Body Report, *US – Continued Zeroing*, para. 298.
[378] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.
[379] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126.
[380] See, e.g. United States' first written submission, paras. 243, 295, and 298.

where changing the temporal basis for the normal value in the manner described below would have led to different dumping margins under the WA-WA methodology and the WA-T methodology. In each of these four scenarios, the WA-T methodology is applied, without zeroing, to export transactions falling within the pattern (targeted sales) and the WA-WA methodology, without zeroing, is applied to export transactions falling outside it (non-targeted sales)[381]:

a. The normal values under both the WA-T methodology and the WA-WA methodology are calculated on a quarterly basis;

b. The normal values under both the WA-T methodology and the WA-WA methodology are calculated on a monthly basis;

c. The normal values under the WA-T methodology are calculated on a quarterly basis and that under the WA-WA methodology is calculated on a POI-wide basis; and

d. The normal values under the WA-T methodology are calculated on a monthly basis and that under the WA-WA methodology is calculated on a POI-wide basis.

7.217. The United States does not question that the mathematical results generated under the WA-T methodology and the WA-WA methodology will be different in the situations described by China. However, the United States rejects China's argument on the ground that there is no textual basis in Article 2.4.2 to calculate normal values differently under the WA-WA methodology and the WA-T methodology, and that China does not show how changing the temporal basis for the determination of normal values would allow an investigating authority to take into account a pattern of export prices which differ significantly.[382] Further, the United States notes that the evidence presented by China shows that changing the temporal basis for the determination of normal values may at times lead to situations where the dumping margin calculated through the WA-T methodology is actually lower than that calculated through the WA-WA methodology, and contends that changing the normal values in such a manner leads to results which are unpredictable and not systematic.[383]

7.218. We disagree. Nothing in the text of Article 2.4.2 prohibits an investigating authority from calculating the normal value under the WA-WA and the WA-T methodology on the basis of different time periods, provided this is done in a manner otherwise consistent with the Anti-Dumping Agreement. The United States does not argue that Article 2.4.2 imposes any such obligation on an investigating authority either.[384] We find that Article 2.4.2 grants an investigating authority the flexibility to adopt different normal values under the WA-WA and the WA-T methodologies, depending on the particularities of a given investigation, and if an investigating authority does so, mathematical equivalence will not arise. We also do not find merit in the United States' argument that changing the normal values in the manner proposed by China leads to results which are unpredictable and not systematic. We do not suggest that an investigating authority is required to use different time periods for calculating the normal values under the WA-WA and WA-T methodologies. We only note that an investigating authority has the flexibility to do so. What matters is that where the investigating authority uses different time periods for calculating normal values under these two methodologies, mathematical equivalence does not arise.

7.219. Therefore, we are of the view that the United States' mathematical equivalence argument holds only in specific circumstances, i.e. when the investigating authority uses a mixed methodology wherein it applies the WA-T methodology to export transactions falling within the pattern and the WA-WA methodology (but not the T-T methodology) to export transactions falling outside it, and uses the same normal value under both of these methodologies. We do not consider that the second sentence of Article 2.4.2 is rendered *inutile* simply because in these specific circumstances the dumping margin obtained through the WA-T methodology will be mathematically equivalent to that obtained through the WA-WA methodology. Therefore, we reject the United States' mathematical equivalence argument.

[381] China's response to Panel question No. 24, para. 127.
[382] United States' second written submission, paras. 98 and 100.
[383] United States' second written submission, para. 102.
[384] United States' second written submission, para. 99.

7.1.6.3.3 Conclusion

7.220. On the basis of the foregoing, we conclude that the USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG*, *Coated Paper*, and *Steel Cylinders* investigations by using zeroing under the WA-T methodology in calculating dumping margins for the concerned Chinese exporters.[385]

7.2 Use of the WA-T methodology in the third administrative review in *PET Film*: Alleged violation of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.2.1 Provisions at issue

7.221. The chapeau of Article 9.3 of the Anti-Dumping Agreement reads:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.222. Article 9.3 stipulates that the anti-dumping duty rate shall not be greater than the dumping margin determined by the investigating authority pursuant to Article 2 of the Anti-Dumping Agreement. Therefore, the dumping margin determined consistently with Article 2 operates as a ceiling for the level of anti-dumping duty that may be imposed by a Member.[386]

7.223. Article VI:2 of the GATT 1994 reads in relevant part:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.

7.224. Article VI:2 of the GATT 1994 reiterates the principle that an anti-dumping duty rate should not go beyond the dumping margin determined by the investigating authority.

7.2.2 Factual background

7.225. At the preliminary determinations stage in the third administrative review in *PET Film*, the USDOC found in the export sales of the DuPont Group to the United States a pattern of export prices which differed significantly among different time periods and regions.[387] The USDOC then explained that the WA-WA methodology could not take into account these price differences because there was a meaningful difference in the dumping margins calculated through the WA-WA and the WA-T methodologies, which indicated that the WA-WA methodology masked dumping.[388] On this basis, in its preliminary determinations, the USDOC decided to use the WA-T methodology

---

[385] By finding that zeroing is not permissible under the WA-T methodology, we do not suggest 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*. We find it particularly important to underline this given the exceptional nature of the WA-T methodology in that it addresses certain complexities arising in dumping determinations which may not be resolved through the normal methodologies provided for in the first sentence of Article 2.4.2.

We are cognizant that where an investigating authority applies the WA-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 WA-T methodology which, as underlined by the Appellate Body, is to unmask targeted dumping.

In this regard, we recall that this situation presented itself in the *US – Washing Machines* dispute and that panel found that Article 2.4.2 of the Anti-Dumping Agreement allowed an investigating authority to disregard the negative result of the margin calculations for the export transactions falling outside the pattern, when aggregating such results with those obtained in the calculations for the export transactions falling within the pattern. (Panel Report, *US – Washing Machines*, paras. 7.161-7.163 and 7.167).

[386] See, e.g. Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

[387] *PET Film* AR3, Decision Memorandum, (Exhibit CHN-104), p. 18.

[388] *PET Film* AR3, Decision Memorandum, (Exhibit CHN-104), pp. 18-19.

to calculate the dumping margin for the DuPont Group.[389] At the final determinations stage of this administrative review, the USDOC continued to apply the WA-T methodology.[390] In its final determination, the USDOC explained that when it applied the WA-T methodology to "*all of the exporter's sales (including the profitable sales that the exporter used to mask its dumping through offsetting), it eliminate[d] the offsetting that mask[ed] dumping*".[391] This indicates that the USDOC used zeroing in this administrative review, which the United States also confirms.[392]

7.226. The USDOC issued an amendment to its final determination in the third administrative review in *PET Film* during the course of these proceedings. In that amendment, the USDOC modified the dumping margin for the DuPont Group, but for reasons unrelated to the USDOC's use of zeroing under the WA-T methodology provided in the second sentence of Article 2.4.2.[393] Therefore, this amendment does not affect the nature of China's claim, which concerns the use of zeroing under the WA-T methodology in the third administrative review in *PET Film*. In light of this amendment notice, China clarifies that the measure that it challenges in these proceedings is the final determination in in this administrative review, as modified as described in this notice of amendment.[394] The United States does not contest China's right to introduce this amendment notice in this dispute. We take note of this amendment, and will make our findings accordingly.

7.2.3 Main arguments of the parties

7.2.3.1 China

7.227. China observes that the USDOC used zeroing under the WA-T methodology prescribed in the second sentence of Article 2.4.2 to calculate the dumping margin for the DuPont Group in the third administrative review in *PET Film*. China does not take issue with the USDOC's use of the WA-T methodology *per se* in this review, stating that the Anti-Dumping Agreement does not restrict the ability of an investigating authority to use the WA-T methodology in an administrative review.[395] However, in China's view, Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 do not permit the use of zeroing under the WA-T methodology in duty assessment proceeding such as administrative reviews in the US system.

7.228. In this regard, China notes that Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 stipulate that the anti-dumping duty rate imposed by a Member should not exceed the underlying margin of dumping. Relying on prior Appellate Body reports in support of its view, China contends that the dumping margin on which the anti-dumping duty rate is based must be determined for the investigated product as a whole.[396] Noting that zeroing means that an investigating authority disregards negative intermediate results in the final stage of the calculation of the dumping margin, China argues that a dumping margin calculated in this manner is not one which is calculated for the investigated product as a whole.[397] Further, China insists that Article 2.4.2 does not apply to administrative reviews, and that it only applies to original investigations.[398] Therefore, even assuming that the second sentence of Article 2.4.2 permits the use of zeroing under the WA-T methodology in original investigations, according to China, Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 do not permit its use

[389] *PET Film* AR3, Decision Memorandum, (Exhibit CHN-104), p. 19.
[390] *PET Film* AR3, Issues and Decision Memorandum, (Exhibit CHN-101), p. 28.
[391] China's first written submission, para. 304 (citing *PET Film* AR3, Issues and Decision Memorandum, (Exhibit CHN-101), p. 31). (emphasis added by China)
[392] The United States explains that the USDOC calculated the dumping margin under the WA-T methodology in the third administrative review in *PET Film* and in the three challenged investigations, i.e. the *OCTG*, *Coated Paper* and *Steel Cylinders* investigations, in the same manner. Given that the USDOC used zeroing under the WA-T methodology when calculating dumping margins in the three challenged investigations, this indicates that the USDOC also used zeroing in the third administrative review in *PET Film*. (United States' response to Panel question No. 26, para. 55).
[393] *PET Film* AR3, Notice of Amendment, (Exhibit CHN-479), p. 13826; see also China's response to Panel question No. 1, para. 2.
[394] China's response to Panel question No. 1, para. 5
[395] China's first written submission, para. 300.
[396] China's first written submission, para. 300 (citing Appellate Body Reports*, US – Zeroing (EC)*, paras. 132-133; *US – Zeroing (Japan)*, paras. 108-115, 166 and 174-176; *US – Stainless Steel (Mexico)*, paras. 97-139; and *US – Continued Zeroing*, paras. 276-287 and 314-316).
[397] China's first written submission, para. 310.
[398] China's second written submission, para. 124.

in administrative reviews.[399] China concludes that by basing the anti-dumping duty rate for the DuPont Group on such a margin of dumping calculated through zeroing, the USDOC acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in the third administrative review in *PET Film*.[400]

7.2.3.2 United States

7.229. The United States argues that the second sentence of Article 2.4.2 permits the use of zeroing under the WA-T methodology when the two conditions provided therein are met. The United States contends that in the third administrative review in *PET Film*, this is precisely what the USDOC did: after finding that the two conditions provided for in the second sentence of Article 2.4.2 were met, the USDOC calculated the dumping margin for the DuPont Group under the WA-T methodology, with zeroing.

7.230. The United States notes that Article 9.3 of the Anti-Dumping Agreement requires that the anti-dumping duty rate not exceed the dumping margin "established under Article 2" of the Anti-Dumping Agreement. Article VI:2 of GATT 1994 also states that the anti-dumping duty rate should not be greater in amount than the dumping margin determined for the dumped product. The United States submits that a dumping margin determined consistently with the requirements of the second sentence of Article 2.4.2 is "by definition" a dumping margin "established under Article 2" of the Anti-Dumping Agreement within the meaning of Article 9.3.[401] The United States argues that as long as the anti-dumping duty rate is equal to a dumping margin calculated consistently with Article 2.4.2, there is no question of the anti-dumping duty rate exceeding or being greater than the dumping margin "established under Article 2" of the Anti-Dumping Agreement.[402]

7.2.4 Main arguments of the third parties

7.2.4.1 European Union

7.231. The European Union notes that past Appellate Body reports where the use of zeroing in administrative reviews was found to be impermissible under the WA-T methodology did not concern a finding of targeted dumping, which is at issue in this dispute.[403] For this reason, in the European Union's view, those Appellate Body reports do not determine whether the use of zeroing is permissible in administrative reviews in which targeted dumping is found.[404] The European Union asserts that in administrative reviews, as in original investigations, high-priced export transactions should not be allowed to offset the "dumping amount".[405]

7.2.4.2 Japan

7.232. Japan recalls that the Appellate Body has found the use of zeroing in administrative reviews to be impermissible under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because its use is contrary to the requirement to calculate the dumping margin for the investigated product as a whole.[406]

7.2.5 Evaluation by the Panel

7.233. We note that while the text of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are worded slightly differently, both require a Member to ensure that an anti-dumping duty does not exceed the dumping margin calculated for the relevant exporter. Article VI:2 of the GATT 1994 prohibits a Member from imposing an anti-dumping duty rate which is "greater in amount" than the margin of dumping. Article 9.3 of the Anti-Dumping Agreement is

[399] China's second written submission, para. 124.
[400] China's first written submission, paras. 311 and 314-315.
[401] United States' first written submission, para. 323.
[402] United States' second written submission, para. 114.
[403] European Union's third-party submission, para. 50.
[404] European Union's third-party submission, para. 50.
[405] European Union's third-party submission, para. 51.
[406] Japan's third-party submission, paras. 62-63.

more specific inasmuch as it prohibits a Member from imposing an anti-dumping duty rate which exceeds the dumping margin "as established under Article 2" of the Anti-Dumping Agreement.

7.234. We recall that the question of whether the use of zeroing in duty assessment proceedings is permissible under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 has arisen in a number of prior disputes, and in all of them the Appellate Body has found the use of zeroing to be inconsistent with these provisions.[407] There is, however, an important difference between those past disputes and the present dispute. To illustrate this difference, we find it useful to discuss the Appellate Body's finding in *US – Zeroing (EC)*, which was the first case to address the issue of zeroing in administrative reviews. In the administrative review proceedings at issue in that case, the USDOC used a methodology wherein it based the importer's anti-dumping duty liability on a dumping margin determined through the comparison of the export price of each individual transaction made by an importer with a contemporaneous weighted average normal value of the exporter.[408] While aggregating the intermediate results generated through the comparison of the weighted average normal value with these individual export transaction prices, the USDOC disregarded the negative intermediate results by treating them as zero.[409] Thus, the USDOC used a methodology that – in terms of its mechanics – looked like the WA-T methodology provided for in the second sentence of Article 2.4.2. However, in those administrative reviews, the USDOC did not explicitly rely on Article 2.4.2 and did not state that it was using the WA-T methodology in accordance with the requirements set forth in that provision. Further, in *US – Zeroing (EC)*, the Appellate Body specifically stated that it did not find it necessary to resolve the issue of zeroing in administrative reviews through an examination of Article 2.4.2, and emphasized that it was not expressing any view as to whether Article 2.4.2 is applicable in administrative reviews or not.[410]

7.235. That being said, we note that in *US – Zeroing (EC)*, as well as in a number of other cases, the Appellate Body found a violation of Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 on the grounds that, under these provisions, a margin of dumping has to be determined: (a) for the investigated product as a whole[411] and (b) for an individual exporter or foreign producer.[412] Specifically, in *US – Zeroing (EC)*, the Appellate Body recalled that its earlier findings that the margin of dumping has to be calculated for the investigated product as a whole was based, among others, on Article 2.1 of the Anti-Dumping Agreement.[413] Noting that Article 9.3 refers to Article 2, the Appellate Body stated that it followed that under Article 9.3 of the Anti-Dumping Agreement as well as Article VI:2 of the GATT 1994, the amount of assessed anti-dumping duty rate should not exceed the margin of dumping for the investigated product as a whole.[414]

7.236. Based on the above, it is clear that under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, an anti-dumping duty should not exceed the dumping margin calculated for the relevant exporter and for the investigated product as a whole. Further, as has also been clarified over a large number of cases, the obligation to determine the dumping margin for the investigated product as a whole means that when the dumping margin is determined on the basis of multiple comparisons made at an intermediate stage, the investigating authority is required to ensure that all intermediate results generated through such multiple comparisons are aggregated in calculating the dumping margin for the investigated product as a whole.[415] The use of zeroing is inconsistent with this requirement because when zeroing is used, the investigating

[407] In *US – Zeroing (EC)* and *US – Zeroing (Japan)*, for example, the Appellate Body found the use of zeroing to be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of GATT 1994. (Appellate Body Reports, *US – Zeroing (EC)*, para. 135; and *US – Zeroing (Japan)*, paras. 166 and 176). In *US – Stainless Steel (Mexico)*, the Appellate Body found the use of zeroing to be "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of GATT. (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133).

[408] See, e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 110.

[409] See, e.g. Appellate Body Report, *US – Zeroing (EC)*, para. 110.

[410] Appellate Body Report, *US – Zeroing (EC)*, para. 164.

[411] See, e.g. Appellate Body Reports, *US – Zeroing (EC)*, para. 127; and *US –Stainless Steel (Mexico)*, paras. 106 and 112.

[412] See, e.g. Appellate Body Reports, *US – Zeroing (EC)*, para. 129; *US – Stainless Steel (Mexico)*, para. 94; and *US – Continued Zeroing*, para. 283.

[413] Appellate Body Report, *US – Zeroing (EC)*, para. 126.

[414] Appellate Body Report, *US – Zeroing (EC)*, para. 127.

[415] See, e.g. Appellate Body Reports, *US – Zeroing (EC)*, para. 132; and *US – Stainless Steel (Mexico)*, para. 103.

authority treats the negative intermediate comparison results as zero, and hence does not take them into account at the aggregation stage.

7.237. In the third administrative review in *PET Film*, the USDOC explicitly used the WA-T methodology referred to in the second sentence of Article 2.4.2 by stating that the conditions set forth therein for the use of that methodology were satisfied.[416] We are of the view that notwithstanding the difference between the administrative or periodic reviews discussed in prior Appellate Body reports and the third administrative review in *PET Film*, the principles that emerged from the case law are convincing and apply equally to the use of the WA-T methodology challenged in this dispute. This is because, as in the past disputes, in the present administrative review, the USDOC compared the weighted average of the normal value with individual export transaction prices, and then aggregated the results of such intermediate comparisons in calculating the margin of dumping for the investigated product as a whole. At the aggregation stage, the USDOC treated the negative intermediate results as zero. This shows that the USDOC did not determine the margin of dumping for the investigated product as a whole and, by basing the anti-dumping duty rate on such a WTO-inconsistent margin of dumping, failed to ensure that the anti-dumping duty rate did not exceed or was not greater than the underlying dumping margin, as required under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.238. We note that the United States seeks to distinguish past Appellate Body reports on the basis that, differently from the administrative reviews subject to those disputes, in this administrative review the USDOC calculated the dumping margin consistently with the requirements of the second sentence of Article 2.4.2. In the United States' view, the second sentence of Article 2.4.2 permits the use of zeroing under the WA-T methodology when the two conditions for the use of that methodology are met. The United States therefore submits that a dumping margin calculated consistently with the requirements of the second sentence of Article 2.4.2 is by definition a dumping margin established under Article 2 of the Anti-Dumping Agreement and that a duty rate determined on the basis of such a margin will be consistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. We have found in paragraph 7.220 above that Article 2.4.2 does not permit zeroing under the WA-T methodology in original investigations. Therefore, the United States' argument does not hold.

7.239. Based on the foregoing, we find that the USDOC acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of GATT 1994 by using zeroing in determining the dumping margin for the DuPont Group in the third administrative review in *PET Film* as amended by the Notice of Amendment.

7.3 Whether the six administrative review determinations introduced at the Panel's first substantive meeting with the parties are within the Panel's terms of reference

7.3.1 Introduction

7.240. In its opening statement at the Panel's first substantive meeting with the parties, China introduced for consideration four administrative review determinations issued by the USDOC after the filing of China's first written submission on 6 March 2015.[417] In its closing statement at the same meeting, China introduced two more administrative review determinations.[418] In this section of our Report, we refer collectively to these as "the six determinations".

7.241. The USDOC issued the Final Results of the six determinations as follows: the fifth administrative review in *OTR Tires* on 15 April 2015[419]; the fifth administrative review in *PET Film* on 11 June 2015[420]; the ninth administrative review in *Furniture* on 17 June 2015[421]; the fourth

[416] *PET Film* AR3, Decision Memorandum, (Exhibit CHN-104), pp. 18-19; and *PET Film* AR3, Issues and Decision Memorandum, (Exhibit CHN-101), p. 28.
[417] These four determinations are *OTR Tires* AR5, *PET Film* AR5, *Furniture* AR9 and *Diamond Sawblades* AR4. See China's opening statement at the first meeting of the Panel, para. 132.
[418] These two determinations are *Solar* AR1 and *Wood Flooring* AR2. See China's closing statement at the first meeting of the Panel, para. 27.
[419] *OTR Tires* AR5, Final Results, (Exhibit CHN-486).
[420] *PET Film* AR5, Final Results, (Exhibit CHN-484).
[421] *Furniture* AR9, Final Results, (Exhibit CHN-483).

administrative review in *Diamond Sawblades* on 8 June 2015[422]; the first administrative review in *Solar* on 14 July 2015[423]; and the second administrative review in *Wood Flooring* on 15 July 2015.[424]

7.242. China challenges all six determinations and contends that they are inconsistent with Articles 6.10, 9.2, and the second sentence of 9.4 of the Anti-Dumping Agreement for the same reasons that China argues that the 32 challenged determinations described in paragraph 35 of China's first written submission are inconsistent with the same provisions.[425] China also challenges four of these six determinations, namely, the fifth administrative review in *OTR Tires*, the fourth administrative review in *Diamond Sawblades*, the first administrative review in *Solar*, and the second administrative review in *Wood Flooring*, as part of its as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement. China, however, distinguishes two of these four determinations from the other two in terms of the arguments on which its claims are based. China challenges the determinations in the first administrative review in *Solar* and the second administrative review in *Wood Flooring* for all the same reasons for which it challenges the 26 determinations identified in its first written submission under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement.[426] With respect to the fifth administrative review in *OTR Tires* and the fourth administrative review in *Diamond Sawblades*, China argues that there are violations of Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 on the basis of a more limited set of arguments.[427]

7.243. The United States contends that the six determinations are new and, therefore, do not fall within the terms of reference of the Panel. The United States presents its objection on two grounds, namely: (a) the six determinations were not subject to consultations between the parties to the dispute within the meaning of Article 4.4 of the DSU; and (b) they were not identified in China's panel request, as required under Article 6.2 of the DSU. We understand the United States to argue that each of these two grounds requires the Panel to exclude the six determinations from the scope of this dispute. In other words, the United States' arguments are not cumulative.[428]

7.244. In the light of the United States' objection with respect to the six determinations, we will first examine whether these determinations fall within our terms of reference before proceeding, if at all, to an assessment of China's claims against such determinations. To this end, we will analyse, first, whether the identification of the specific measures at issue in China's panel request includes these six determinations, as required under Article 6.2 of the DSU. If we conclude that it does not, we will find the six determinations to fall outside our terms of reference. If, however, we find that the six determinations are included in China's panel request, we will examine whether the fact that the six determinations were not part of the consultations between the parties constitutes a jurisdictional bar under Article 4.4 of the DSU.

7.3.2 Whether China's panel request covers the six determinations

7.245. Article 6.2 of the DSU sets forth the requirements applicable to panel requests.[429] That provision reads:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

[422] *Diamond Sawblades* AR4, Final Results, (Exhibit CHN-485).
[423] *Solar* AR1, Final Results, (Exhibit CHN-489).
[424] *Wood Flooring* AR2, Final Results, (Exhibit CHN-490).
[425] China's response to Panel question No. 2(a), paras. 6-8.
[426] China's response to Panel question No. 2(b), para. 10.
[427] China's response to Panel question No. 2(b), paras. 13-20.
[428] United States' response to Panel question No. 3, paras. 1-4; and second written submission, paras. 119-122.
[429] Appellate Body Report, *US – Carbon Steel*, para. 124.

7.246. Thus, pursuant to Article 6.2, a panel request has to identify the "specific measures at issue" and provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Importantly, as the Appellate Body has made clear, compliance with the requirements of Article 6.2 is not a mere formality[430], since a panel request serves two chief objectives: it establishes and delimits the jurisdiction of a panel[431]; and serves the due process objective of providing notice to the respondent and the third parties regarding the nature of the dispute.[432]

7.247. We note that the jurisdictional disagreement between the parties pertains to the identification of the specific measures at issue, not the legal basis of the complaint. Article 6.2 of the DSU requires that a panel request identify the specific measures at issue against which the complaining party presents its claims. As a general matter, measures that fall within a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.[433] We recall, however, that the Appellate Body and certain panels have recognized that, in certain limited circumstances, measures adopted subsequent to the establishment of a panel may fall within a panel's terms of reference.[434]

7.248. In some disputes where this particular issue arose, the Appellate Body examined the relationship between the measure identified in the panel request and the new measure adopted subsequent to the filing of the panel request. In *Chile – Price Band System*, for instance, the Appellate Body found that "where an original measure had merely been amended by a subsequent measure and the amendment did not, in any way, change the *essence of the original measure*", the measure in its amended form could constitute the specific measure at issue identified in the panel request.[435] The panel in *Japan – Film* held that the requirements of Article 6.2 would be met in the case of an unidentified measure that "is subsidiary or so *closely related* to a 'measure' specifically identified, that the responding party can reasonably be found to have received *adequate notice* of the scope of the claims asserted by the complaining party."[436] Along similar lines, the panel in *Argentina – Footwear (EC)* explained that "it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU."[437] In that panel's view, the inquiry should centre on the substance of the measures "rather than the legal acts in their original or modified legal forms that are most relevant for [that panel's] terms of reference".[438] Thus, the specificity requirement in Article 6.2 of the DSU means that "the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request".[439]

7.249. The Appellate Body has also observed that Article 6.2 does not "categorically prohibit[]" the inclusion of measures that come into existence or are completed after the establishment of a panel is requested[440], provided that the panel request is framed with "sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[441] A complainant is not, under Article 6.2 of the DSU, required to identify each challenged measure independently from other measures, so long as a measure is discernible in the panel request.[442]

[430] Appellate Body Report, *Australia – Apples*, para. 416.
[431] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640.
[432] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.11.
[433] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[434] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[435] Appellate Body Report, *EC – Chicken Cuts*, para. 156 (quoting Appellate Body Report, *Chile – Price Band System*, para. 139). (emphasis original)
[436] Panel Report, *Japan – Film*, para. 10.8. (emphasis added) See also Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subpara. 27.
[437] Panel Report, *Argentina – Footwear (EC)*, para. 8.40.
[438] Panel Report, *Argentina – Footwear (EC)*, para. 8.40.
[439] Appellate Body Report, *US – Continued Zeroing*, para. 168.
[440] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 125.
[441] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[442] Appellate Body Report, *US – Continued Zeroing*, para. 170. The Appellate Body has indicated that "there may be circumstances in which a party describes a measure in a more generic way, which nonetheless allows the measure to be discerned." (Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116).

7.250. Turning to the facts of the present dispute, as noted above, the United States argues that the six determinations fall outside our terms of reference because they were not included in China's panel request.

7.251. In its panel request, China identified, *inter alia*, the following measures:

a. The Single Rate Presumption for Non-Market Economies (NMEs);

b. The NME-wide Methodology; and

c. The Use of Adverse Facts Available.

7.252. With respect to the Single Rate Presumption for NMEs, the panel request challenges a norm of general and prospective application as such, as well as the determinations and related measures listed in Annex 3.[443] With respect to the NME-Wide Methodology, the panel request challenges the determinations and related measures listed in Annex 4.[444] Finally, with respect to the Use of Adverse Facts Available, the panel request challenges a norm of general and prospective application as such, as well as the determinations and related measures listed in Annex 5.[445]

7.253. Annexes 3, 4 and 5 of China's panel request each contains a list of 13 anti-dumping orders. For each of the orders, China refers to the specific determinations, such as the original investigation, or the subsequent administrative reviews, which it challenges. China included systematically, for each of the listed anti-dumping orders, the following phrases:

> "any modification, replacement or amendment to the measures listed above; and
>
> any closely connected, subsequent measures that involve the application of the Single Rate Presumption"[446];
>
> "any modification, replacement or amendment to the measures listed above; and
>
> any closely connected, subsequent measures that involve the application of any challenged aspect of the NME-Wide Methodology"[447];
>
> "any modification, replacement or amendment to the measures listed above; and
>
> any closely connected, subsequent measures that involve the application of adverse facts available."[448]

7.254. Hence, in terms of which measures have been identified in China's panel request, the phrase "any closely connected, subsequent measures" informs the 13 challenged orders with respect to the application of the Single Rate Presumption, the NME-wide Methodology, and adverse facts available. The question is whether that phrase is broad, and yet precise, enough to encompass the six determinations not identified explicitly in China's panel request.

7.255. In this respect, we observe that a situation similar to this dispute arose in *US – Zeroing (Japan) (Article 21.5 – Japan)*. In that dispute, Japan identified in its panel request eight administrative reviews[449] pertaining to three anti-dumping duty orders. Japan's panel request also referred to "any subsequent closely connected measures".[450] During the course of the panel proceedings, the USDOC issued another administrative review determination, which Japan argued was within the panel's terms of reference.

[443] WT/DS471/5, para. 16.
[444] WT/DS471/5, para. 19.
[445] WT/DS471/5, para. 25.
[446] WT/DS471/5, Annex 3. (emphasis added)
[447] WT/DS471/5, Annex 4. (emphasis added)
[448] WT/DS471/5, Annex 5. (emphasis added)
[449] The Appellate Body referred to these as "periodic reviews".
[450] WT/DS322/27, para. 12.

7.256. The panel in that dispute addressed two issues, namely, whether Japan's panel request met the specificity requirement of Article 6.2 of the DSU, and whether measures not in existence at the time of the panel request fell within its terms of reference. With respect to whether the phrase "subsequent closely connected measures" was sufficiently broad to encompass the new administrative review, the panel recalled that the United States retrospective duty assessment system required importers to post a cash deposit of the estimated amount of duties due for the following period, and that if exporter(s) requested a review, the USDOC would assess the final liability for the exporter(s) requesting the review.[451] Importantly, the panel also noted that because each administrative review supersedes the preceding one, "there is a high degree of predictability regarding the future occurrence of subsequent administrative reviews".[452] The panel thus determined that the phrase "subsequent closely connected measures" satisfied the specificity requirement of Article 6.2[453] and covered "subsequent periodic reviews, occurring under the same identified anti-dumping duty order, which 'supersede' the reviews named in the panel request".[454] The panel underlined that the new administrative review had been initiated before the establishment of the panel and that, once finalized, it would become the next administrative review in the continuum of administrative reviews related to the anti-dumping duty order identified in the panel request.[455] The panel therefore concluded that the new administrative review came under its terms of reference because "the measure in issue eventually came into existence as part of a continuum that existed at the time of the panel request, and [] the process for bringing about the measure's existence was already underway".[456]

7.257. The Appellate Body upheld the panel's analysis and findings concerning the inclusion of the new administrative review in its terms of reference. It began by noting that the phrase "subsequent closely connected measures", as used in Japan's panel request, referred to measures "enacted after" (subsequent to), and "relate[d] … to" (closely connected to), the administrative reviews identified by Japan in its panel request.[457] The Appellate Body noted that, although successive administrative review determinations are separate and distinct measures, there is a link between the reviews "issued under the same respective anti-dumping duty order".[458] In these circumstances, the successive administrative reviews "constitute[] 'connected stages … involving the imposition, assessment and collection of duties under the same anti-dumping order'".[459]

7.258. The Appellate Body also observed that the administrative reviews listed in the panel request and the new administrative review "involved the same products, from the same countries, and formed part of a continuum of events".[460] Moreover, the due process rights of the United States were not impaired because it was given several opportunities to respond to the arguments raised by Japan, which were in any event "similar" to those raised in respect of the reviews identified in the panel request.[461] Furthermore, the Appellate Body considered that the third parties were put on notice by the panel request given the inclusion of the reference to "subsequent closely connected measures" and the connections between the reviews identified in the panel request and the new review.[462] The Appellate Body also echoed the panel's finding that the new administrative review had been initiated at the time of the panel request. In finding that the new

[451] If a review is not requested, "duties are assessed at the rate established in the completed review covering the most recent prior period, or if no review has been completed, the cash deposit rate applicable at the time merchandise was entered". (*United States Code of Federal Regulations*, Title 19, Section 351.212(a), (Exhibit CHN-28)).

[452] Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.102.

[453] Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.105.

[454] Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.103. The panel also considered that, given the "the regularity and predictability associated with administrative reviews under an anti-dumping order, the United States should reasonably have expected that future administrative reviews may fall within the panel's jurisdiction." (Ibid. para. 7.105).

[455] Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.110.

[456] Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.116.

[457] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 112.

[458] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230).

[459] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230, in turn quoting Appellate Body Report, *US – Continued Zeroing*, para. 181)). (omission by the Appellate Body)

[460] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 240).

[461] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 119.

[462] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 119.

administrative review was within the panel's terms of reference, the Appellate Body concluded that this was consistent with the objective, set out in Article 3.3 of the DSU, to ensure a prompt settlement of the dispute.[463]

7.259. Although the Appellate Body in that dispute dealt with a compliance proceeding under Article 21.5 of the DSU, we consider that its reasoning with regard to Article 6.2 of the DSU is highly relevant to the issue before us. The six determinations at issue in these proceedings were not identified explicitly in China's panel request. Yet all such determinations pertain to anti-dumping duty orders that were explicitly listed in China's panel request. Each of the six determinations represents an administrative review pertaining to one of the 13 anti-dumping duty orders at issue in this dispute. For each of the listed anti-dumping duty orders, China included the phrase "any closely connected, subsequent measures". In addition, all six administrative reviews were initiated before the establishment of the Panel on 26 March 2015: the fifth administrative review in *OTR Tires*, on 8 November 2013[464]; the first administrative review in *Solar*, on 3 February 2014[465]; the fourth administrative review in *Diamond Sawblades*, on 30 December 2013[466]; the second administrative review in *Wood Flooring*, on 3 February 2014[467]; the fifth administrative review in *PET Film*, on 30 December 2013[468]; and the ninth administrative review in *Furniture*, on 28 February 2014.[469]

7.260. Against this backdrop, we consider that the phrase "any closely connected, subsequent measures" in China's panel request should be construed as encompassing the six determinations. The six determinations before this Panel are "closely connected" to the determinations explicitly listed in China's panel request, and form part of a chain of measures or a continuum wherein the six determinations were made in administrative reviews that superseded previous administrative reviews or original investigations. Moreover, the six determinations are linked to anti-dumping duty orders on the basis of which anti-dumping duties were originally imposed and, therefore, "involve[] the same products, from the same countries".[470] In addition, the six determinations are "subsequent measures" because they were issued after, and hence succeeded, the determinations explicitly listed in China's panel request.

7.261. Moreover, the administrative reviews leading up to the six determinations were initiated prior to the establishment of this Panel. Given the particularities of the United States' retrospective duty assessment system[471], the United States was aware that the six determinations would be issued in the future, i.e. after the establishment of the Panel on 26 March 2014. Hence, as far as the six determinations were concerned, we find it difficult to accept the United States' argument that it did not reasonably expect that the phrase "closely connected, subsequent measures" referred to those administrative review determinations that were underway. We also note that, in the particular circumstances of this dispute, the United States' due process rights have not been infringed, as it had several opportunities to present its arguments with respect to the consistency of these six determinations with the provisions of the Anti-Dumping Agreement on which China bases its relevant claims. Moreover, as noted above, the arguments that China raises in relation to the six determinations are identical in the case of the claim challenging the Single Rate Presumption, and more limited, but identical for the remaining arguments in the case of the claims under Article 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement.

7.262. The United States further argues that the six determinations pertain to time periods that are different from the time periods of the determinations explicitly listed in China's panel request, and that they involve different facts.[472] We agree with the United States that the six determinations are different from the measures explicitly listed in the panel request in terms of the

[463] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 127.
[464] *OTR Tires* AR5, Preliminary Results, (Exhibit CHN-234), p. 61292.
[465] *Solar* AR1, Preliminary Results, (Exhibit CHN-243), p. 1022.
[466] *Diamond Sawblades* AR4, Preliminary Results, (Exhibit CHN-248), p. 71980.
[467] *Wood Flooring* AR2, Preliminary Results, (Exhibit CHN-262), p. 1388.
[468] *PET Film* AR5, Decision Memorandum, (Exhibit CHN-477), p. 2.
[469] *Furniture* AR9, Issues and Decision Memorandum, (Exhibit CHN-480), p. 4.
[470] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116.
[471] We note that the USDOC "shall", upon the filing of a request, "review and determine … the amount of any anti-dumping duty". (United States Tariff Act of 1930, Section 751, *United States Code*, Title 19, Section 1675, (Exhibit CHN-17), Section 1675(a)(1)(B)).
[472] United States' second written submission, para. 122.

facts they involve and the time periods they concern. As noted above, however, this does not change the fact that the six determinations are closely connected to the anti-dumping duty orders explicitly listed in China's panel request, and are therefore captured by the phrase "any closely connected, subsequent measures". Moreover, the fact that, for two of the four determinations challenged under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement, China presents a narrower set of *arguments* compared to those presented with regard to the determinations explicitly listed in its panel request, does not affect our jurisdiction concerning the six determinations. In this regard, we recall that as long as the contested measures and the relevant claims are identified in a panel request consistently with the requirements of Article 6.2 of the DSU, the complaining Member's arguments in support of its claims do not affect the panel's jurisdiction and may be presented in the course of panel proceedings.[473] The evaluation of China's arguments is only relevant to our assessment of the claims concerning the six determinations.

7.263. On this basis, we reject the United States' contention that the six determinations are not covered by China's panel request. We proceed to examine the United States' argument that the six determinations are outside our terms of reference because they were not subject to consultations within the meaning of Article 4.4 of the DSU.

7.3.3 Whether the six determinations should have been subject to consultations

7.264. In addition to its challenge under Article 6.2 of the DSU, the United States argues that the six determinations fall outside this Panel's terms of reference because they were not subject to consultations under Article 4.4 of the DSU. There is no doubt that these determinations were not part of the consultations between the parties because none but one of these administrative reviews had been initiated, and none had been completed, at the time of consultations. Therefore, the question is whether the lack of consultations about the six determinations puts them outside our terms of reference in these proceedings.

7.265. Pursuant to Article 4.4 of the DSU, a request for consultations shall, *inter alia*, "includ[e] identification of the measures at issue". For its part, Article 6.2 of the DSU requires, *inter alia*, that a request for the establishment of a panel "identify the *specific* measures at issue".[474] The Appellate Body has explained the degree of specificity required in identifying the measure at issue in consultations and in panel requests. It observed that the inclusion of the word "specific" in Article 6.2, but not in Article 4.4, "makes it clear that, in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request"[475]. Put differently, the identification of the measure at issue in a request for consultations is not to be subject to "too rigid a standard".[476]

7.266. That said, we recall that a request for consultations "play[s] an important role in defining the scope of the dispute", as it informs the respondent and the WTO membership of the "nature and object of the challenge raised by the complainant, and enables the respondent to prepare for the consultations themselves".[477] The Appellate Body has also indicated that a measure that was not named in a request for consultations, but is contained in the subsequent panel request, may still fall within the terms of reference of a panel provided that it does not "expand the scope"[478] or change the "essence"[479] of the dispute as presented in the request for consultations.[480]

7.267. In this dispute, the listing of measures in China's request for consultations follows the same structure as the panel request described above. With respect to the Single Rate Presumption, the NME-Wide Methodology and the Use of Adverse Facts Available, the request for consultations cites 13 anti-dumping orders. For each of the orders, China refers to the specific

[473] In this respect, the Appellate Body has underlined that arguments in support of a claim that a measure violates a WTO provision do not have to be set out in detail in a panel request; rather, they may be developed in the submissions made to the panel. (Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 121).
[474] Emphasis added.
[475] Appellate Body Report, *Argentina – Import Measures*, para. 5.9.
[476] Appellate Body Report, *US – Upland Cotton*, para. 293.
[477] Appellate Body Report, *Argentina – Import Measures*, para. 5.12.
[478] Appellate Body Report, *US – Upland Cotton*, para. 293.
[479] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138.
[480] Appellate Body Report, *Argentina – Import Measures*, para. 5.13.

determinations, such as the original investigation and subsequent administrative reviews, if any.[481] For each anti-dumping order, the consultations request refers to "any closely connected, subsequent measures".[482]

7.268. Accordingly, the request for consultations makes clear that China's concerns extended to measures that were closely connected and subsequent to those explicitly identified therein. Although the request for consultations was filed on 3 December 2013 (thus predating the initiation of five of the six administrative reviews), as noted above, the nature of the United States retrospective duty assessment system is such that the United States could reasonably have expected impending requests for an administrative review from the subject exporters under the listed anti-dumping orders. We are thus of the view that the six determinations should be considered as falling within the scope of the phrase "any closely connected, subsequent measures". In addition, the six determinations do not expand the scope or change the essence of the dispute as compared to the request for consultations, because they involved the same products, from the same countries and, along with the determinations explicitly listed in China's request for consultations, they form part of a continuum of events.

7.269. Therefore, we reject the United States' contention that the six determinations are outside our terms of reference because they were not subject to consultations under Article 4.4 of the DSU.

7.3.4 Conclusion

7.270. On the basis of the foregoing, we reject the United States' arguments under Articles 4.4 and 6.2 of the DSU and find that the six determinations fall within our terms of reference.

7.4 Whether the Single Rate Presumption is, as such and as applied in 38 determinations, inconsistent with Articles 6.10, 9.2, and the second sentence of Article 9.4 of the Anti-Dumping Agreement

7.4.1 Introduction

7.271. China argues that what it calls the Single Rate Presumption[483] amounts to a norm of general and prospective application adopted by the USDOC, and that this measure is as such inconsistent with Articles 6.10, 9.2, and the second sentence of Article 9.4 of the Anti-Dumping Agreement.[484] China further asserts that the alleged Single Rate Presumption was applied in the 38 determinations at issue (32 determinations explicitly listed in China's first written submission[485], plus the six additional determinations introduced at the first substantive meeting[486]), and that such an application was inconsistent with the same provisions of the Anti-Dumping Agreement that the alleged Single Rate Presumption violates as such.

7.4.2 Provisions at issue

7.272. The chapeau of Article 6.10 of the Anti-Dumping Agreement, which governs the calculation of dumping margins, provides:

> The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the

[481] WT/DS471/1, Annexes 3-5.
[482] WT/DS471/1, Annexes 3-5.
[483] In this report, we refer to this alleged norm as the "Single Rate Presumption".
[484] China's first written submission, para. 319.
[485] China's first written submission, para. 35.
[486] China's opening statement at the first meeting of the Panel, para. 132; and closing statement at the first meeting of the Panel, para. 27. We have found in paragraph 7.270 above that the six determinations introduced at our first substantive meeting with the parties are within our terms of reference.

> authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

7.273. Article 9.2 of the Anti-Dumping Agreement, which governs the assignment of anti-dumping duties, reads:

> When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

7.274. Article 9.4 of the Anti-Dumping Agreement contains disciplines regarding the duty applicable to the exporters that are not individually examined in cases where an investigating authority limits its examination as provided for in the second sentence of Article 6.10 of the Anti-Dumping Agreement. The second sentence of Article 9.4 stipulates:

> The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

7.4.3 Main arguments of the parties

7.4.3.1 China

7.275. China argues that, in anti-dumping proceedings involving exporters from NME countries, the USDOC applies the alleged Single Rate Presumption, which consists of a presumption that all exporters from an NME country comprise a single entity under common government control, and the assignment of a single margin of dumping, or anti-dumping duty rate, to that entity.[487] To rebut this presumption, and obtain an individually determined margin of dumping, China submits that an exporter must prove, through the Separate Rate Test, an absence of government control, both in law and in fact, over its export activities.[488] China considers that the alleged Single Rate Presumption constitutes a norm of general and prospective application, which is consistently used by the USDOC as a deliberate policy[489], and is, as such and as applied in 38 anti-dumping determinations, inconsistent with Articles 6.10, 9.2, and the second sentence of Article 9.4 of the Anti-Dumping Agreement.[490]

7.276. As evidence that the alleged Single Rate Presumption amounts to a norm of general and prospective application, China notes the United States' admission that the USDOC required, in each of the challenged 38 determinations, each individual Chinese exporter to prove separate rate status in order to receive an individual duty rate or a duty rate consistent with Article 9.4 of the Anti-Dumping Agreement.[491] Moreover, China presents certain passages from the USDOC's Import Administration Policy Bulletin No. 05.1 (Policy Bulletin No. 05.1), which in its view show that the USDOC presumes that all exporters comprise a single NME-wide entity under common government control[492], and are therefore assigned a single anti-dumping duty rate.[493] China further claims that according to Policy Bulletin No. 05.1, this presumption may be overcome provided that each

[487] China's first written submission, para. 317.
[488] China's first written submission, para. 318.
[489] China's first written submission, para. 323.
[490] China's first written submission, para. 319; and second written submission, para. 165.
[491] China's second written submission, para. 181.
[492] China's first written submission, para. 325.
[493] China's first written submission, para. 325.

exporter demonstrates, through fulfilling certain criteria developed by the USDOC, an absence of both *de jure* and *de facto* governmental control over its export activities.[494]

7.277. Similarly, China posits that the USDOC's Enforcement and Compliance Antidumping Manual (Antidumping Manual) states that, in anti-dumping proceedings involving NME countries, the USDOC begins with the presumption that all exporters are essentially operating units of a single, government-wide entity, and are thus assigned a single anti-dumping duty rate. The Antidumping Manual goes on to state that, to rebut that presumption, it is incumbent on the producer or exporter to prove an absence of government control, both in law and in fact, over its export activities.[495] In addition, China submits that the Single Rate Presumption has been referred to in the USDOC's anti-dumping determinations on numerous occasions over recent decades since the inception of the alleged measure in the *Sparklers* (1991) and *Silicon Carbide* (1994) cases.[496]

7.278. China also points to decisions by the United States Court of Appeals for the Federal Circuit (USCAFC) and the United States Court of International Trade (USCIT) that have each endorsed the USDOC's authority to rely on a presumption of central governmental control and to place the burden on the exporters to demonstrate an absence of such control.[497] Furthermore, China alleges that the fact that the USDOC has a procedure, with the relevant forms and documents, that NME exporters have to follow in completing their separate rate application or separate rate certification in order to obtain or retain separate rate status is evidence that the presumption of governmental control is applied generally and prospectively.[498]

7.279. On the basis of this evidence, China concludes that the Single Rate Presumption is a well-defined norm of general and prospective application that the USDOC has consistently described as a policy in anti-dumping proceedings involving NME countries.[499]

7.280. Turning to its claims of violation of the Anti-Dumping Agreement, China argues first that the Single Rate Presumption is, as such, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. China considers that the use of the verb "shall" in Article 6.10 signifies that determining individual dumping margins for each known exporter or producer is a general obligation.[500] Similarly, China notes that Article 9.2 lays down the obligation to collect anti-dumping duties in the appropriate amounts in each case and from all sources found to be dumped, except those from which price undertakings have been accepted. China argues that the term "sources" in the first sentence of Article 9.2 refers to individual exporters and not to the country as a whole[501], and that the amount of an anti-dumping duty is appropriate if it is based on the individual margin of dumping for the exporter concerned.[502] China recognizes that the obligations in Articles 6.10 and 9.2 are subject to a single, narrow exception[503], i.e. when the number of subject exporters is so high that it is impracticable to determine individual dumping margins and impose individual anti-dumping duties. In China's view, it is only under this narrow exception that an investigating authority may limit its examination to certain exporters under Article 6.10, and name the "supplying country concerned" under Article 9.2 of the Anti-Dumping Agreement.[504]

7.281. China claims that the Single Rate Presumption violates Articles 6.10 and 9.2 because it presumes singularity[505] and shifts the burden to the exporters to prove independence from governmental control.[506] Based on the Appellate Body's reasoning in *EC – Fasteners (China)*[507],

[494] China's first written submission, para. 325.
[495] China's first written submission, para. 327.
[496] China's first written submission, para. 329 and fn 365.
[497] China's first written submission, paras. 332-333; and second written submission, fn 250 to para. 182.
[498] China's second written submission, para. 183.
[499] China's first written submission, para. 330 (citing Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.115). See also China's second written submission, para. 182.
[500] China's first written submission, paras. 351-352.
[501] China's first written submission, para. 358 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 338).
[502] China's first written submission, para. 359 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 339).
[503] China's first written submission, para. 351.
[504] China's first written submission, para. 360; and second written submission, paras. 171-172.
[505] China's opening statement at the first meeting of the Panel, para. 90; closing statement at the first meeting of the Panel, para. 18; and second written submission, para. 219.
[506] China's second written submission, para. 223.

China argues that, where the burden to rebut governmental control is not discharged, the exporters concerned will not be entitled to an individual dumping margin (contrary to Article 6.10) and an individual anti-dumping duty rate (contrary to Article 9.2).[508] In China's view, the Anti-Dumping Agreement requires proof, rather than presumption, of singularity.[509]

7.282. China moreover submits that derogation from the general obligations set forth in Articles 6.10 and 9.2 with respect to imports from NME countries lacks any basis in the Anti-Dumping Agreement or in the Protocol on the Accession of the People's Republic of China to the WTO (China's Accession Protocol).[510] Paragraph 15 of China's Accession Protocol contains a single, limited derogation to the general rules of the Anti-Dumping Agreement, namely, a departure from domestic prices or costs in China as the basis for normal value.[511] For China, the Accession Protocol does not foresee a presumption that all companies in China are part of a single, PRC-wide entity.[512]

7.283. In addition to its as such claims, China asserts that the application of the Single Rate Presumption in the 38 challenged determinations was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement for the same reasons that the Single Rate Presumption is as such inconsistent with those two provisions.[513]

7.284. China also claims that the Single Rate Presumption is as such inconsistent with the second sentence of Article 9.4 of the Anti-Dumping Agreement. In this regard, China notes that, in cases where an investigating authority limits its examination in accordance with the second sentence of paragraph 10 of Article 6 of the Agreement, the second sentence of Article 9.4 requires the investigating authority to determine individual anti-dumping duties or normal values for any known exporter or producer not included in the examination but who nevertheless provides the necessary information to be considered individually. However, China argues that the Single Rate Presumption subjects the right provided for in the second sentence of Article 9.4 to an additional condition, namely, the fulfilment of the Separate Rate Test.[514] For this reason, China contends that the Single Rate Presumption violates the second sentence of Article 9.4.[515]

7.285. Finally, China maintains that the application of the Single Rate Presumption in the challenged 38 determinations was also inconsistent with the second sentence of Article 9.4 of the Anti-Dumping Agreement for the same reasons that the Single Rate Presumption as such is inconsistent with that provision.

7.4.3.2 United States

7.286. The United States contends that the alleged Single Rate Presumption is not a norm of general and prospective application that can be challenged in WTO dispute settlement and that, at any rate, it is consistent with Articles 6.10, 9.2, and the second sentence of Article 9.4 of the Anti-Dumping Agreement.

7.287. With respect to the characterization of the measure at issue, the United States submits that China has not met the high threshold[516] required to demonstrate that the alleged Single Rate Presumption has general and prospective application.[517] The United States notes that the excerpts from the Policy Bulletin No. 05.1 on which China relies form part of the "Background" section of

[507] China's second written submission, para. 198 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 364).
[508] China's first written submission, para. 371. See also China's response to Panel question No. 29, paras. 145 and 146; and second written submission, paras. 178-179.
[509] China's second written submission, para. 197.
[510] China's first written submission, para. 374 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 374). See also China's opening statement at the first meeting of the Panel, para. 91; and second written submission, para. 207.
[511] China's response to Panel question No. 39(a), para. 179; and second written submission, para. 212.
[512] China's response to Panel question No. 39(b), para. 183.
[513] China's first written submission, paras. 378-382.
[514] China's first written submission, para. 384; and second written submission, paras. 174 and 202.
[515] China's response to Panel question No. 52, para. 272.
[516] United States' second written submission, para. 128.
[517] United States' first written submission, para. 338.

the document, as opposed to the "Statement of Policy" section.[518] In contrast, the Statement of Policy that the Policy Bulletin No. 05.1 announces is not concerned with the alleged Single Rate Presumption but with a new application process for separate rates and a new position on combination rates.[519] In the view of the United States, the language of the Policy Bulletin No. 05.1 cited by China does not explain how the excerpt cited has normative character and will necessarily give rise to the alleged Single Rate Presumption.[520] The United States also adds that the language cited by China deals exclusively with anti-dumping investigations involving NME countries, not administrative reviews.[521]

7.288. As concerns the Antidumping Manual, the United States submits that China has not explained how the quoted passages of this document support its contention that the alleged Single Rate Presumption will necessarily give rise to particular situations in the future.[522] Furthermore, this document clearly states that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out [t]herein are subject to change without notice", and that "[t]his manual cannot be cited to establish [US]DOC practice."[523]

7.289. With regard to the USDOC anti-dumping determinations cited by China, the United States posits that "they summarize, at most, what has happened in the past" but not "what will happen generally and prospectively".[524] In any event, the United States maintains that China has failed to explain how a practice can set out a binding norm of general and prospective application.[525] Along similar lines, the United States argues that the statements in the court decisions China relies upon make it clear that the USDOC "may" undertake the actions described therein. For the United States, such discretion undermines the notion that a norm of general and prospective application that determines the USDOC's behaviour exists.[526] In addition, the United States considers that the United States court decisions put forth by China concern complaints made by particular parties rather than authoritative statements of future policy.[527]

7.290. On this basis, the United States concludes that adducing deficient evidence to a base of deficient evidence does not render the evidence collectively any more reliable[528] and that, in this dispute, China has failed to establish the existence of a norm of general and prospective application.[529]

7.291. The United States rejects China's as such claims under Articles 6.10 and 9.2 of the Anti-Dumping Agreement. In the view of the United States, the initial question under Article 6.10 is to identify the entity, or group of entities, that constitute each "known exporter" or the "known producer".[530] For the United States, this provision does not require an investigating authority to find that "every company or legal entity is *ipso facto* a known exporter or producer entitled to an individual margin of dumping"[531], since, as the Appellate Body has held[532], "actual commercial

[518] United States' first written submission, para. 339; and opening statement at the first meeting of the Panel, para. 44.
[519] United States' second written submission, para. 136.
[520] United States' second written submission, para. 142 (referring to Panel Report, *US – Zeroing (Japan)*, para 7.48).
[521] United States' first written submission, para. 339. See also United States' response to Panel question No. 31, para. 72; and second written submission, para. 141.
[522] United States' second written submission, para. 145 (referring to Panel Report, *US – Zeroing (Japan)*, para 7.48).
[523] United States' first written submission, para. 340 (quoting Antidumping Manual, (Exhibits USA-28 and CHN-23), p. 1). See also United States' opening statement at the first meeting of the Panel, para. 45.
[524] United States' second written submission, para. 161.
[525] United States' first written submission, para. 344. See also United States' response to Panel question No. 30(b), para. 60; and second written submission, para. 161.
[526] United States' second written submission, para. 160.
[527] United States' opening statement at the first meeting of the Panel, para. 48. See also United States' response to Panel question No. 34, para. 83.
[528] United States' response to Panel question No. 30(b), para. 58. See also United States' closing statement at the first meeting of the Panel, para. 3.
[529] United States' closing statement at the first meeting of the Panel, para. 3.
[530] United States' first written submission, para. 348.
[531] United States' first written submission, para. 349. (emphasis original)
[532] United States' first written submission, para. 376 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 376). See also United States' second written submission, paras. 184, 185, 234, and 235.

activities and relationships of companies"[533] could lead an investigating authority to regard all of them as a single exporter or producer despite their nominally or legally different status.[534]

7.292. Furthermore, the United States asserts that Article 9.2 does not prohibit an investigating authority from assigning a single anti-dumping duty rate to a number of companies, including, where appropriate a PRC-wide entity[535], if the investigating authority determines that the relationship between multiple companies is sufficiently close to consider all of them as a single entity.[536] Moreover, the United States maintains that Article 9.2 is "facially inapplicable"[537] to the challenged measure inasmuch as it applies to original investigations. In such cases, the USDOC only determines a cash deposit rate calculated on the basis of the estimated margins of dumping, and which is only an estimate of the final duties that may be owed by a respective importer.[538] The United States posits that, under the United States retrospective system, the actual collection of anti-dumping duties governed by Article 9.2 does not occur until the USDOC conducts administrative reviews.[539]

7.293. The United States moreover criticizes the Appellate Body in *EC – Fasteners (China)* for having rejected the argument that China's Accession Protocol and the Report of the Working Party on the Accession of China (China's Accession Working Party Report) provide the legal and factual predicate for treating Chinese companies as part of a single PRC-wide entity in anti-dumping proceedings.[540] Notably, the United States considers that the Appellate Body failed to find that paragraph 15(d) of China's Accession Protocol and paragraphs 26[541]; 43 through 49[542]; 147 through 152[543]; and 171 through 176[544] of China's Accession Working Party Report show that China was not to be accepted automatically as a market economy.[545] According to the United States, China's Accession Protocol, China's Accession Working Party Report, and the USDOC's determination that China is an NME permit the USDOC to treat Chinese exporters and producers as a single entity absent evidence to the contrary.[546] At any rate, the United States asserts that the USDOC affords Chinese exporters an opportunity to demonstrate independence from the PRC-wide entity through the Separate Rate Test.[547]

7.294. Along similar lines, the United States requests the Panel to reject China's as applied claims under Articles 6.10 and 9.2 because, in the challenged determinations, the USDOC's treatment of the Chinese exporters as part of the PRC-wide entity was adequately supported by evidence and consistent with such provisions.[548] In addition, the specific language China has quoted in Table SRP in respect of 18 challenged determinations does not demonstrate that the USDOC actually applied the alleged Single Rate Presumption.[549] The United States further argues that in eight of the challenged administrative reviews, the PRC-wide entity was not under review, and China has not explained the reasons that render the Single Rate Presumption inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement in the context of these determinations.[550]

7.295. With respect to China's as such claim under the second sentence of Article 9.4 of the Anti-Dumping Agreement, the United States considers that this provision is applicable only to the anti-dumping duty rates applied to imports from unexamined exporters, and does not govern the rates

[533] United States' first written submission, para. 350.
[534] United States' first written submission, para. 350; and second written submission, para. 233.
[535] United States' first written submission, para. 355.
[536] United States' first written submission, para. 357.
[537] United States' first written submission, para. 359.
[538] United States' first written submission, para. 359; and second written submission, para. 190.
[539] United States' first written submission, paras. 358-359.
[540] United States' second written submission, para. 195.
[541] United States' first written submission, para. 364 and fn 371.
[542] United States' first written submission, para. 369 and fn 376.
[543] United States' second written submission, fn 330 to para. 196.
[544] United States' first written submission, para. 369 and fn 377.
[545] United States' response to Panel question No. 40, para. 107.
[546] United States' response to Panel question No. 36, para. 89.
[547] United States' first written submission, para. 385.
[548] United States' first written submission, para. 384.
[549] United States' response to Panel question No. 43, para. 114. These determinations are: *Aluminum* OI, *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamonds Sawblades* AR3, *Wood Flooring* AR1, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *Furniture* AR7, and *Furniture* AR8.
[550] United States' second written submission, paras. 186-188.

assigned to those companies that have been included in the examination.[551] The United States submits that China must, but has failed to, demonstrate that the NME-wide entity is not under examination in all NME cases.[552] The United States also disagrees with China's as applied claims under the second sentence of Article 9.4 because China has not demonstrated, as a preliminary matter, the as such inconsistency of the alleged Single Rate Presumption with that provision.[553] The United States asserts that China has failed to demonstrate that the necessary conditions for the application of the second sentence of Article 9.4, including those in Article 6.10.2, were met in any of the challenged determinations.[554]

7.4.4 Main arguments of the third parties

7.4.4.1 European Union

7.296. The European Union submits that evidence of the existence of a norm of general and prospective application may include proof of systematic application of the measure and internal documents providing administrative guidance, even if not binding, such as Policy Bulletin No. 05.1.[555]

7.297. With respect to China's claims under Articles 6.10 and 9.2 of the Anti-Dumping Agreement, the European Union refers to the Appellate Body Report in *EC – Fasteners (China)* to assert that a measure that presumes the existence of a single entity is inconsistent with these two provisions and that China's Accession Protocol does not contain an exception to the obligations set forth in those provisions.[556] Thus, the European Union anticipates that the Panel will be guided by the reasoning developed by the Appellate Body in that dispute.

7.298. To the extent that the Panel discusses the criteria the USDOC employs to assess the relationship between exporters and the State, the European Union considers that WTO Members may make "single entity" determinations based on the type of criteria employed by the USDOC.[557]

7.4.4.2 Viet Nam

7.299. Viet Nam argues that the use of the terms "shall, as a rule" in Article 6.10 suggests that an investigating authority is required to determine individual dumping margins for each known exporter or producer, and that the second sentence of that provision introduces a limited and defined exception with respect to the sampling of exporters or producers when it is impracticable to investigate all of them.[558] Along similar lines, Viet Nam considers that Article 9.2 imposes the general requirement that suppliers shall be individually named with respect to the imposition of anti-dumping duties unless, by way of exception, doing so would be impracticable.[559] Viet Nam maintains that both of these provisions require an investigating authority to determine individual dumping margins for, and assign individual duty rates to, known exporters or producers, unless the investigating authority can establish that the factual circumstances fit within the defined exception in each provision.[560]

7.300. However, for Viet Nam, the USDOC's presumption of the existence of an NME-wide entity conflicts with the obligations set forth in Articles 6.10 and 9.2. In particular, the USDOC presumes that all exporters within the NME country are, in fact, a single entity under the control of the government.[561] It is only if each exporter rebuts this presumption that it will be entitled to a

[551] United States' first written submission, para. 388; and second written submission, paras. 206 and 217-218.
[552] United States' second written submission, paras. 218 and 222.
[553] United States' first written submission, para. 391.
[554] United States' response to Panel question No. 50, paras. 134-135; and second written submission, para. 220.
[555] European Union's third-party submission, para. 59.
[556] European Union's third-party submission, para. 61 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 364).
[557] European Union's third-party submission, para. 66 (referring to United States' first written submission, para. 382).
[558] Viet Nam's third-party submission, paras. 42 and 45.
[559] Viet Nam's third-party submission, para. 49.
[560] Viet Nam's third-party submission, para. 50.
[561] Viet Nam's third-party submission, para. 53.

separate rate.[562] Viet Nam concludes that the USDOC's practice does not fit within the single, limited exception provided for in Articles 6.10 and 9.2, and hence, the measure at issue is inconsistent with those provisions.[563]

7.4.5 Evaluation by the Panel

7.301. China argues that, in anti-dumping proceedings involving exporters from NME countries, the USDOC applies the alleged Single Rate Presumption, which consists of a presumption that all exporters from an NME country comprise a single entity under common government control, and the assignment of a single margin of dumping, or anti-dumping duty rate, to that entity.[564] China submits that to rebut this presumption and obtain an individually determined margin of dumping, an exporter must prove, through the Separate Rate Test, an absence of government control, both in law and in fact, over its export activities.[565]

7.302. We commence our legal analysis by addressing whether the alleged Single Rate Presumption constitutes a measure in the form of a norm of general and prospective application that can be challenged as such in WTO dispute settlement. If, as China argues, such a norm exists, we will assess China's as such and as applied claims under Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Depending on our findings on China's claims under these two provisions, we will consider whether, and if so to what extent, we should also address China's as such and as applied claims under the second sentence of Article 9.4.

7.4.5.1 Whether the Single Rate Presumption constitutes a measure that can be challenged as such in WTO dispute settlement

7.303. The first question before us is whether the alleged Single Rate Presumption represents a measure that may be challenged in WTO dispute settlement as such. During the course of these proceedings, the parties have exchanged opposing arguments in this regard. China conceives of the Single Rate Presumption as a norm of general and prospective application whose scope and precise content are described in the Policy Bulletin No. 05.1, the Antidumping Manual, as well as in the USDOC's "practice" since at least 1991.[566] China also relies on several United States court decisions where, in its view, the challenged norm was described. The United States, for its part, argues that the evidence China has adduced is insufficient, and therefore does not meet the high evidentiary burden, to establish that the alleged norm has general and prospective application.[567] The parties agree that the alleged Single Rate Presumption is not written in a binding legal instrument under United States law.

7.304. We begin by recalling that Article 3.3 of the DSU provides that the dispute settlement system addresses "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". The word "measures" in that provision serves to "identif[y] the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'".[568] The Appellate Body has explained that a "measure" for purposes of WTO dispute settlement is "[i]n principle, any act or omission attributable to a WTO Member" which are, in the usual case, "acts or omissions of the organs of the state, including those of the executive branch".[569]

7.305. In some disputes, complaining Members have challenged measures that were not embodied in a binding legal instrument under the law of the responding Member. This situation has presented itself in a number of WTO disputes and has been addressed in a consistent manner by panels and the Appellate Body, which has given rise to a set of principles. The Appellate Body has considered that measures such as a rule or norm of "general and prospective application"[570],

[562] Viet Nam's third-party submission, para. 53.
[563] Viet Nam's third-party submission, paras. 51 and 54.
[564] China's first written submission, para. 317.
[565] China's first written submission, para. 318.
[566] See China's first written submission, paras. 322-334.
[567] United States' first written submission, paras. 337-346; and opening statement at the first meeting of the Panel, paras. 42-51.
[568] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.
[569] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.
[570] Appellate Body Report, *US – Zeroing (EC)*, para. 179. See also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

"ongoing conduct"[571], "concerted action or practice"[572] or a measure of "systematic and continued application"[573] may be challenged in WTO dispute settlement. Accordingly, this consistent prior analysis has recognized that a measure not written in a binding legal instrument may be challenged as such in WTO dispute settlement provided that it meets certain conditions.

7.306. In this dispute, China claims that the alleged Single Rate Presumption constitutes a norm of general and prospective application.[574] The Appellate Body has indicated that an as such claim against a norm or a rule of general and prospective application requires that the complaining Member clearly establish at a minimum: (a) that the alleged norm or rule is attributable to the responding Member; (b) its precise content; and (c) that it has general and prospective application.[575] Both parties agree with this three-prong legal test.[576] The United States, however, argues that China has failed to show that the alleged rule or norm has general and prospective application.[577] Specifically, the United States points out that the evidence China has put forward is insufficient to establish that the alleged Single Rate Presumption "will be invariably applied in the future", that is, in "*all* scenarios that … *arise after* its issuance."[578]

7.307. Although the United States does not take issue with the first and second elements of the legal test laid out above, we consider it appropriate to verify whether the alleged Single Rate Presumption is attributable to the United States, as well as its precise content. If we find that these elements are duly substantiated by evidence, we will proceed to assess whether the alleged measure has general and prospective application.

7.4.5.1.1 Attribution of the alleged Single Rate Presumption to the United States

7.308. With respect to whether the alleged measure is attributable to the United States, it is undisputed that the acts claimed to be part of such measure are carried out by the USDOC, which is an organ of the United States. Hence, the alleged Single Rate Presumption is attributable to the United States.

7.4.5.1.2 The precise content of the alleged Single Rate Presumption

7.309. As regards the precise content of the alleged measure, China describes the Single Rate Presumption as consisting of two elements, namely: (a) the USDOC's "presum[ption] that all producers and exporters in the country comprise a single entity under common government control (the 'NME-wide entity') and assigns a single margin of dumping, or anti-dumping duty rate, to that entity"; and (b) that "[t]o rebut this presumption and obtain an individually-determined margin of dumping, a producer/exporter must complete USDOC's separate rate application and satisfy the 'Separate Rate Test'."[579] In this respect, China has submitted several USDOC documents describing the alleged norm. For example, the Policy Bulletin No. 05.1 states:

---

[571] Appellate Body Report, *US – Continued Zeroing*, para. 181. Similarly, the panel in *US – Orange Juice (Brazil)* defined the term "ongoing conduct" as "conduct that is currently taking place and is *likely to continue* in the future." (Panel Report, *US – Orange Juice (Brazil)*, para. 7.176). (emphasis original)

[572] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794. In this regard, the Appellate Body held that "[a]s a general proposition, [the Appellate Body] do[es] not exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement." In these circumstances, the Appellate Body did not consider "that a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show that such a measure exists." (Ibid.).

[573] Appellate Body Report, *Argentina – Import Measures*, paras. 5.138-5.146. The Appellate Body agreed with the panel's view that a measure has a "systematic application" if it does not have "sporadic, unrelated applications" of individual parts; and that a measure has "continued application" if it "is currently applied and it will continue to be applied in the future until the underlying policy is modified or withdrawn." (Ibid. paras. 5.142 - 5.143).

[574] China's first written submission, para. 323.

[575] Appellate Body Report, *US – Zeroing (EC)*, para. 198. In *Argentina – Import Measures*, the Appellate Body stated that the complainant may be required to demonstrate, in addition to attribution and precise content, "other elements, depending on the particular characteristics or nature of the measure being challenged". (Appellate Body Report, *Argentina – Import Measures*, para. 5.104).

[576] China's first written submission, para. 323; and United States' first written submission, para. 338.

[577] United States' first written submission, para. 338.

[578] United States' opening statement at the first meeting of the Panel, para. 43. (emphasis original)

[579] China's first written submission, para. 317.

> In an NME antidumping investigation, the [USDOC] presumes that all companies within the NME country are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities.[580]

7.310. Furthermore, over 100 USDOC anti-dumping determinations on the record (including the 38 anti-dumping determinations challenged as part of China's as applied claims) reproduce the core features of the Single Rate Presumption.[581] These determinations state that in proceedings

[580] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 1.

[581] *Grain-Oriented Electrical Steel* OI, Decision Memorandum, (Exhibit CHN-404), p. 15; *Monosodium Glutamate* OI, Decision Memorandum, (Exhibit CHN-407), pp. 9-12; *Silica Bricks and Shapes* OI, Decision Memorandum, (Exhibit CHN-408), pp. 8-11; *Hardwood and Decorative Plywood* OI, Decision Memorandum, (Exhibit CHN-409), pp. 12-18; *Xantham Gum* OI, Decision Memorandum, (Exhibit CHN-411), pp. 8-11; *Drawn Stainless Steel Sinks* OI, Decision Memorandum, (Exhibit CHN-412), pp. 8-13; *Solar* OI, Preliminary Determination, (Exhibit CHN-168), pp. 31315-31317; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), pp. 77969-77970; *Certain Steel Wheels* OI, Notice of Preliminary Determination, (Exhibit CHN-309), pp. 67709-67710; *Wood Flooring* OI, Final Determination, (Exhibit CHN-49), pp. 64321-64322; *Aluminum Extrusions* OI, Final Determination, (Exhibit CHN-32), pp. 18527-18528; *PET Film* OI, Final Determination, (Exhibit CHN-56), p. 55040; *Drill Pipe* OI, Final Determination, (Exhibit CHN-332), p. 1969; *Seamless Refined Copper Pipe and Tube* OI, Preliminary Determination, (Exhibit CHN-414), p. 26719-26721; *Certain Woven Electric Blankets* OI, Preliminary Determination, (Exhibit CHN-415), para. 5569-5571; *Carrier Bags from Viet Nam* OI, Preliminary Determination, (Exhibit CHN-416), pp. 56815-56817; *Certain Kitchen Appliance Shelving and Racks* OI, Preliminary Determination, (Exhibit CHN-312), pp. 9594-9595; *Citric Acid and Certain Citrate Salts* OI, Final Determination, (Exhibit CHN-337), p. 16840; *Small Diameter Graphite Electrodes* OI, Final Determination, (Exhibit CHN-338), p. 2053; *Lightweight Thermal Paper* OI, Preliminary Determination, (Exhibit CHN-418), pp. 27507-27508; *Sodium Nitrite* OI, Notice of Final Determination, (Exhibit CHN-339), p. 38985; *Circular Welded Carbon Quality Steel Pipe* OI, Notice of Preliminary Determination, (Exhibit CHN-314), pp. 2449-2451; *Sodium Hexametaphosphate* OI, Preliminary Determination, (Exhibit CHN-318), pp. 52546-52547; *Coated Free Sheet Paper* OI, Final Determination, (Exhibit CHN-342), p. 60634; *Certain Polyester Staple Fiber* OI, Final Determination, (Exhibit CHN-343), p. 19692; *Certain Activated Carbon* OI, Final Determination, (Exhibit CHN-344), p. 9510; *Certain Lined Paper Products* OI*,* Notice of Final Determination, (Exhibit CHN-320), p. 53082; *Diamond Sawblades* OI, Final Determination, (Exhibit CHN-45), pp. 29307-29308; *Certain Artist Canvas* OI, Final Determination, (Exhibit CHN-345), p. 16117; *53-Foot Domestic Dry Containers* OI, Issues and Decision Memorandum, (Exhibit USA-101), pp. 46-53; *Bicycles* OI, Notice of Final Determination, (Exhibit CHN-114), pp. 19027-19028; *Chlorinated Isocyanurates* OI, Notice of Final Determination, (Exhibit CHN-346), p. 24504; *Certain Tissue Paper Products* OI, Notice of Final Determination, (Exhibit CHN-347), pp. 7476-7477; *Hand Trucks and Certain Parts Thereof* OI, Notice of Final Determination, (Exhibit CHN-348), pp. 60981-60982; *Certain Color Television Receivers* OI, Notice of Final Determination, (Exhibit CHN-323), pp. 20595-20596; *Certain Malleable Iron Pipe Fitting* OI, Final Determination, (Exhibit CHN-349), p. 61396; *Barium Carbonate* OI, Notice of Final Determination, (Exhibit CHN-350), p. 46578; *Lawn and Garden Steel Fence Posts* OI, Notice of Final Determination, (Exhibit CHN-351), p. 20374; *Silicon Metal from the Russian Federation* OI, Notice of Final Determination, (Exhibit CHN-352), p. 6887; *OTR Tires* OI, Final Determination, (Exhibit CHN-41), p. 40487; *Certain Cold-Rolled Carbon Steel Flat Products* OI, Notice of Final Determination, (Exhibit CHN-353), p. 62109; *Carbon and Certain Alloy Steel Wire Rod from Ukraine* OI, Notice of Final Determination, (Exhibit CHN-164), p. 55787; *Folding Metal Tables and Chairs* OI, Notice of Final Determination, (Exhibit CHN-354), p. 20091; *Bags* OI, Notice of Preliminary Determination, (Exhibit CHN-267), pp. 3546-3547; *OCTG* OI, Final Determination, (Exhibit CHN-13), p. 20338; *Certain Automotive Replacement Glass Windshields* OI, Final Determination, (Exhibit CHN-355), p. 6483; *Coated Paper* OI, Final Determination, (Exhibit CHN-12), p. 59220; *Furniture* OI, Notice of Preliminary Determination, (Exhibit CHN-283), p. 35319-35320; *Certain Frozen and Canned Warmwater Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-119), pp. 42660-42661; *Ribbons* OI, Final Determination, (Exhibit CHN-33), p. 41810; *Ribbons* AR3, Decision Memorandum, (Exhibit CHN-156), p. 6; *PET Film* AR3, Final Results, (Exhibit CHN-15), p. 35246-35247; *PET Film* AR4, Decision Memorandum, (Exhibit CHN-282), p. 4-7; *PET Film* AR5, Decision Memorandum, (Exhibit CHN-477), pp. 5-7; *Certain Steel Nails* AR 2011-2012, Final Results, (Exhibit CHN-356), p. 19317; *Pure Magnesium* AR 2011-2012, Final Results, (Exhibit CHN-357), p. 95; *Certain Lined Paper Products* AR 2011-2012, Decision Memorandum, (Exhibit CHN-432), pp. 7-8; *Certain Lined Paper Products* AR 2010-2011, Notice of Final Results, (Exhibit CHN-128), p. 61393; *Certain Lined Paper Products* AR 2006-2007, Notice of Final Results, (Exhibit CHN-375), p. 17164; *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 4; *Freshwater Crawfish Tail Meat* AR 2009-2010, Final Results, (Exhibit CHN-363), p. 21530; *Freshwater Crawfish Tail Meat* AR 2002-2003, Notice of Preliminary Results, (Exhibit CHN-442), p. 32982; *Freshwater Crawfish Tail Meat* AR 2000-2001, Notice of Preliminary Results, (Exhibit CHN-444), p. 63882-63883; *Freshwater Crawfish Tail Meat* AR 1999-2000, Notice of Final Results, (Exhibit CHN-402), p. 19549; *Tapered Roller Bearings and Parts Thereof* AR 2009-2010, Final Results, (Exhibit CHN-364), p. 2273; *Certain Frozen Warmwater Shrimp From Viet Nam* AR 2009-2010, Final Results, (Exhibit CHN-365), p. 56160; *Circular Welded Austenitic Stainless Pressure Pipe* AR 2008-2010, Final Results, (Exhibit CHN-366), p. 43982; *Laminated Woven Sacks* AR 2009-2010, Final Results, (Exhibit CHN-367), p. 21334; *Certain Polyester Staple Fiber* AR 2008-2009, Final Results, (Exhibit CHN-368), p. 2887; *Certain Tissue Paper Products* AR 2008-2009, Final Results, (Exhibit CHN-369), p. 63807; *Certain*

involving NME countries, the USDOC begins with a rebuttable presumption that all exporters within the country are subject to governmental control, and that in these circumstances, the USDOC assigns a single rate to all exporters of the subject merchandise, unless an exporter can demonstrate an absence of governmental control so as to be entitled to a separate rate.[582] Similar language is found in the Antidumping Manual[583], the court decisions on the record[584], and the templates of the separate rate application[585] and separate rate certification.[586]

Tissue Paper Products AR 2006-2007, Final Results, (Exhibit CHN-377), p. 58114; *Honey* AR 2007-2008, Final Results, (Exhibit CHN-371), p. 24882; *Honey* AR 2004-2005, Final Results, (Exhibit CHN-382), p. 37716; *Honey AR* 2002-2003, Final Results, (Exhibit CHN-389), p. 38875; *Honey* AR 2001-2002, Final Results, (Exhibit CHN-394), p. 25061; *Magnesium Metal* AR 2006-2007, Final Results, (Exhibit CHN-378), pp. 40293-40294; *Tapered Roller Bearings and Parts Thereof* AR 2005-2006, Final Results, (Exhibit CHN-381), p. 56725; *Bags* AR 2004-2005, Preliminary Results, (Exhibit CHN-271), pp. 54023-54024; *Bags* AR 2005-2006, Preliminary Results, (Exhibit CHN-272), p. 51590-51591; *Bags* AR 2006-2007, Preliminary Results, (Exhibit CHN-274), p. 52284; *Bags* AR3, Final Results, (Exhibit CHN-54), pp. 6857-6858; *Bags* AR4, Final Results, (Exhibit CHN-55), p. 63719; *Tapered Roller Bearing and Parts Thereof* AR 2003-2004, Final Results, (Exhibit CHN-387), p. 2519-2520; *Petroleum Wax Candles* AR 2004-2005, Final Results, (Exhibit CHN-384), p. 62417; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Final Results, (Exhibit CHN-386), p. 24642; *Brake Rotors* AR 2003-2004, Final Results, (Exhibit CHN-388), p. 69939; *Persulfates* AR 2002-2003, Final Results, (Exhibit CHN-391), p. 6836; *Persulfates* AR 2001-2002, Final Results, (Exhibit CHN-396), p. 68030; *Fresh Garlic* AR 2000-2001, Final Results, (Exhibit CHN-399), p. 4759; *Sulfanilic Acid* AR 1999-2000, Final Results, (Exhibit CHN-403), p. 1963; *Aluminum* AR1, Final Results, (Exhibit CHN-35), p. 98; *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205), pp. 9-13; *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-167), pp. 5-6; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-120), pp. 4-5; *Shrimp* AR9, Decision Memorandum, (Exhibit CHN-121), pp. 5-6; *OTR Tires* AR3, Decision Memorandum, (Exhibit CHN-236), pp. 5-7; *OCTG* AR1, Preliminary Results, (Exhibit CHN-238), p. 34016; *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), pp. 11144-11145; *Diamond Sawblades* AR2, Decision Memorandum, (Exhibit CHN-137), p. 4-7; *Diamond Sawblades* AR3, Issues and Decision Memorandum, (Exhibit CHN-133), pp. 5-9; *Diamond Sawblades* AR4, Final Remand Redetermination, (Exhibit CHN-474), pp. 7-10; *Wood Flooring* AR1, Decision Memorandum, (Exhibit CHN-263), pp. 6-10; *Wood Flooring* AR2, Decision Memorandum, (Exhibit CHN-117), pp. 6-9; *Sebacic Acid* AR 1996-1997, Preliminary Results, (Exhibit CHN-126), p. 17368; *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), pp. 9-16; *Ribbons* AR1, Final Results, (Exhibit CHN-51), p. 10131; *Furniture* AR7, Issues and Decision Memorandum, (Exhibit CHN-151), pp. 6-8; *Furniture* AR8, Decision Memorandum, (Exhibit CHN-302), pp. 9-14; and *Furniture* AR9, Issues and Decision Memorandum, (Exhibit CHN-480), pp. 5-6.

[582] In addition to the determinations China challenges as applied (see fns 485-486 above), China has presented a list of 92 anti-dumping determinations, 40 original investigations and 52 administrative reviews, in Annex 9 to its first written submission.

[583] The Antidumping Manual states:

> In proceedings involving NME countries, the [USDOC] begins with a rebuttable presumption that all companies within the country are essentially operating units of a single, government-wide entity and, thus, should receive a single antidumping duty rate (i.e., an NME-wide rate).
> ...
> Under the [USDOC's] current policy, all exporters seeking a separate rate in an investigation/review must complete a separate rate application form. (Antidumping Manual, Chapter 10, (Exhibit CHN-23), pp. 3 and 5) (emphasis original)

[584] The USCAFC upheld the USDOC's presumption "that NME exporters would be subject to a single, countrywide antidumping duty rate unless they could demonstrate legal, financial, and economic independence from the Chinese government". (USCAFC, Transcom Inc. v. United States, 294 F.3d 1371 (Fed. Cir. 2002), (Exhibit CHN-130), p. 1373). The USCAFC has also confirmed the USDOC's "authority to employ a presumption of state control for exporters in a [NME country], and to place the burden on the exporters to demonstrate an absence of central government control". (USCAFC, Sigma Corp. v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), p. 1405). The USCIT has described the "judicially-affirmed practice" as follows: "Under the NME presumption, a company that fails to demonstrate independence from the NME entity is subject to the countrywide rate, while a company that demonstrates its independence is entitled to an individual rate as in a market economy". (USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), pp. 1310-1311 (quoting USCAFC, Transcom Inc. v. United States, 294 F.3d 1371 (Fed. Cir. 2002), (Exhibit CHN-130), p. 1373, in turn quoting USCAFC, Sigma Corp. v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), pp. 1405-1406)).

[585] The separate rate application template reads, in relevant part, as follows:

> The [USDOC] assigns separate rates in non-market economy ("NME") cases only if the applicant can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities in accordance with the separate-rates test criteria.
> ...
> To establish whether a company's export activities are sufficiently independent of the government to be eligible for separate rate status, the [USDOC] analyzes each exporting entity under the test established in ["*Sparklers*"], and later expanded upon in ["*Silicon Carbide*"]. (Separate Rate Application, (Exhibit CHN-31), pp. 1-2) (emphasis original)

[586] The separate rate certification template reads, in relevant part, as follows:

7.311. On this basis, we conclude that the precise content of the alleged Single Rate Presumption, as a norm, is readily ascertainable from the evidence on the record, i.e. that in anti-dumping proceedings involving NME countries, exporters are presumed to form part of an NME-wide entity and are assigned a single anti-dumping duty rate, unless each exporter demonstrates, through the fulfilment of the criteria set out in the Separate Rate Test[587], an absence of *de jure* and *de facto* governmental control over its export activities.[588]

7.4.5.1.3 General and prospective application of the alleged Single Rate Presumption

7.312. Next, we turn to the issue of whether the alleged Single Rate Presumption has general and prospective application. In this respect, we note that China describes the alleged measure as a "policy"[589], which "is used consistently by [the] USDOC in anti-dumping proceedings involving NMEs".[590] In support of its assertion, China adduces a number of documents that, in its opinion, demonstrate that the Single Rate Presumption constitutes a norm of general and prospective application. We address these in turn.

Policy Bulletin No. 05.1

7.313. China first refers to the Policy Bulletin No. 05.1 where it is stated that "'[i]n an NME antidumping investigation, the [USDOC] *presumes* …' government control".[591] In this connection, we observe that the Policy Bulletin No. 05.1, issued in 2005, states that its purpose was not to change "the long-established standard for eligibility for receiving a separate rate", but to "clarif[y] the [USDOC's] previous practice by giving more explicit instructions on how the requirements can be fulfilled".[592] The parties agree that, prior to the issuance of the Policy Bulletin No. 05.1, NME exporters were required to present information on the absence of *de jure* and *de facto* governmental control in Section A of the USDOC's dumping questionnaire. Policy Bulletin No. 05.1, however, instituted the separate rate application as a form or template that NME exporters would have to fill out at the beginning of an anti-dumping investigation.[593]

> The [USDOC] assigns a separate rate in non-market economy ("NME") cases only if the firm can demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), over its export activities in accordance with the separate-rate test criteria. (Separate Rate Certification, (Exhibit USA-84), p. 2) (emphasis original)

[587] Policy Bulletin No. 05.1, and the Antidumping Manual further lay down the criteria to establish "absence of both *de jure* and *de facto* governmental control" over the exporters' export activities. With respect to *de jure* governmental control, the USDOC evaluates the relevant laws, regulations and other enactments in order to ascertain whether there is: (a) an absence of restrictive stipulations associated with an individual exporter's business and export licences; (b) any legislative enactments decentralizing control of companies; and (c) any other formal measures by the central and/or local government decentralizing control of companies. As for *de facto* governmental control, the USDOC assesses whether: (a) the export prices are set by, or subject to the approval of, government authority; (b) the exporter has the authority to negotiate and sign contracts and other agreements; (c) the exporter has autonomy from the government in making decisions regarding the selection of management; and (d) the exporter retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. (Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 2. See also Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 4; and Separate Rate Application, (Exhibit CHN-31), p. 2).

[588] We note that, in the context of administrative reviews, the USDOC "has further simplified the separate rates process" by allowing exporters "who have already applied for and received a separate rate in a previous proceeding to submit a certification that their status has not changed and they continue to meet the de jure and de facto criteria to qualify for a separate rate". (Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 6). If exporters provide a separate rate certification, they will not be required to file a separate rate application in subsequent segments of the proceedings. According to the separate rate certification template provided by the United States as Exhibit USA-84, an exporter must submit the following declaration:

> I certify that (Firm) was previously granted separate rate status as part of the final determination/results in the (insert investigation/review and period of investigation/review); published in Federal Register (insert citation), that the separate rate status is currently applicable, and the separate rate status has not been revoked. (Separate Rate Certification, (Exhibit USA-84), p. 6)). (emphasis omitted)

[589] China's first written submission, para. 328.

[590] China's first written submission, para. 323.

[591] China's first written submission, para. 328 (quoting Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 1). (emphasis added by China)

[592] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 4.

[593] China's response to Panel question No. 44, paras. 191-192; and United States' response to Panel question No. 44, paras. 115-116.

7.314. In the Background section, the Policy Bulletin No. 05.1 provides an explanation of the "long-established standard" for evaluating whether an exporter can demonstrate an absence of *de jure* and *de facto* governmental control (as adopted by the USDOC in the *Sparklers* (1991) and *Silicon Carbide* (1994) cases[594]) and be entitled to receive "a rate that is separate from the NME-wide rate".[595] It is noteworthy that the description of the different components of the USDOC's practice in this regard is made in the present tense[596], and does not contain nuanced language suggesting that the USDOC applies this "long-established standard" in anti-dumping proceedings involving NME countries occasionally, discretionally or under limited circumstances.

7.315. The United States argues that China refers to excerpts from the Background section of Policy Bulletin No. 05.1, and not from the Statement of Policy section, which "contains the policies actually being announced".[597] Thus, the United States contends that, because the Policy Bulletin No. 05.1 does not announce the Single Rate Presumption as a "policy", it cannot serve as evidence to establish the general and prospective application of the alleged measure. We disagree with the United States. The Statement of Policy of the Policy Bulletin No. 05.1 concerns the "application for separate rates" and the "combination rates".[598] These are operative aspects of the application for a separate rate in NME proceedings, which is an element of the Single Rate Presumption. Hence, the restatement of the Single Rate Presumption in the Policy Bulletin No. 05.1 explains the background within which the Statement of Policy set out in that document applies. In any event, the placement of the reference to the Single Rate Presumption cannot, alone, be determinative of the nature or existence of the measure.

7.316. The United States further argues that "[d]ocuments like Policy Bulletin [No.] 05.1 … lack legally binding force".[599] China does not contend that the Policy Bulletin No. 05.1 is legally binding within the United States legal system. Nor does China claim that the Policy Bulletin No. 05.1, as a legal instrument, embodies the Single Rate Presumption as the measure at issue.[600] Rather, China invokes the relevant excerpts of the Background section of this Bulletin as evidence of the recognition, by the USDOC, that in anti-dumping proceedings involving NME countries, the USDOC applies the Single Rate Presumption. At any rate, we recall that "the manner in which municipal law characterizes a measure is not determinative for its characterization under the covered agreements".[601] To the extent that the Policy Bulletin No. 05.1 is adduced as evidence of the recognition of the Single Rate Presumption as a "long-established standard" or "policy", the excerpts from the Policy Bulletin No. 05.1 to which China refers inform our assessment of the existence of a norm of general and prospective application.

7.317. Turning to whether the Policy Bulletin No. 05.1 provides evidence that the Single Rate Presumption has general and prospective application, we note that this document starts out by

---

[594] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 2.

[595] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 1.

[596] The different components of the Single Rate Presumption are described in Policy Bulletin No. 05.1, as follows: "[i]n an NME antidumping investigation, the [USDOC] *presumes* that all companies within the NME country are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities"; "[i]f an NME entity *demonstrates* this independence with respect to its export activities, it *is* eligible for a rate that is separate from the NME-wide rate"; "[i]n order to request and qualify for separate rate status in an investigation, a company must have exported the subject merchandise to the United States during the period of investigation, and it must provide information responsive to" the absence of *de jure* and *de facto* governmental control. (Policy Bulletin No. 05.1, (Exhibit CHN-109), pp. 1-2). (underlining added; italics original; footnote omitted)

[597] United States' opening statement at the first meeting of the Panel, para. 44.

[598] The "Combination Rates" section of the Policy Bulletin No. 05.1, points out that the separate rate assigned to an exporter will "apply only to merchandise both exported by the firm and produced by a firm that supplied the exporter during the period of investigation." This signifies that the USDOC will assign a separate rate to "an exporter and its producers *as a group*". (Policy Bulletin No. 05.1, (Exhibit CHN-109), pp. 6-7). (emphasis original)

[599] United States' second written submission, para. 143.

[600] In this regard, we disagree with the United States' argument, presented in paragraph 135 of its second written submission, that China seeks to equate the Policy Bulletin No. 05.1 with the Sunset Policy Bulletin challenged in *US – Oil Country Tubular Goods Sunset Reviews*. We are cognizant that, unlike the Sunset Policy Bulletin in that dispute, in these proceedings, the Policy Bulletin No. 05.1 is not presented by China as the measure at issue, but rather as part of the evidentiary basis seeking to demonstrate the existence of the measure at issue, namely, the Single Rate Presumption.

[601] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.127.

explaining the background to the assignment of separate duty rates to exporters in anti-dumping proceedings involving NME countries. It then notes the issues with the previous regime and the proposals made by various entities in order to improve it. Importantly, it notes that "the [USDOC] also ha[d] concerns regarding the effectiveness of [the then] current test in determining whether a company is properly eligible for separate rate status."[602] Further, the Policy Bulletin No. 05.1 clarifies that the new separate rate application "is meant to clarify and streamline the separate rates process for both the [USDOC] and for respondents."[603] Thereafter, the Policy Bulletin No. 05.1 explains the new regime that it introduces. In doing so, it uses language that is particularly important to our inquiry regarding the general and prospective nature of the alleged Single Rate Presumption. For instance, it states that when an investigation involving an NME country is initiated, "the initiation notice will announce that" the subject exporters "can apply for a separate rate by completing an application for separate rates"[604]; that the application for each investigation "will be tailored … on the NME country involved in the investigation"[605]; and that "mandatory respondents will continue to be required to respond to the complete questionnaire."[606] In our view, the use of "will" suggests to us that the Single Rate Presumption is to be applied generally and prospectively in all investigations involving NME countries.

7.318. Finally, the Policy Bulletin No. 05.1 states that "[t]his practice will be effective for all NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy."[607] We recall that the Separate Rate Test is an integral component of the alleged Single Rate Presumption. If the Single Rate Presumption did not exist, the need to clarify the application for separate rates, as well as the adoption of the combination rates approach, would have had no *raison d'être*. On this basis, we conclude that the text of the Policy Bulletin No. 05.1 is evidence that supports China's argument that the alleged Single Rate Presumption has general and prospective application concerning anti-dumping investigations involving NME countries.

Antidumping Manual

7.319. China also refers to the Antidumping Manual to show that the Single Rate Presumption has general and prospective application. Specifically, China posits that the Antidumping Manual "provides that '[i]n proceedings involving NME countries, the [USDOC] *begins with a rebuttable presumption* …' of government control."[608] The United States responds that the Antidumping Manual is insufficient to establish a general and prospective norm[609], since the Manual itself states that it "cannot be cited to establish [USDOC] practice"[610], and thus "has alerted the world that the Manual cannot serve as a basis to argue that [the USDOC] has adopted an approach that must be followed for any particular, future proceeding."[611]

7.320. We note that Chapter 10 of the Antidumping Manual is titled "Non-Market Economies". One of the objectives of this chapter is to explain "how individual companies can obtain duty rates separate from that of the NME entity".[612] We observe that, under the heading "III. Separate Rates; B. Practice", the Antidumping Manual describes the constituent elements of the Single Rate Presumption described by China as follows:

> In proceedings involving NME countries, the [USDOC] begins with a rebuttable presumption that all companies within the country are essentially operating units of a single, government-wide entity and, thus, should receive a single antidumping duty rate (i.e., an NME-wide rate).[613] (emphasis original)

[602] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 3.
[603] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 6.
[604] Policy Bulletin No. 05.1, (Exhibit CHN-109), pp. 3-4. (emphasis added)
[605] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 4. (emphasis added)
[606] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 4. (emphasis added)
[607] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 6. (emphasis omitted)
[608] China's first written submission, para. 328 (quoting Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 7). (emphasis added by China)
[609] United States' first written submission, para. 340.
[610] United States' opening statement at the first meeting of the Panel, para. 45.
[611] United States' opening statement at the first meeting of the Panel, para. 45.
[612] Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 2.
[613] Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 3.

...

> [T]o establish whether a company's export activities are sufficiently independent of the government to be eligible for separate rate status, the [USDOC] analyzes each exporting entity under the test established in the Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991) (Sparklers), and later expanded upon in Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585 (May 2, 1994) (Silicon Carbide).[614] (emphasis original)

7.321. The United States argues that the statements from the Antidumping Manual that China relies on cannot serve as evidence of the general and prospective application of the alleged Single Rate Presumption. Specifically, the United States claims that the first page of the Antidumping Manual makes it clear that the document is only for internal training and guidance of the Import Administration personnel, and that "guidance" in the Antidumping Manual must be understood as providing "education or training rather than administrative guidance".[615] For China, the Antidumping Manual confirms that those exporters that do not or cannot demonstrate their independence from the NME-wide entity receive the NME-wide rate[616], and that the Antidumping Manual is used for "the internal training and *guidance*" of the USDOC personnel who conduct investigations and administrative reviews.[617]

7.322. As the United States points out, the Antidumping Manual states, on its first page, that it "cannot be cited to establish [US]DOC practice".[618] The Antidumping Manual is a document published by the USDOC, the purpose of which is to provide USDOC officials with "internal training and guidance" on the practices or current policies set out therein, including the Single Rate Presumption. The United States interprets the term "guidance" in the context of the Antidumping Manual as "provid[ing] education or training rather than administrative guidance".[619] Even accepting the United States' explanation of the purpose of the Antidumping Manual, we have difficulty understanding why the USDOC staff would be educated or trained in respect of practices or policies that are not intended to be applied in all future anti-dumping proceedings involving NME countries.

7.323. Moreover, the United States claims that the practices described in the Antidumping Manual are subject to, and do, change.[620] We observe that any legal instrument, including laws and regulations, may be subject to repeal or amendment in the future. That, however, does not necessarily remove the general and prospective nature of such legal instruments at a given point in time. Although the way this measure is applied by the USDOC may change in the future, that fact alone does not lead to the conclusion that the Single Rate Presumption is not, today, a norm of general and prospective application.

7.324. Accordingly, we are of the view that, despite the disclaimer found on its first page, the Antidumping Manual may be taken into account, together with other pieces of evidence that China has presented, in determining whether the alleged Single Rate Presumption has general and prospective application. Further, taking into account the specific content of the Antidumping Manual discussed above, we find that the Manual, like the Policy Bulletin No. 05.1, supports China's argument that the Single Rate Presumption has general and prospective application, as a practice or policy with respect to anti-dumping investigations and administrative reviews involving NME countries.[621]

---

[614] Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 4.

[615] United States' second written submission, para. 152.

[616] China's response to Panel question No. 32, para. 168 (citing Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 3).

[617] China's opening statement at the first meeting of the Panel, para. 82 (quoting Antidumping Manual, Chapter 1, (Exhibit USA-28)). (emphasis added by China)

[618] Antidumping Manual, (Exhibit USA-28), p. 1.

[619] United States' second written submission, para. 152.

[620] United States' second written submission, para. 147.

[621] We underline the fact that the content of the Antidumping Manual applies equally to original investigations and administrative reviews. Notably, in describing the Separate Rate Test through which NME exporters can rebut the presumption of governmental control and thus be assigned an individual duty rate, the Antidumping Manual states that "[u]nder the [USDOC's] current policy, all exporters seeking a separate rate in

Court decisions

7.325. China has pointed to a number of court decisions where the USCAFC and the USCIT have addressed the Single Rate Presumption. It notes that as early as 1997, the USCAFC confirmed the NME presumption adopted by the USDOC, noting that it is "within [the USDOC's] authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control."[622] The USCAFC went on to note that placing the burden on the exporters to show lack of state control is justified because "exporters have the best access to information pertinent to the 'state control' issue".[623] A few years later, the USCAFC again sanctioned the USDOC's policy to subject NME exporters to "a single, countrywide antidumping duty rate unless they could demonstrate legal, financial, and economic independence from the Chinese government".[624] China relies in addition on the USCIT's recent reference to an "established and judicially-affirmed practice", when noting that "[u]nder the NME presumption, a company that fails to demonstrate independence from the NME entity is subject to the country-wide rate, while a company that demonstrates its independence is entitled to an individual rate as in a market economy."[625] This is because, in the USCIT's view, "most companies in NME-designated countries like China do not engage in independent pricing behavior at all" such that inquiring into an exporter's "separate sales behavior ceases to be meaningful".[626] The USCIT has found that the USDOC has consistently applied the presumption of government control and the concomitant assignment of a PRC-wide duty rate, and that "[i]t appears that the issue of [the USDOC's] reliance upon a presumption of government control for respondents from NME-designated countries is settled".[627]

7.326. The United States alleges that the court decisions referred to by China are insufficient to establish that the Single Rate Presumption has general and prospective application because they "are adjudicating concerns raised by particular private parties in specific determinations – not what [the USDOC] will do in the future."[628] We observe, as a general matter, that the use of decisions by domestic courts as relevant evidence in determining facts and ascertaining the meaning of municipal law is not foreign to international dispute resolution.[629] Although the court decisions submitted by China adjudicate matters pertaining to specific parties and are based on the surrounding circumstances of each case, the relevant passages of these decisions clearly describe the alleged Single Rate Presumption and recognize that all of its features form part of a USDOC policy to such an extent that it is considered to be "settled"[630], "established and judicially affirmed"[631], "not in conflict with the Statute"[632], "to some extent, sanctioned"[633], "upheld"[634] or

an investigation/review must complete a separate rate application form. The separate rate application is posted for each investigation/review on the IA website upon initiation of the investigation/review and may be tailored to some extent depending, for example, on the NME country involved in the investigation." (Antidumping Manual, Chapter 10, (Exhibit CHN-23), pp. 5-6).

[622] USCAFC, Sigma Corp. v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), p. 1405.

[623] USCAFC, Sigma Corp. v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), p. 1406.

[624] USCAFC, Transcom Inc. v. United States, 294 F.3d 1371 (Fed. Cir. 2002), (Exhibit CHN-130), p. 1373.

[625] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), pp. 1310-1311 (quoting USCAFC, Transcom Inc. v. United States, 294 F.3d 1371 (Fed. Cir. 2002), (Exhibit CHN-130), p. 1373, in turn quoting USCAFC, Sigma Corp. v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), pp. 1405-1406).

[626] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1311.

[627] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), pp. 1311-1312. (emphasis added)

[628] United States' opening statement at the first meeting of the Panel, para. 48.

[629] See Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.106. See also Permanent Court of International Justice, Merits, Case Concerning the Payment of Various Serbian Loans issued in France, (1929) Series A, p. 46; International Court of Justice, Merits, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea *v.* Democratic Republic of the Congo), (2010) ICJ Reports, para. 70; and International Court of Justice, Merits, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain) (Second Phase) (1970) ICJ Reports, para. 50.

[630] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1312.

[631] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), pp. 1310-1311.

[632] Peer Bearing Co.-Changshan v. United States 587 F.Supp.2d 1319 (CIT 2008), (Exhibit CHN-163), p. 1325.

"approv[ed by the USCAFC]".[635] We are of the view that the courts' statements cited constitute evidence of the confirmation by judicial bodies of the existence of a measure that is generally applied in all cases concerning NME countries and that is expected to be applied in the future. Hence, we consider that these court decisions also provide relevant evidence that the Single Rate Presumption has general and prospective application.

USDOC's anti-dumping determinations

7.327. In addition to the Policy Bulletin No. 05.1, the Antidumping Manual, and United States court decisions, China has adduced over 100 USDOC anti-dumping determinations (investigations and administrative reviews) where the USDOC has referred to the presumption that all NME exporters are within government control, and should be assigned a single anti-dumping duty rate, unless an exporter can affirmatively demonstrate an absence of *de jure* and *de facto* government control with respect to exports.[636] Some of those determinations were published during the course of the present proceedings.[637] We also note in this context that, in response to questioning from the Panel, the United States was not able to identify any anti-dumping proceeding involving an NME country where the USDOC did not apply the Single Rate Presumption since the *Sparklers* case in 1991.[638]

7.328. The United States seeks to dismiss the significance of these determinations arguing that, even accepting China's characterization of these determinations, they "only illustrate what USDOC has practiced in particular instances in the past, not what it will generally and prospectively do."[639] We agree with the United States that prior USDOC anti-dumping determinations are informed by the specific facts of each case. Yet, the determinations presented by China demonstrate that the USDOC has applied the Single Rate Presumption in anti-dumping proceedings involving NME countries since its inception in 1991.[640] Indeed, the USDOC has often referred to the presumption of governmental control, and the subsequent assignment of an NME-wide duty, as a "long-standing policy"[641], or "standard policy".[642] In the determinations that China has placed on the record, the USDOC has stated, with similar wording, that in proceedings involving NME countries, the USDOC operates on the basis of a rebuttable presumption that all companies within the country are subject to government control, and that in these circumstances the USDOC assigns a single rate to all exporters of subject merchandise unless an exporter can demonstrate the absence of *de jure* and *de facto* government control over its export activities so as to be entitled to a separate rate.[643]

7.329. Accordingly, we consider that the anti-dumping determinations on the record are evidence of the USDOC's consistent application of a long-standing policy for a period that spans over 24

[633] USCIT, East Sea Seafoods LLC v. United States, 703 F.Supp.2d 1336 (CIT 2010), (Exhibit CHN-134), p. 1354.

[634] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1311.

[635] USCAFC, Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369 (Fed. Cir. 2003), (Exhibit CHN-132), p. 1378.

[636] See para. 7.310 above.

[637] See para. 7.241 above.

[638] The United States identified a determination in an original investigation involving Chinese exporters, dating back to 1986, where the USDOC did not apply the presumption of governmental control over the exporters' export activities. (*Porcelain-on-Steel Cooking Ware* OI, Final Determination, (Exhibit USA-105)). Yet, the United States confirmed that "[m]ore recently, [the] USDOC has not been presented with circumstances which resulted in [the] USDOC not applying a rebuttable presumption that the export activities of all Chinese exporters are subject to China government control." (United States' response to Panel question No. 35, para. 87).

[639] United States' first written submission, para. 342. See also United States' opening statement at the first meeting of the Panel, para. 46.

[640] See para. 7.310 above.

[641] See, for instance, *Bicycles* OI, Notice of Final Determination, (Exhibit CHN-114), p. 19036.

[642] See, for instance, *Sebacic Acid* AR 1996-1997, Preliminary Results, (Exhibit CHN-126), p. 17368; *Bags* AR 2005-2006, Preliminary Results, (Exhibit CHN-272), p. 51590; and *Bags* AR3, Preliminary Results, (Exhibit CHN-274), p. 52284. Importantly, the USDOC observed that, pursuant to its "established NME methodology, a party's separate rate status must be established in each segment of the proceeding in which the party is involved". (*Ribbons* AR1, Final Results, (Exhibit CHN-51), p. 10132, referring to USCAFC, Sigma Corp. v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), pp. 1405-1406).

[643] See para. 7.310 above.

years, namely since the inception of the alleged Single Rate Presumption in the *Sparklers* case in 1991. We further recall that, despite a request from the Panel, the United States has not provided examples of USDOC determinations, from 1991 onwards, in which the presumption of governmental control, the assignment of a single duty rate, and the concomitant Separate Rate Test were not applied in cases involving NME countries.[644] Additionally, China has presented a number of administrative review determinations that the USDOC issued during the course of these Panel proceedings in which the Single Rate Presumption was applied. In our opinion, this shows that the USDOC continues to apply consistently the alleged Single Rate Presumption as laid down, in general terms, in the Policy Bulletin No. 05.1 and the Antidumping Manual. This, in turn, lends support to the view that the Single Rate Presumption has general and prospective application.

Separate rate application and separate rate certification templates

7.330. In support of its argument that the Single Rate Presumption is of general and prospective nature, China has also submitted the template of the so-called separate rate application, which is posted on the USDOC's website upon the initiation of an anti-dumping investigation or an administrative review involving an NME country. We recall that the separate rate application came into being in 2005 through the adoption of the Policy Bulletin No. 05.1.[645] The template submitted by China begins by stating that "all exporters seeking a separate rate in an investigation/review must complete" this document.[646] It further notes that "[t]he [USDOC] assigns separate rates in non-market economy ('NME') cases only if the applicant can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities"[647]; and that "[the USDOC] analyses each exporting entity under the test established in" *Sparklers* (1991) and *Silicon Carbide* (1996), whereby exporters must "provide sufficient proof of an absence of government control, both in law and in fact, with respect to export activities".[648]

7.331. The separate rate application submitted by China clarifies that, in the case of administrative reviews, only those firms that have not received separate-rate status in prior segments (i.e. the original investigation or a previous administrative review) would be required to file this form, whereas "firms that currently have separate rate status should complete the separate rate Certification form instead."[649] In this respect, the United States has placed on the record a separate rate certification template that NME exporters must complete in administrative reviews if they have been granted separate-rate status at an earlier stage. As explained above, the filing of the separate rate certification may absolve the exporter concerned from filing a full separate rate application.[650] The separate rate certification states that the "[c]ompletion of this Certification does not guarantee separate rate status for [the period of review]"; and that "[c]ompanies who had changes to corporate structure, ownership, or to the official company name may not file a [s]eparate [r]ate [c]ertification but must instead file a Separate Rate Application."[651] Moreover, firms must certify an absence of *de jure* and *de facto* governmental control over their export activities.[652]

7.332. On the basis of the information supplied in the separate rate application or the separate rate certification, the USDOC determines whether the exporter concerned is entitled to a separate

[644] See para. ⁋7.327 above.

[645] United States' response to Panel question No. 32, para. 75. According to the United States, "prior to the issuance of Policy Bulletin [No.] 05.1, companies could provide positive evidence to [the] USDOC that the Chinese government did not materially influence their export activities". (Ibid. (referring to *Furniture* OI, Notice of Preliminary Determination, (Exhibit CHN-283)). In particular, "exporters were given the opportunity to obtain a separate rate by submitting a request for separate rates treatment along with Section A of the dumping questionnaire". (United States' response to Panel question No. 44, para. 116).

[646] Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 5.

[647] Separate Rate Application, (Exhibit CHN-31), p. 1.

[648] Separate Rate Application, (Exhibit CHN-31), p. 2.

[649] Separate Rate Application, (Exhibit CHN-31), p. 2. The parties have confirmed that NME exporters are required to submit the separate rate application in every investigation and administrative review (or a separate rate certification if the firm has received separate rate status in a previous segment) in order for them to be eligible for a separate duty rate. (China's response to Panel question No. 32, para. 168; and United States' response to Panel question No. 44, para. 115).

[650] Separate Rate Certification, (Exhibit USA-84). See also para. ⁋7.381 below and fns 586 and 588 above.

[651] Separate Rate Certification, (Exhibit USA-84), p. 2.

[652] Separate Rate Certification, (Exhibit USA-84), pp. 7-9.

dumping margin and a separate duty rate.[653] Additionally, the United States has pointed out that the separate rate application and the separate rate certification templates "are currently available to any party, at any time, on [the] USDOC's website".[654] In light of these circumstances, we agree with China's argument that the very existence of a template or standard form is indicative that the information required therein will, or is expected to, be required in future cases in order for NME exporters to obtain a separate rate. We consider this as further evidence that the Single Rate Presumption has general and prospective application with respect to anti-dumping investigations and administrative reviews involving NME countries.

Conclusion on whether the alleged Single Rate Presumption has general and prospective application

7.333. Having analysed each piece of evidence presented by China in order to demonstrate that the alleged Single Rate Presumption represents a measure for purposes of WTO dispute settlement, we find it important to offer a holistic assessment of such evidence before reaching a conclusion in this regard.

7.334. We recall that the parties' disagreement lies in whether the alleged Single Rate Presumption has general and prospective application. In this regard, we are mindful that neither the Policy Bulletin No. 05.1 nor the Antidumping Manual is a legally binding document under United States law. However, guided by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, our task is not to determine whether, under municipal law, the Policy Bulletin No. 05.1 and the Antidumping Manual are binding legal instruments, but rather, whether these constitute "acts setting forth rules or norms that are intended to have general and prospective application".[655] Both the Policy Bulletin No. 05.1 and the Antidumping Manual lay down the Single Rate Presumption in the single present tense and without qualifications.[656] According to these documents, the Single Rate Presumption applies to any NME exporter subject to an anti-dumping investigation or an administrative review, and is therefore not individualized to a specific exporter. This, in our view, indicates that both the Policy Bulletin No. 05.1 and the Antidumping Manual lay down the Single Rate Presumption in *general* terms as a policy or course of action in a normative fashion.[657]

7.335. Moreover, the Policy Bulletin No. 05.1, which institutes the separate rate application as part of the Single Rate Presumption, clearly states that it is to be "effective for all NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy".[658] Along similar lines, the Antidumping Manual prescribes precisely the elements of the Single Rate Presumption. The Antidumping Manual is used to train the USDOC staff for the conduct of anti-dumping proceedings. As observed above, we fail to comprehend why administrative personnel would need to be educated or trained in respect of a certain behaviour that is not intended to be required in the future. Furthermore, the court decisions on the record are also highly relevant inasmuch as they have considered the Single Rate Presumption to be "settled"[659], "established and judicially affirmed"[660], "not in conflict with the Statute"[661], "to some extent, sanctioned"[662], "upheld"[663] or "approv[ed by the USCAFC]".[664]

[653] United States' response to Panel question No. 32, paras. 73-74.
[654] United States' response to Panel question No. 32, para. 73.
[655] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).
[656] In this respect, we agree with China that the use of the unqualified simple present tense "can express a state that is always true or continues indefinitely". (China's opening statement at the second meeting of the Panel, para. 69 (referring to Martin Hewings, *Advanced Grammar in Use*, 2nd. ed. (Cambridge University Press, 2005), (Exhibit CHN-518), p. 202)).
[657] We recall that, while the Bulletin Policy No. 05.1 refers exclusively to original investigations, the Antidumping Manual refers to both original investigations and administrative reviews.
[658] Policy Bulletin No. 05.1, (Exhibit CHN-109), p. 6. (emphasis omitted)
[659] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), pp. 1311-1312.
[660] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1310.
[661] USCIT, Peer Bearing Co. v. Changshan, 587 F.Supp.2d 1319 (Fed. Cir. 2008), (Exhibit CHN-163), p. 1325.
[662] USCIT, East Sea Seafoods LLC v. United States, 703 F.Supp.2d 1336 (CIT 2010), (Exhibit CHN-134), p. 1354.

Accordingly, these documents are evidence that the Single Rate Presumption is to be applied *prospectively*.

7.336. In addition, the numerous USDOC determinations on the record show the consistent application of the Single Rate Presumption since 1991.[665] Such application predates the Policy Bulletin No. 05.1 and the Antidumping Manual and has continued to apply until at least 14 July 2015, that is, the date of the latest administrative review determination that China has placed on the record (the first administrative review in *Solar*).[666] Moreover, despite a specific request from the Panel, the United States has not pointed to any anti-dumping proceeding involving NME countries where the USDOC did not apply the Single Rate Presumption following its inception in 1991.[667] We also observe that the existence of the separate rate application and the separate rate certification templates constitutes yet another indication that the USDOC has set out to apply the Single Rate Presumption in all cases involving NME countries, as these documents have to be filed by NME exporters in every investigation or review where they are involved.[668]

7.337. In consequence, we view the different probative elements on the record as complementing one another. The evidence, as a whole, leads to the conclusion that the Single Rate Presumption has normative content as it makes clear and explains the conduct expected from the USDOC. It has general application because it is intended to apply to all NME exporters involved in original investigations and administrative reviews conducted by the United States. Finally, we are persuaded that the Single Rate Presumption as a whole has prospective application, as the evidence demonstrates a pattern of conduct by the USDOC that one can reasonably expect will be followed in the future. The prospective character of the Single Rate Presumption is confirmed by the statements of United States courts, the relevant USDOC determinations on the record, and the templates of the separate rate application and the separate rate certification discussed above.

7.338. In so concluding, we observe that all of the evidence examined above, except the separate rate certification template and the six determinations introduced at the first substantive meeting, was submitted by China as early as in its first written submission. We thus disagree with the United States' argument that China did not put forth, in its first written submission, evidence concerning the USDOC's requirement to satisfy the Separate Rate Test as a condition for NME exporters obtaining an individual dumping margin and duty rate.[669]

7.339. We therefore conclude that the Single Rate Presumption as described in paragraph 7.311 above, is a norm of general and prospective application that can be challenged, as such, in WTO dispute settlement.[670] On this basis, we proceed to assess China's claims under

[663] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1311.

[664] USCAFC, Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369 (Fed. Cir. 2003), (Exhibit CHN-132), p. 1378.

[665] See para. 7.310 above.

[666] *Solar* AR1, Decision Memorandum, (Exhibit CHN-487), pp. 20-21. See also *Solar* AR1, Final Results, (Exhibit CHN-489), p. 41001.

[667] United States' response to Panel question No. 35, para. 87.

[668] United States' response to Panel question No. 32, para. 73.

[669] United States' second written submission, paras. 124 and 163. We note that the evidence submitted by China with respect to both the presumption of government control and the Separate Rate Test is discussed in paragraphs 322-333 of China's first written submission.

[670] Along similar lines, we take note of the findings of the panel in *US – Shrimp II (Viet Nam)*. In that dispute, Viet Nam challenged "USDOC's standard practice" described in terms identical to the Single Rate Presumption China challenges in these proceedings. That panel analysed the relevant excerpts of the Antidumping Manual, Policy Bulletin No. 05.1, and a limited number of anti-dumping determinations where the USDOC had applied the Single Rate Presumption and, on the basis of these pieces of evidence, it found that "Viet Nam ha[d] established that, in anti-dumping proceedings involving NME countries, the USDOC starts with a rebuttable presumption that all companies within that NME country belong to a single, NME-wide entity and that a single rate is assigned to that entity, and, thus, to companies deemed to belong to that entity". (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.122). The United States argues that the body of evidence in *US – Shrimp II (Viet Nam)* and in this dispute is "analogous" (United States' response to Panel question No. 30(b), para. 58); while China notes that the evidence before this Panel includes much of the evidence before the panel in that dispute as well as additional evidence. (China's response to Panel question No. 30(b), para. 152). Although the analysis of the panel in *US – Shrimp II (Viet Nam)* is instructive, our legal analysis is based on the specific evidence and arguments put forward by the parties in these proceedings.

Articles 6.10 and 9.2, followed, to the extent necessary, by China's claims under the second sentence of 9.4 of the Anti-Dumping Agreement.

7.4.5.2 Whether the Single Rate Presumption is, as such and as applied in 38 determinations, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

7.340. In assessing China's claims, we begin with the analysis of the as such claims under Articles 6.10 and 9.2 of the Anti-Dumping Agreement, followed by the as applied claims under the same provisions with respect to the 38 challenged anti-dumping determinations.

7.4.5.2.1 China's as such claims under Articles 6.10 and 9.2 of the Anti-Dumping Agreement

7.341. China contends that the Single Rate Presumption is as such inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement because it presumes the existence of an NME-wide entity in anti-dumping proceedings involving NME countries and subjects the individual exporters to a single anti-dumping duty rate assigned to that entity, unless each exporter demonstrates an absence of *de jure* or *de facto* governmental control over its export activities.[671] The United States responds that both Articles 6.10 and 9.2 permit an investigating authority to treat a group of companies in close relationship as a single entity, and that China's Accession Protocol is evidence that NME conditions prevail in China. In the view of the United States, therefore, it is consistent with WTO rules to treat Chinese exporting companies as part of a single, government-controlled entity in anti-dumping proceedings involving China.[672]

7.342. We consider it appropriate to commence our assessment of China's claims by ascertaining the meaning of the legal provisions at issue. The first sentence of Article 6.10 establishes that "as a rule", an investigating authority "shall" determine an "individual margin of dumping" for "each known exporter or producer concerned of the product under consideration". As the Appellate Body has observed, "the auxiliary verb 'shall' is commonly used in legal texts to express a mandatory rule."[673] Thus, the first sentence of Article 6.10 provides for a mandatory rule (that is, a rule of "binding nature"[674] rather than "a preference"[675]), to determine individual margins of dumping for each known producer or exporter of the product under consideration. At the same time, this mandatory rule is qualified by the term "as a rule", which, as clarified by the Appellate Body, "indicates that this obligation is not absolute, and foreshadows the possibility of exceptions."[676] Put differently, the term "as a rule" in Article 6.10 "anticipates the possibility of departures from the general rule"[677], although, as the Appellate Body has indicated, these exceptions "must be provided for in the covered agreements, so as to avoid the circumvention of the obligation to determine individual margins of dumping in Article 6.10."[678]

7.343. One such exception is found in the second sentence of Article 6.10, which allows an investigating authority to depart from the obligation to determine individual margins of dumping in cases where the number of exporters is so large as to make such determinations "impracticable". Specifically, Article 6.10 affords investigating authorities "a right to conduct a limited examination"[679] of either: (a) a reasonable number of interested parties or products by using statistically valid samples; or (b) the largest percentage of the volume of exports from the country in question that can reasonably be investigated. The Appellate Body has noted that the limited

[671] China's first written submission, para. 387.
[672] United States' first written submission, para. 371.
[673] Appellate Body Report, *EC – Fasteners (China)*, para. 316.
[674] Appellate Body Report, *EC – Fasteners (China)*, para. 327.
[675] Appellate Body Report, *EC – Fasteners (China)*, para. 329.
[676] Appellate Body Report, *EC – Fasteners (China)*, para. 317. The Appellate Body held, however, that while the term "as a rule" qualifies the obligation to calculate individual margins of dumping, "it does not render it a mere preference. Otherwise, the use of 'shall' in the first sentence would be deprived of its ordinary meaning." (Ibid.).
[677] Appellate Body Report, *EC – Fasteners (China)*, para. 327. As underlined by the Appellate Body, the use of the words "shall as a rule" indicates that "the drafters of Article 6.10 were careful not to express an obligation that would conflict with other provisions in the *Anti-Dumping Agreement* permitting derogation from the rule to determine individual margins of dumping". (Ibid. para. 320). (emphasis original)
[678] Appellate Body Report, *EC – Fasteners (China)*, para. 320.
[679] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 117. See also Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.278.

examination that the second sentence of Article 6.10 permits is commonly referred to as "sampling", even though the selection of exporters based on the largest percentage of volume of exports is not "sampling" in the technical sense.[680] Importantly, in cases where an investigating authority resorts to sampling, it remains bound to determine individual margins of dumping for each sampled exporter[681], whereas the rate applicable to the non-sampled (unexamined) exporters is governed by Article 9.4 of the Anti-Dumping Agreement.[682]

7.344. For its part, Article 9 of the Anti-Dumping Agreement is entitled "Imposition and Collection of Anti-Dumping Duties". Article 9.2 consists of three separate but interrelated sentences. The first sentence provides that anti-dumping duties "shall" be collected "in the appropriate amounts in each case", "on a non-discriminatory basis", and "from all sources found to be dumped and causing injury". The Appellate Body has observed that the term "all sources" refers to "individual exporters or producers" subject to the investigation, and "not to the country as a whole".[683] Moreover, an "appropriate amount", when read together with the obligation set out in Article 6.10, suggests that "where an individual margin of dumping has been determined … the *appropriate* amount of anti-dumping duty that can be imposed also has to be an individual one."[684] The second sentence of Article 9.2 imposes an obligation on investigating authorities to "name the supplier or suppliers of the product concerned". Although Article 9.2 does not clarify the purpose of naming suppliers, the Appellate Body has explained that "the obligation to name individual suppliers in the second sentence of paragraph 2 is closely related to the imposition of individual anti-dumping duties", and that the "requirement to name suppliers that are subject to imposition and collection of anti-dumping duties should be interpreted as a requirement to specify duties for each supplier."[685] Finally, the third sentence of Article 9.2 provides for an exception which permits investigating authorities to name the country concerned in circumstances in which "several suppliers from the same country are involved, and it is impracticable to name all these suppliers".

7.345. The Appellate Body has observed that there exists significant parallelism between Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Article 6.10 "requires the determination of individual margins of dumping, which corresponds to the obligation to impose anti-dumping duties on an individual basis in Article 9.2".[686] In addition, both provisions use the term "impracticable"[687] when setting out an exception for determining individual dumping margins (Article 6.10) and imposing individual anti-dumping duty rates (Article 9.2).

7.346. In the present dispute, the United States does not dispute that, under Articles 6.10 and 9.2, each exporter or producer is entitled to an individual dumping margin and an individual anti-dumping duty rate. Rather, the United States argues that "the initial question is to identify the entity, or group of entities, that constitute each known 'exporter' or the known 'producer'"[688], and relies on paragraph 15 of China's Accession Protocol and China's Accession Working Party Report as important context in deciding which entities in China are to be considered as a single entity for

[680] Appellate Body Report, *EC – Fasteners (China)*, para. 318 (referring to Panel Report, *EC – Fasteners (China)*, para. 7.85). The Appellate Body clarified that the term "sampling" is commonly used "even where a statistically valid sample is not used but the second alternative for limiting the examination is used". (Ibid.).

[681] Panel Report, *Argentina – Ceramic Tiles*, para. 6.90.

[682] Panel Report, *China – Autos (US)*, para. 7.96.

[683] Appellate Body Report, *EC – Fasteners (China)*, para. 338 (referring to Panel Report, *EC – Fasteners (China)*, para. 7.103).

[684] Appellate Body Report, *EC – Fasteners (China)*, para. 339. (emphasis original)

[685] Appellate Body Report, *EC – Fasteners (China)*, para. 341.

[686] Appellate Body Report, *EC – Fasteners (China)*, para. 344. In like fashion, the panel in *EU – Footwear (China)* stated that "the similar structure of the two provisions supports the conclusion that they concern the same basic principle, that individual exporters and producers in anti-dumping investigations should be treated individually in the determination and imposition of anti-dumping duties." (Panel Report, *EU – Footwear (China)*, para. 7.91).

[687] The adjective "impracticable" has been interpreted as "'[n]ot practicable; unable to be carried out or done; impossible in practice'". (Appellate Body Report, *EC – Fasteners (China)*, para. 347 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1332)). The Appellate Body noted that "impracticable" connotes different "qualities or characteristics of an action" than the term "ineffective", which means something "[n]ot producing any, or the desired effect; ineffectual, inoperative, inefficient". (Ibid. (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1363)).

[688] United States' first written submission, para. 348. (footnote omitted)

purposes of Article 6.10.[689] In this respect, paragraph 15 of China's Accession Protocol reads in relevant parts:

> **15. Price Comparability in Determining Subsidies and Dumping**
>
> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> > (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
> >
> > (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> ...
>
> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

7.347. The chapeau of paragraph 15 lays down the general rule that the Anti-Dumping Agreement will apply in anti-dumping proceedings involving imports from China. That rule, however, is to be applied "consistent[ly]" with the special provisions set out in paragraphs (a) through (d) of this Section. Subparagraph (a) prescribes that, in determining price comparability in anti-dumping proceedings involving products of Chinese origin, investigating authorities are authorized to use, "a methodology that is not based on a strict comparison with domestic prices or costs". This possibility is available to the extent that the producers under investigation "cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product." If the Chinese producers under investigation can clearly establish that market economy conditions prevail in the relevant industry, the investigating authority of another WTO Member will, in determining price comparability, have to use Chinese prices or costs for the industry under consideration. Hence, under paragraph 15 of China's Accession Protocol, it is incumbent upon the Chinese producers under investigation to clearly show that market conditions prevail in the industry producing the like product. If the producers fail to discharge that burden, the importing Member may, in determining price

[689] United States' first written submission, para. 365. Notably, the United States asserts that during the accession negotiations WTO Members expressed concern over whether China had transitioned into a market economy and that, in response to this concern, China's Accession Protocol "does permit a Member the discretion to presume that either market economy conditions prevail or non-market economy conditions prevail in the industry in question." (Ibid.).

comparability, apply a methodology that is not based on a strict comparison with domestic prices or costs in China.[690]

7.348. Paragraph 15(a) of China's Accession Protocol refers to, but does not define, "price comparability". However, the term is used in Article 2.4 of the Anti-Dumping Agreement, which governs the fair comparison between the export price and normal value. Export price is the price at which the product under consideration is exported, whereas normal value generally refers to the price in the domestic market of the exporting Member.[691] Hence, by referring to a methodology that is not based on a strict comparison with domestic prices or costs, paragraph 15(a) of China's Accession Protocol speaks to the normal value aspect of the price comparison exercise. In other words, paragraph 15(a) of China's Accession Protocol governs issues relating to the determination of normal value (i.e. Chinese prices and costs), but is silent on other aspects of the determination of dumping by an investigating authority.[692] This understanding is consistent with the Appellate Body's statement that paragraph 15 "establishes special rules regarding the domestic price aspect of price comparability", but does not contain "an open-ended exception that allows WTO Members to treat China differently for other purposes … such as the determination of export prices or individual versus country-wide margins and duties".[693]

7.349. In *EC – Fasteners (China)*, the Appellate Body examined a measure which bore close resemblance to the Single Rate Presumption. The Appellate Body understood Article 9(5) of the European Union's Basic Anti-Dumping Regulation as "establish[ing] a presumption that producers or exporters that operate in NMEs are not entitled to individual treatment" due to the "close relationship" among exporters, and that "in order to qualify for such treatment, NME exporters bear the burden to demonstrate that they satisfy the criteria of the [individual treatment] test."[694] In the context of that measure, the Appellate Body found that:

> Placing the burden on NME exporters to rebut a presumption that they are related to the State and to demonstrate that they are entitled to individual treatment runs counter to Article 6.10, which "as a rule" requires that individual dumping margins be determined for each known exporter or producer, and is inconsistent with Article 9.2 that requires that individual duties be specified by supplier.[695] (emphasis omitted)

7.350. Moreover, the Appellate Body found no support in the WTO agreements for a presumption that requires exporters and producers from NMEs to demonstrate that they are unrelated to the State in order to qualify for individual treatment in the calculation of their dumping margins. Nor did the Appellate Body consider that China's Accession Protocol contained a legal basis for such a presumption that led to the calculation of country-wide dumping margins and the imposition of country-wide duty rates on all Chinese exporters of a product under investigation.[696]

7.351. The Appellate Body also addressed the issue of whether, in NME countries, the State and the exporters can be considered as a single entity. It considered that Articles 6.10 and 9.2 "do not preclude an investigating authority from determining a single dumping margin and a single anti-

[690] Appellate Body Report, *EC – Fasteners (China)*, paras. 286-287.

[691] According to Article 2.1 of the Anti-Dumping Agreement, normal value is the price of the "like product when destined for consumption in the exporting country".

[692] Appellate Body Report, *EC – Fasteners (China)*, paras. 287-288.

[693] Appellate Body Report, *EC – Fasteners (China)*, para. 290. (footnote omitted) See also ibid. para. 366. Along similar lines, the panel in *US – Shrimp (Viet Nam)* held that "nothing in paragraphs 254 and 255 of the Working Party Report [of Viet Nam], or any other provision thereof, indicat[es] that the interpretation and/or application of any other provision of the Anti-Dumping Agreement … should be modified to accommodate any special difficulties that might arise in a proceeding involving imports from Viet Nam." (Panel Report, *US – Shrimp (Viet Nam)*, para. 7.251). As noted above, paragraph 255 of Viet Nam's Accession Working Party Report parallels paragraph 15 of China's Accession Protocol.

[694] Appellate Body Report, *EC – Fasteners (China)*, para. 363. See also Panel Report, *EU – Footwear (China)*, paras. 7.63-7.147, where the panel examined Article 9(5) of the European Basic Anti-Dumping Regulation, that is, the same measure as that challenged by China in *EC – Fasteners (China)*. Along similar lines, the panel in *US – Shrimp II (Viet Nam)*, found that in the context of the United States' anti-dumping regime, "in anti-dumping proceedings involving NME countries, the USDOC starts with a rebuttable presumption that all companies within that NME country belong to a single, NME-wide entity and that a single rate is assigned to that entity, and, thus, to companies deemed to belong to that entity". (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.122).

[695] Appellate Body Report, *EC – Fasteners (China)*, para. 364.

[696] Appellate Body Report, *EC – Fasteners (China)*, para. 365.

dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the Anti-Dumping Agreement."[697] In particular, the Appellate Body noted that the Anti-Dumping Agreement "addresses pricing behaviour by exporters" such that "if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the [Anti-Dumping] Agreement and a single margin and duty could be assigned to that single exporter."[698] Importantly, the Appellate Body stressed that, prior to collapsing two or more companies into a single entity, an investigating authority "is called upon to make an objective affirmative determination" as to whether "one or more exporters have a relationship with the State such that they can be considered as a single entity and receive a single dumping margin and a single anti-dumping duty."[699] This objective affirmative determination is to be conducted "on the basis of the evidence that has been submitted or that [the investigating authority] has gathered in the investigation", on whether the subject exporters or producers are separate legal entities, as well as any other evidence that "demonstrates that legally distinct exporters or producers are in a sufficiently close relationship to constitute a single entity and should thus receive a single dumping margin and anti-dumping duty."[700]

7.352. The United States criticizes the Appellate Body's findings for dismissing China's Accession Protocol as "a basis by which Members can presume Chinese firms are likely to be controlled by the state."[701] Specifically, the United States asserts that paragraph 15(d) of China's Accession Protocol shows that "Members by and large treated China as non-market economy – and believed that antidumping measures would have to continue to take in[to] account these conditions."[702] As noted in paragraph 7.346 above, paragraph 15(d) of China's Accession Protocol contains three sentences. The first sentence stipulates that "[o]nce China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession." The second sentence states that "[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession." Finally, the third sentence provides that "[i]n addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector." We also note that paragraph 15(a) of the Protocol stipulates in its chapeau that "[i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China" based on two rules that are set forth in subparagraphs (a)(i) and (ii). Subparagraph (a)(i) states that "[i]f the producers under investigation can clearly show that

[697] Appellate Body Report, *EC – Fasteners (China)*, para. 376. (emphasis omitted)

[698] Appellate Body Report, *EC – Fasteners (China)*, para. 376. (emphasis omitted) The Appellate Body identified a number of "situations" that can signal that, albeit legally distinct, "two or more exporters are in such a relationship that they should be treated as a single entity. These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output." (Ibid.). In this dispute, China "does not contend that the Single Rate Presumption, as such, prevents [the] USDOC from selecting NME-wide entities for individual examination". (China's response to Panel question No. 46, para. 260).

[699] Appellate Body Report, *EC – Fasteners (China)*, para. 363.

[700] Appellate Body Report, *EC – Fasteners (China)*, para. 363. Similarly, the panel in *US – Shrimp II (Viet Nam)* recalled the Appellate Body's interpretations of Articles 6.10 and 9.2 in *EC – Fasteners (China)*, which in its view were "highly persuasive as to the correct interpretation of these provisions". (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.149). On that basis, the panel held that although the Anti-Dumping Agreement permits the treatment of "nominally distinct exporters" as a single entity, Articles 6.10 and 9.2 require that such a decision be made on the basis of "an objective affirmative determination", supported by the evidence gathered during the proceedings, "as to who is the known exporter or producer of the product concerned". (Ibid. paras. 7.154-7.155 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 363)). We note, as the United States argues, in paragraph 197 and footnote 333 of its second written submission, that the measure at issue in *EC – Fasteners (China)* was not identical to the measure before us and that there are differences between the two disputes with respect to the relevant facts and legal arguments. However, like the panel in *US – Shrimp II (Viet Nam)*, we find the underlying legal issue in *EC – Fasteners (China)* to be the same as the issue before us, and therefore consider it appropriate to rely on the Appellate Body's reasoning and interpretation in that dispute.

[701] United States' response to Panel question No. 40, para. 107.

[702] United States' response to Panel question No. 40, para. 107.

market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability". Subparagraph (a)(ii) stipulates that "[t]he importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product." As noted in paragraph 7.348 above, paragraph 15(a) of China's Protocol of Accession concerns exclusively the determination of the normal value in the calculation of dumping margins for Chinese producers. The issue before us, however, is whether or not it is compatible with Articles 6.10 and 9.2 of the Anti-Dumping Agreement to treat multiple exporters from NMEs as part of an NME-wide entity, rather than treating them individually, in calculating their dumping margins and in determining their duty rates. Therefore, we do not find the United States' reliance on paragraph 15(d) as being relevant to the assessment of the claim before us.

7.353. The United States further faults the Appellate Body for not addressing China's Accession Working Party Report (notably, paragraphs 26[703]; 43 through 49[704]; 171 through 176[705]; and 147 through 152[706]), which in its view constitute the underlying foundation of paragraph 15 of the Accession Protocol. We observe, as a preliminary matter, that paragraph 1.2 of China's Accession Protocol incorporates the paragraphs listed in paragraph 342 of China's Accession Working Party Report as "an integral part of the WTO Agreement". In this connection, we note that several of the paragraphs of China's Accession Working Party Report to which the United States refers are listed in paragraph 342[707], while others fall outside that list.[708]

7.354. We observe however that, in terms of their content, none of the paragraphs that the United States cites lends support to its contention that, in anti-dumping proceedings involving Chinese products, the USDOC may presume that all Chinese exporters are controlled by the government, group them into a PRC-wide entity and subject them to the duty rate assigned to the entity, unless such exporters rebut that presumption. Specifically, we note that paragraph 26 of China's Accession Working Party Report alludes to aspects of China's fiscal and monetary policies and contains no reference to the manner in which anti-dumping proceedings concerning goods of Chinese origin are to be conducted.

7.355. Paragraphs 43 through 49 appear under the heading "State-Owned and State-Invested Enterprises". These paragraphs reflect China's statement that state-owned enterprises operate on the basis of market economy rules, and that decisions by these enterprises, including purchases and sales, are to be based on commercial considerations, and not under the influence of the government. They also address certain government procurement and transfer of technology issues.[709] We note, moreover, that paragraph 44 of China's Accession Working Party Report reflects the concerns by *some* members of China's Accession Working Party "about the continuing governmental influence and guidance of the decisions and activities of such enterprises relating to the purchase and sale of goods and services".[710] This statement by some members of China's Accession Working Party does not provide a general recognition among WTO Members that Chinese companies generally operate under government control and that, therefore, it would be legitimate to group them together into a PRC-wide entity for purposes of dumping determinations in anti-dumping investigations involving Chinese products. Accordingly, we are of the view that the United States' reliance on paragraph 44 of China's Accession Working Party Report is inapposite.

7.356. The United States also invokes paragraphs 171 through 176 of China's Accession Working Party Report. These paragraphs appear under the heading "Industrial Policy, including Subsidies" and concern subsidy-related issues, such as financial contributions; the potential for trade-distorting subsidization in the Chinese economy; the administration of special economic areas; and certain subsidy programmes in the steel and high-tech industries. None of these paragraphs,

[703] United States' first written submission, para. 364 and fn 371.
[704] United States' first written submission, para. 369 and fn 376.
[705] United States' first written submission, para. 369 and fn 377.
[706] United States' first written submission, para. 369 and fns 378 and 379.
[707] Paragraphs 46, 47, 49, 148, 152, 171, 172, 173, and 174 of China's Accession Working Party Report.
[708] Paragraphs 26, 43, 44, 45, 48, 147, 149, 150, 151, 175, and 176 of China's Accession Working Party Report.
[709] China's Accession Working Party Report, paras. 43 and 45-49.
[710] China's Accession Working Party Report, para. 44.

however, addresses the manner in which anti-dumping proceedings involving Chinese products are to be conducted. Hence, we consider that these paragraphs are of no assistance in ascertaining the meaning of paragraph 15(a) of China's Accession Protocol.

7.357. Moreover, the United States refers to paragraphs 147 through 152 of China's Accession Working Party Report, which appear under the heading "Anti-Dumping, Countervailing Duties". Paragraphs 147 and 148 address the way China conducts anti-dumping investigations and the concerns certain WTO Members expressed in that regard; paragraph 149 deals with the interpretation of "national law" in paragraph 15(d) of the Accession Protocol; paragraph 151 relates to certain concerns the representative of China raised during the WTO accession process over the treatment of China in anti-dumping proceedings conducted by other WTO Members[711]; and paragraph 152 concerns determinations made by the Chinese authorities in investigations initiated pursuant to applications made before China's accession to the WTO. We note that paragraph 151(b), in particular, provides that each importing Member "should ensure that it had notified its market-economy criteria and its methodology for determining price comparability to the Committee on Anti-Dumping Practices before they were applied." Hence, paragraph 151(b) deals with certain notification guarantees that importing Members "should ensure", but does not confer a right to depart from the rules of the Anti-Dumping Agreement in anti-dumping proceedings involving imports originating in China.[712] Accordingly, we are of the view that the above paragraphs of China's Accession Working Party Report do not contain language that informs the interpretation of paragraph 15(a) of China's Accession Protocol.

7.358. We note that paragraph 150 of China's Accession Working Party Report is the only paragraph, of those cited by the United States, relevant to the understanding of paragraph 15(a) of China's Accession Protocol. It provides:

> Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.

7.359. Paragraph 150 reflects the recognition by several members of China's Accession Working Party that, in order to address the special difficulty in determining cost and price comparability, it might sometimes be appropriate to dispense with domestic costs and prices in China. Thus, like paragraph 15(a) of China's Accession Protocol, paragraph 150 of the China's Accession Working Party Report concerns exclusively the determination of normal value in calculating dumping margins for Chinese companies, and not other aspects of a dumping determination, such as whether exporters should be treated individually or as a single entity.

7.360. Consequently, we consider that the Appellate Body's interpretation of Articles 6.10 and 9.2 of the Anti-Dumping Agreement, as well as of paragraph 15 of China's Accession Protocol, in *EC – Fasteners (China)* is persuasive. Specifically, we agree that China's Accession Protocol contains special disciplines regarding the methodologies for determining normal value (i.e. comparability with domestic prices or costs), but is silent on other aspects, such as export prices or the determination of dumping margins and anti-dumping duty rates. We have not been presented with compelling arguments as to the specific wording in, or relevant context of, paragraph 15 of China's Accession Protocol that would allow the USDOC to adopt a rebuttable presumption that all of the Chinese exporters are subject to governmental control, and assign on that basis a single dumping

[711] More specifically, the representative of China expressed concern that other Members had "treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determinations." (China's Accession Working Party Report, para. 151.).

[712] For this reason, we disagree with the United States that *inter alia* paragraph 151(b) is "particularly instructive in showing that [China's Accession] Working Party Report supports [the] USDOC's treatment of certain Chinese companies as part of a single China government entity." (United States' response to Panel question No. 113(b), para. 67).

margin and a single anti-dumping duty rate to the PRC-wide entity as a whole. On the contrary, paragraph 15 recognizes, at the outset, that the Anti-Dumping Agreement "shall apply in proceedings involving imports of Chinese origin" consistent with provisions set out in subparagraphs (a) through (d). As explained above, none of these subparagraphs speaks to, and hence foresees special disciplines on, the singularity of dumping margins and duty rates for Chinese exporters or producers. Accordingly, consistent with paragraph 15 of China's Accession Protocol, the general obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement apply in full.[713]

7.361. Like the measure at issue in *EC – Fasteners (China)*, the Single Rate Presumption presumes, from the start, that the NME exporters are controlled by the government; groups them within an NME-wide entity; and assigns a single duty rate to the entity as a whole. In order to overcome the presumption of governmental control and be eligible for a separate dumping margin and duty rate, the Single Rate Presumption requires individual NME exporters to make a specific request to that effect and to pass the Separate Rate Test which contains certain conditions aimed to establish *de jure* and *de facto* independence from governmental control. We note, and agree with the Appellate Body's statement in *EC – Fasteners (China)*, that an investigating authority may treat multiple exporters as a single entity if it finds, through an objective affirmative determination, that there exists a situation that would signal that two or more legally distinct exporters are in such a relationship that they should be treated as a single entity.[714] In these circumstances, an investigating authority may calculate a single dumping margin and assign a single duty rate to that entity. However, under the Single Rate Presumption, the USDOC does not make such an objective affirmative determination of the existence of a relationship among several exporters or between exporters and the government. Rather, in proceedings involving NME countries, the USDOC simply assumes such a relationship, lumps together individual exporters and assigns them a single duty rate.

7.362. Accordingly, we conclude that the Single Rate Presumption is inconsistent with the general rule to calculate an individual dumping margin for each known exporter or producer (Article 6.10) and to assign an individual anti-dumping duty to each supplier (Article 9.2). We are also of the view that, for the reasons outlined above, presuming governmental control in the case of Chinese exporters and subjecting them to a single, country-wide dumping margin and anti-dumping duty rate, unless they demonstrate an absence of *de jure* and *de facto* governmental control over their export operations, does not find justification in the Anti-Dumping Agreement or in paragraph 15 of China's Accession Protocol.

7.363. We turn now to the United States' argument that, through the separate rate application, the USDOC engages in "a comprehensive and particularized review of a particular company's relationship with the Chinese government"[715], and that "[s]uch an analysis goes beyond the criteria that formed the individual treatment test at issue" in *EC – Fasteners (China)*, which the Appellate Body found was inconsistent with Articles 6.10 and 9.2.[716] The United States appears to allege that the USDOC's decision following the exporters' applications for a separate rate constitutes the determination that the Appellate Body in *EC – Fasteners (China)* alluded to as

[713] We take note of the Appellate Body's statements that "Section 15 of China's Accession Protocol does not provide a legal basis for flexibility in respect of export prices and for justifying an exception to the requirement to determine individual dumping margins in Article 6.10 of the Anti-Dumping Agreement"; and that "Section 15 of China's Accession Protocol does not authorize WTO Members to treat China differently from other Members except for the determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value." (Appellate Body Report, *EC – Fasteners (China)*, paras. 328 and 290, respectively). Similarly, in assessing paragraph 255 of Viet Nam's Accession Working Party Report, which mirrors paragraph 15 of China's Accession Protocol, the panel in *US – Shrimp II (Viet Nam)* noted that this provision does not permit treating Vietnamese exporters differently for purposes other than the determination of the normal value. More specifically, paragraph 255 does not authorize "a presumption that, in Viet Nam, all companies belong to a single, Viet Nam-wide entity, and should receive a single rate." (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.181). Consequently, the panel held that under Articles 6.10 and 9.2 "'singularity' must be determined on the basis of positive evidence in the particular case, and cannot be presumed". (Ibid. para. 7.161). The panel concluded that the USDOC's presumption that all Vietnamese exporters were part of a single Viet Nam-wide entity, and thus should be assigned a single anti-dumping rate unless they satisfy the Separate Rate Test, is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. (Ibid. para. 7.193).

[714] Appellate Body Report, *EC – Fasteners (China)*, para. 376.

[715] United States' opening statement at the first meeting of the Panel, para. 52.

[716] United States' first written submission, para. 383.

being necessary for an investigating authority to treat two or more companies as a single entity on account of their relationship.

7.364. However, the nature of the Separate Rate Test is at odds with the objective affirmative determination that the Appellate Body mentioned. As explained above, Articles 6.10 and 9.2 require that exporters be treated as individual entities unless they are found, based on positive evidence, to be related to one another, or to the government. However, by virtue of the Single Rate Presumption, the USDOC does not determine whether an exporter and the Chinese government are closely related such that it would be justified to treat them as a single exporter. Rather, the USDOC proceeds from the presumption that there is a close relationship (i.e. governmental control) that warrants treating them as a single entity. It is only through the examination of the separate rate application or the separate rate certification that the USDOC determines whether an exporter is *not* controlled by the government. That is, the Separate Rate Test plays its role only in the second phase of the process, namely, after the USDOC applies the presumption of government control.[717] Accordingly, even assuming that the Separate Rate Test criteria effectively address whether two or more exporters are in close relationship with the government so as to be considered as a single entity (which we need not and do not decide in this dispute), such criteria do nothing to ensure that singularity not be presumed, and hence, do not cure the inconsistency of the Single Rate Presumption with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

7.365. Finally, we recall the United States' argument that China's claim under Article 9.2 concerning original investigations cannot succeed. Specifically, the United States argues that Article 9.2 is "facially inapplicable" to original investigations in retrospective duty assessment systems where the cash deposit rate determined is only an estimate of the final duties that may be owed by a given importer[718], and the actual collection of duties in the appropriate amounts does not occur until the USDOC conducts an administrative review.[719] The parties agree that, under the United States retrospective duty assessment system, the USDOC determines in the original investigation a weighted-average dumping margin on the basis of which a cash deposit rate is imposed for the subsequent period of, normally, one year.[720] In that one-year period, United States importers pay the cash deposit rate calculated by the USDOC for their exporters. At the end of that period, if an administrative review is requested for an exporter, the USDOC initiates the review and calculates the final duty rate for that exporter based on its shipments made during the one-year period. If the final duty rate is greater than the cash deposit, the importers pay the difference; if the final duty rate is smaller than the cash deposit rate, the difference is refunded to the importers. This suggests that it is only after the completion of an administrative review that the USDOC calculates the final anti-dumping duty rate for each exporter for which such a review is requested.[721] However, if an administrative review is not requested for a given exporter, the cash deposit collected following the original investigation becomes the final duty for that exporter for the relevant period.[722]

7.366. We find unconvincing the United States' argument that Article 9.2 does not apply to original investigations under the United States retrospective duty assessment system. Where the original investigation yields a final determination of sales at less than fair value, the USDOC instructs the Customs Border Protection to request a cash deposit, or the posting of a bond from the exporters concerned. As such, the USDOC imposes an anti-dumping duty, albeit on a

[717] For this reason, we disagree with the United States' argument, presented in paragraph 192 of its second written submission, that China has failed to address why it would be improper for the investigating authority to make an inference of lack of independence from the government when an NME exporter fails to demonstrate independence from the State through the Separate Rate Test.

[718] United States' first written submission, para. 359. See also United States' second written submission, para. 190.

[719] United States' first written submission, para. 359. See also United States' second written submission, para. 190.

[720] China's first written submission, paras. 23-25; and United States' first written submission, para. 359.

[721] China's first written submission, paras. 23-25; and United States' first written submission, para. 359.

[722] *United States Code of Federal Regulations*, Title 19, (Exhibit CHN-28), Section 351.212 (c). In addition, the cash deposit applicable for the following period will be that "previously ordered", i.e. the cash deposit determined during the original investigation or the most recent completed administrative review. (Ibid.). See also United States' response to Panel question No. 47, para. 124, where the United States points out that "the rate set in the investigation is the cash deposit rate, and the rate ultimately 'imposed' would depend on whether the company sought review and further demonstrated that its export activities were independent from the Chinese government."

preliminary basis, as a result of an original investigation. Moreover, the cash deposit rate determined during the original investigation may become final if the subject exporters do not request an administrative review of the duty. We consider that once the cash deposit is imposed under the United States system, there is a duty in place within the meaning of Article 9.2. The fact that the duty rate may change where the USDOC determines the final liability in an administrative review does not alter the fact that a duty has been imposed. In our view, therefore, the obligations set forth under Article 9.2 apply to original investigations in the United States system.

7.367. In sum, we conclude that Article 6.10 of the Anti-Dumping Agreement contains the obligation to calculate individual dumping margins for each known exporter of the product under consideration. Article 9.2, for its part, requires that investigating authorities specify individual anti-dumping duties and name the individual suppliers of the product concerned. The Single Rate Presumption stands in contrast to these obligations because it subjects NME exporters to a single dumping margin and duty rate, unless each exporter overcomes the presumption of *de jure* and *de facto* governmental control over its export operations.[723] Although China's Accession Protocol contains special disciplines concerning the calculation of normal value in proceedings involving products of Chinese origin, these do not alter the scope of provisions of the Anti-Dumping Agreement addressing the determination of export prices, dumping margins or anti-dumping duty rates.

7.368. On the basis of the foregoing, we find that the Single Rate Presumption, as described in paragraph 7.311 above, is as such inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

7.4.5.2.2 China's as applied claims under Articles 6.10 and 9.2 of the Anti-Dumping Agreement

7.369. China further claims that the Single Rate Presumption is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement as applied in the 38 challenged determinations. In seeking to establish its as applied claims, China has submitted an annex to its written submission, as well as Exhibit CHN-476 (revised), where it presents quoted excerpts from the 38 challenged determinations, allegedly indicating that the USDOC applied the Single Rate Presumption in each of them.

7.370. The United States argues that, consistently with Articles 6.10 and 9.2, the USDOC has not denied any Chinese exporter of its proper anti-dumping duty rate, and that China's Accession Protocol allows the USDOC to "rightfully presume" that all exporters form part of a PRC-wide entity by reason of governmental control or material influence over their activities.[724] Moreover, the United States contends that the excerpts from 22 determinations that China challenges do not contain any language demonstrating that the USDOC actually applied a presumption of governmental control and assigned a single dumping margin, unless each exporter rebutted that presumption through the Separate Rate Test.[725] These determinations consist of one original investigation (the original investigation in *Aluminum*) and 21 administrative reviews.[726] In addition, the United States argues that in eight of these 21 administrative reviews, the PRC-wide entity was

[723] The panel in *US – Shrimp II (Viet Nam)* reached a similar finding with respect to the USDOC's presumption of governmental control and the Separate Rate Test, noting that the challenged measure in that dispute operated differently from what is prescribed in Articles 6.10 and 9.2. In particular, it considered that the USDOC presumes from the start that all exporters belong to the NME-wide entity, unless each exporter or producer "rebut[s] the presumption of affiliation with the State". (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.156). Only then would an exporter be entitled to a separate dumping margin and anti-dumping duty rate. Thus, the panel found that the USDOC did not make an "objective affirmative determination" as to who is the known exporter or producer, but rather "presume[d] from the start the existence of this exporter or producer in the form of a NME-wide entity". (Ibid. para. 7.156). Although the analysis of the panel in *US – Shrimp II (Viet Nam)* is instructive, our legal analysis is based on the specific evidence and arguments put forward by the parties in these proceedings.

[724] United States' first written submission, para. 328.

[725] United States' response to Panel question Nos. 43 and 45, paras. 113 and 119.

[726] The 21 administrative review determinations with which the United States takes issue are: *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Solar* AR1, *Furniture* AR7, *Furniture* AR8, and *Furniture* AR9. (United States' response to Panel question Nos. 43 and 45, paras. 114 and 119).

not under review and therefore the Single Rate Presumption could not have been applied. The United States does not contest that, in the remaining 16 determinations, that is, 12 original investigations[727] and four administrative reviews[728], the USDOC applied the Single Rate Presumption.

7.371. We consider it appropriate to begin our assessment of China's as applied claims by ascertaining whether in the 13 original investigations and 25 administrative reviews at issue the USDOC applied the Single Rate Presumption. Should this be the case, we will find that the application of the Single Rate Presumption in each of the 38 anti-dumping determinations was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement for the same reasons that the Presumption itself is inconsistent with these two provisions.

Original investigations

7.372. With respect to the 13 original investigations at issue, China has provided in Annex 2: Table SRP to its first written submission quotations from the relevant determinations under three rows, i.e. "Single Rate Presumption", "Practical consequences of the application of the Single Rate Presumption", and "Separate rate test". Regarding the Single Rate Presumption, the part of the USDOC's determinations that China quotes states, in almost identical terms, that:

> In proceedings involving NME countries, [the USDOC] begins with a rebuttable presumption that all companies/exporters within the NME country are subject to government control and, thus, should be assessed/assigned a single antidumping duty [deposit] rate.[729]

7.373. Regarding practical consequences of the application of the Single Rate Presumption, the part of the USDOC's determinations that China quotes states, in almost identical terms, that:

> Because [the USDOC] begin[s] with the presumption that all companies within a non-market economy ("NME") country are subject to government control and because only the companies listed under the "Final Determination Margins" section below [Mandatory respondents and Separate Rate Applicants] have overcome that presumption, [the USDOC is] applying a single antidumping rate—the PRC-wide rate—to all other exporters of subject merchandise from the PRC.[730]

7.374. Regarding the Separate Rate Test, the part of USDOC's determinations that China quotes states, in almost identical terms, that:

> It is the [USDOC's] policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.[731]

7.375. These excerpts show that, in each of the determinations issued in these 13 challenged original investigations, the USDOC recalled the fact that in proceedings involving NME countries, it begins with the rebuttable presumption of government control, as well as the "policy" to assign a single rate to all exporters from the NME country unless they show an absence of government control, and thus are entitled to a separate rate. In addition, the quoted passages also show the USDOC's finding that only the companies "listed under the 'Final Determination Margins' … have overcome that presumption" and hence will receive a single anti-dumping duty rate, while the rest of the exporters will receive the "PRC-wide rate".

7.376. We recall that, with respect to one original investigation (the original investigation in *Aluminum*), the United States argues that China has not demonstrated that the USDOC applied the Single Rate Presumption.[732] Yet, the final determination in that investigation is drafted in almost

[727] *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *PET Film* OI, and *Furniture* OI.
[728] *Aluminum* AR1, *Aluminum* AR2, *Diamond Sawblades* AR4, and *OTR Tires* AR5.
[729] See China's first written submission, Annex 2: Table SRP, pp. 46-70.
[730] See China's first written submission, Annex 2: Table SRP, pp. 46-70.
[731] See China's first written submission, Annex 2: Table SRP, pp. 46-70.
[732] United States' response to Panel question No. 43, para. 114.

identical terms as the passages quoted above.[733] It further adds that the reasons for applying a PRC-wide entity is "because these other companies did not demonstrate entitlement to a separate rate", and that the "PRC-wide rate applies to all entries of subject merchandise except for entries from the companies eligible for separate rate status".[734]

7.377. Given the clarity of the passages quoted above, we conclude that the record shows that the Single Rate Presumption was applied in each of the 13 challenged original anti-dumping investigations.[735] We therefore find that the application of the Single Rate Presumption in those 13 investigations was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement for the same reasons that the Single Rate Presumption is as such inconsistent with the same provisions.

Administrative reviews

7.378. With respect to the administrative review determinations at issue, we recall our finding that the six determinations presented at the first substantive meeting are within our terms of reference and, therefore, this dispute concerns 25 administrative reviews, that is, 19 determinations listed in China's first written submission and the six determinations presented at our first substantive meeting with the parties.

7.379. The United States asserts that, in 21 of the 25 administrative reviews at issue, the excerpts quoted by China do not show that the Single Rate Presumption was actually applied.[736] In this respect, we note that Annex 2: Table SRP, to China's first written submission contains quotations from the 25 challenged administrative reviews where the USDOC recalled, in each such determination, the Single Rate Presumption and the Separate Rate Test along the same lines of the passages quoted in paragraphs 7.372 and 7.374 above, respectively, in connection with the 13 challenged investigations. The only difference is that Annex 2: Table SRP, to China's first written submission does not contain, for these administrative reviews, a column equivalent to the "Practical consequences of the application of the Single Rate Presumption" quoted in paragraph 7.373 above.

7.380. However, the evidence on the record shows that, in each challenged administrative review, the USDOC conditioned the granting of a separate dumping margin and duty rate on the filing and fulfilment by each applicant of the separate rate application or certification.[737] Additionally, the

[733] See China's first written submission, Annex 2: Table SRP, pp. 46-47.

[734] *Aluminum* OI, Final Determination, (Exhibit CHN-32), p. 18529. See also ibid. pp. 18527-18528.

[735] We also note that the notices of initiation in 12 of the 13 challenged investigations state that in order to receive a separate rate, the Chinese exporters were required to submit a separate rate application. (See China's response to Panel question No. 44, paras. 195, 201, 203, 209, 213, 215, 219, 232, 234, 240, 246, and 250 (citing *Aluminum* OI, Initiation of Investigation, (Exhibit CHN-185), p. 22113; *Coated Paper* OI, Initiation of Investigations, (Exhibit CHN-184), pp. 53714-53715; *Shrimp* OI, Notice of Initiation of Investigations, (Exhibit CHN-187), p. 3878; *OTR Tires* OI, Initiation of Investigation, (Exhibit CHN-183), pp. 43594-43595; *OCTG* OI, Initiation of Investigation, (Exhibit CHN-182), p. 20676; *Solar* OI, Initiation of Investigation, (Exhibit CHN-181), p. 70964; *Diamond Sawblades* OI, Initiation of Investigations, (Exhibit CHN-186), p. 35629; *Steel Cylinders* OI, Initiation of Investigation, (Exhibit CHN-180), pp. 33216-33217; *Wood Flooring* OI, Initiation of Investigation, (Exhibit CHN-179), p. 70718; *Ribbons* OI, Initiation of Investigations, (Exhibit CHN-178), p. 39296; *Bags* OI, Initiation of Investigations, (Exhibit CHN-188), p. 42003; and *PET Film* OI, Initiation of Investigations, (Exhibit CHN-190), p. 60805.) While the notice of initiation in *Furniture* OI does not specifically mention this requirement, our findings in paragraphs 7.372 through 7.376 above provide a sufficient basis to conclude that the Single Rate Presumption was applied in this investigation.

[736] These reviews are *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* AR7, *Furniture* AR8, *Furniture* AR9, *Solar* AR1, and *Wood Flooring* AR2.

[737] *Aluminum* AR1, Final Results, (Exhibit CHN-35), pp. 98-99; *Aluminum* AR2, Final Results, (Exhibit CHN-36), pp. 78785-78786; *Shrimp* AR7, Final Results, (Exhibit CHN-38), p. 56210; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-120), pp. 4-5; *Shrimp* AR9, Final Results, (Exhibit CHN-40), pp. 75534-75535; *OTR Tires* AR3, Final Results, (Exhibit CHN-42), p. 22514; *OTR Tires* AR5, Decision Memorandum, (Exhibit CHN-478), pp. 7-12; *OCTG* AR1, Final Results, (Exhibit CHN-43), p. 74645; *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), pp. 11144-11145; *Diamond Sawblades* AR2, Final Results, (Exhibit CHN-47), p. 36167; *Diamond Sawblades* AR3, Final Results, (Exhibit CHN-48), p. 35724; *Diamond Sawblades* AR4, Issues and Decision Memorandum, (Exhibit CHN-473), pp. 5-7; *Wood Flooring* AR1, Final Results, (Exhibit CHN-50), p. 26714; *Wood Flooring* AR2, Decision Memorandum, (Exhibit CHN-117), pp. 6-10; *Ribbons* AR1, Final Results, (Exhibit CHN-51), pp. 10131-10132; *Ribbons* AR3, Final Results, (Exhibit CHN-52), p. 61289; *Bags* AR3, Final Results, (Exhibit CHN-54), pp. 6857-6858; *Bags* AR4, Final Results, (Exhibit CHN-55),

United States has explained that, in each of the challenged administrative reviews, "all Chinese exporters concerned were notified that to receive a rate separate from that of the China-government entity, they would need to submit a [s]eparate [r]ate [a]pplication or [s]eparate [r]ate [c]ertification, where appropriate, or complete 'Section A' of the dumping questionnaire."[738] Accordingly, the exporters concerned in each of the 25 administrative reviews were notified that access to a separate rate would be conditioned upon the submission of the separate rate application or certification. We are of the opinion that these elements constitute sufficient evidence to conclude that, in each of the 25 administrative reviews, the USDOC presumed the existence of governmental control and required Chinese exporters to pass the Separate Rate Test as a prerequisite to obtaining a rate separate from that of the PRC-wide entity.

7.381. Moreover, the United States argues that, in eight of the challenged administrative reviews (which form part of the 21 administrative reviews referred to above), the PRC-wide entity was not subject to review, and consequently, the USDOC did not determine a rate for the entity.[739] The United States contends that China has not shown how the USDOC's determinations in these administrative reviews were inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.[740] We note that, as the United States argues, the PRC-wide entity was not subject to review in eight of the challenged administrative reviews. The exporters under review in these eight reviews were those that enjoyed separate-rate status in previous segments of the proceedings. Yet, such exporters were required to submit a separate rate certification in order to continue to avail themselves of a separate duty rate. As explained above, the Separate Rate Test may be satisfied in two ways, namely, through the filing of a separate rate application[741] or a separate rate certification.[742] The latter applies to exporters who were granted separate rate status in previous segments of an anti-dumping proceeding. Such a certification is a permutation of the procedure that exporters must follow in order to enjoy separate rate status; those exporters who fail to submit it will be treated as part of the PRC-wide entity. Thus, in the eight determinations where the PRC-wide entity was not subject to review, the USDOC required that those exporters that were subject to the review file the separate rate certification. Had the subject exporters failed to submit the separate rate certification, the USDOC would have included them in the PRC-wide entity and would have assigned the PRC-wide rate to them. Accordingly, we conclude that the Single Rate Presumption was applied to the exporters under review in each of the eight determinations where the PRC-wide entity was not subject to review.

7.382. Having found that the Single Rate Presumption was applied in each of the 38 challenged determinations, we conclude that such application was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement for the same reasons that we have found the Single Rate Presumption to be as such inconsistent with these two provisions. Specifically, by applying the Single Rate Presumption in these 38 determinations, the USDOC presumed the existence of a PRC-wide entity from the start and, thereby, failed to make an objective affirmative determination that the multiple exporters included within the PRC-wide entity were in such a relationship that they should be treated as a single entity. Furthermore, by presuming governmental control over the exporters included within the PRC-wide entity in these determinations, the USDOC subjected them to a single, PRC-wide anti-dumping duty rate, which was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

p. 63719; *PET Film* AR3, Final Results, (Exhibit CHN-15), pp. 35246-35247; *PET Film* AR4, Final Results, (Exhibit CHN-57), p. 37716; *PET Film* AR5, Decision Memorandum, (Exhibit CHN-477), pp. 3 and 5-7; *Furniture* AR7, Final Results, (Exhibit CHN-59), pp. 35249-35251; *Furniture* AR8, Final Results, (Exhibit CHN-60), pp. 51954 and 51956; *Furniture* AR9, Issues and Decision Memorandum, (Exhibit CHN 480), pp. 4-6; and *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), pp. 9-16.

[738] United States' response to Panel question No. 44, para. 115.

[739] Specifically, the United States maintains that in *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Bags* AR4, *Furniture* AR9, *PET Film* AR3, *PET Film* AR4, and *PET Film* AR5, "the China-government entity was not under review … and, therefore, a rate was not determined for the entity in these reviews." (United States' response to Panel question No. 46, para. 121 and fn 149).

[740] United States' response to Panel question No. 46, para. 121.

[741] See fn 587 above.

[742] See fn 588 above.

7.4.5.3 China's as such and as applied claims under the second sentence of Article 9.4 of the Anti-Dumping Agreement

7.383. We recall that the Single Rate Presumption consists of two components, namely, the presumption of government control and the requirement to pass the Separate Rate Test, in order to be entitled to an individual dumping margin and duty rate. The findings of violation of Articles 6.10 and 9.2 reached above are based on a holistic assessment of these two components. Indeed, these two components complement each other in the sense that the Separate Rate Test serves to rebut the presumption of government control. The gist of our legal analysis is that the Single Rate Presumption assumes singularity rather than having the USDOC make a positive determination to find singularity in light of the circumstances of each anti-dumping proceeding.

7.384. In addition to its claims under Articles 6.10 and 9.2 of the Anti-Dumping Agreement, China alleges that the Single Rate Presumption is, as such and as applied in the 38 determinations at issue, inconsistent with the obligation contained in the second sentence of Article 9.4. China alleges that there is a violation of that provision because the Single Rate Presumption subjects the right to have an individual duty rate or normal value to the completion of the Separate Rate Test. This, in China's view, constitutes an additional condition not found in Articles 9.4 or 6.10.2 of the Anti-Dumping Agreement.[743]

7.385. We note that, under its Article 9.4 claim, China challenges the second component of the Single Rate Presumption, namely, the obligation to pass the Separate Rate Test in order to rebut the presumption of governmental control and have an individual duty rate. That is, China's claim under the second sentence of Article 9.4 takes issue with a component of the challenged measure that we have found to be inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. This raises the question whether we should proceed to assess China's claim under the second sentence of Article 9.4 even if that claim challenges the same problem, namely, the obligation to complete the Separate Rate Test in order to have an individual duty rate.

7.386. In this respect, the Appellate Body has repeatedly considered that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[744] The principle of judicial economy[745] stems from the general principle enshrined in Article 3.7 of the DSU, namely, that the objective of the WTO dispute settlement system is to resolve the matter at issue in order "to secure a positive solution to a dispute".[746] However, the Appellate Body has also warned against exercising "false judicial economy", which is when a panel does not make findings on claims that are "necessary in order to enable the DSB to make sufficiently precise recommendations and rulings" in order to resolve a dispute.[747]

7.387. In evaluating China's claims under the second sentence of Article 9.4, the relevant question is whether the findings on such claims would "add[] anything to the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute".[748] In this respect, we recall that the Separate Rate Test is part and parcel of the Single Rate Presumption which, as found above, is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Those findings entail that assuming governmental control over the individual exporters in anti-dumping proceedings involving NME countries and requiring them to show an absence of such control by satisfying the criteria in the Separate Rate Test violates the rules set forth in Articles 6.10 and 9.2. In its claim under the second sentence of Article 9.4, China argues that requiring those exporters to pass the Separate Rate Test also violates Article 9.4 because it operates as an additional condition for benefiting from the right to have an individual duty rate, as set forth in that provision. It is therefore clear to us that our findings of violation of Articles 6.10 and 9.2 address the very concern that underlies China's claim under the second sentence of Article 9.4. Consequently, we do not consider it necessary to make findings under China's Article 9.4 claim in

[743] China's first written submission, para. 385.
[744] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at p. 340. See also Appellate Body Report, *India – Patents (US)*, para. 87.
[745] Appellate Body Report, *US – Lead and Bismuth II*, para. 71.
[746] Appellate Body Report, *Australia – Salmon*, para. 223.
[747] Appellate Body Report, *Australia – Salmon*, para. 223.
[748] Appellate Body Report, *US – Wheat Gluten*, para. 183. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.194, where the Appellate Body stated that panels are to be guided by "the need to address all of those claims whose resolution is necessary to resolve the dispute so as to avoid a partial resolution of the dispute".

order to secure a positive solution to the dispute since such findings would add nothing to "the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute".[749]

7.4.5.4 Overall conclusion

7.388. In the light of the foregoing, we find that the Single Rate Presumption, as described in paragraph 7.311 above, is as such inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. We also find that the application of the Single Rate Presumption in the 38 challenged determinations was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. We exercise judicial economy with respect to China's as such and as applied claims under the second sentence of Article 9.4 of the Anti-Dumping Agreement.

7.5 China's claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement

7.5.1 Introduction

7.389. China challenges several aspects of the USDOC's methodologies, as such and as applied, for determining anti-dumping duty rates for NME-wide entities. China argues that what it refers to as the AFA Norm amounts to a norm of general and prospective application, which is as such inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. China further claims that the alleged AFA Norm was applied in 28[750] of the 30 determinations at issue (26 determinations explicitly listed in China's first written submission[751], plus four of the additional determinations introduced at the first substantive meeting[752])[753], and that the application of this Norm was inconsistent with the same provisions of the Anti-Dumping Agreement. In addition, China asserts, solely on an as applied basis, that the 30 determinations at issue violate Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement.

7.5.2 Provisions at issue

7.390. Article 6.1 of the Anti-Dumping Agreement reads in relevant part:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

Article 6.1 provides interested parties with an important right by stipulating that interested parties shall be given notice of the information required and ample opportunity to present in writing evidence that they consider relevant to the investigating authority's determinations in a given investigation. We recall that this provision, alongside Article 6.2, has been described by the Appellate Body as setting out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews.[754]

7.391. Article 6.8 of the Anti-Dumping Agreement reads:

---

[749] Appellate Body Report, *US – Lamb*, para. 194.

[750] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *PET Film* OI, *Furniture* OI, *Furniture* AR7, and *Furniture* AR8.

[751] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *PET Film* OI, *Furniture* OI, *Furniture* AR7, and *Furniture* AR8.

[752] *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR4, and *Wood Flooring* AR2. We have found, in paragraph 7.270 above, that the four determinations introduced at the Panel's first substantive meeting with the parties are within our terms of reference.

[753] These 30 determinations form part of the 38 determinations challenged by China under its as applied claims challenging the Single Rate Presumption. More specifically, these 30 determinations are those of the 38 determinations in which the USDOC determined an anti-dumping duty rate for the PRC-wide entity.

[754] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

> 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.

Article 6.8 stipulates that where an interested party fails to provide necessary information or significantly impedes the investigation, an investigating authority may base its determinations on facts available. It also stipulates that in applying facts available, the investigating authority must observe the provisions of Annex II to the Anti-Dumping Agreement. One of the principal objectives of the Anti-Dumping Agreement is to ensure objective decision-making based on facts. Article 6.8 and Annex II serve this objective by ensuring that even where the requested information is not provided, the investigating authority will base its determination on facts, albeit perhaps "second-best" facts.[755]

7.392. Paragraph 1 of Annex II to the Anti-Dumping Agreement reads:

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

Paragraph 1 of Annex II requires an investigating authority to inform an interested party of three aspects before facts available may be used in making determinations concerning such a party. First, the investigating authority must specify in detail the information required from the interested party. Second, it must explain the manner in which this information should be structured by the interested party. Third, the investigating authority must ensure that the interested party at issue is aware of the consequences of a failure to provide the required information. Despite being phrased in the conditional tense, the provisions of Annex II are considered mandatory due to the obligation to observe these provisions, set out in Article 6.8.[756]

7.393. Paragraph 7 of Annex II to the Anti-Dumping Agreement reads:

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

Paragraph 7 of Annex II addresses situations where an investigating authority uses information from secondary sources in the place of information that was requested from an interested party. It stipulates that in such situations the investigating authority must exercise special circumspection and, where practicable, check such information against information from other independent sources. The possibility of an interested party ending up with a less favourable result due to its failure to cooperate is, however, explicitly recognized in this provision.

7.394. The first sentence of Article 9.4 of the Anti-Dumping Agreement reads:

[755] Panel Report, *US – Hot-Rolled Steel,* para. 7.55.
[756] Panel Report, *US – Steel Plate*, para. 7.56.

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> > (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
> >
> > (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. (emphasis original)

The first sentence of Article 9.4 explains how anti-dumping duty rates have to be calculated for exporters that were not individually examined in cases where the investigating authority has resorted to limited examination in its dumping determinations, as provided for under the second sentence of Article 6.10 of the Anti-Dumping Agreement. The first sentence of Article 9.4 provides that such duty rates shall not go beyond the weighted average of the margins of dumping calculated for the exporters or producers included in the limited examination. Further, this provision states that, in the calculation of this ceiling, the investigating authority shall disregard zero and *de minimis* margins as well as margins calculated on the basis of facts available pursuant to Article 6.8 of the Anti-Dumping Agreement. In this latter regard, the first sentence of Article 9.4 protects exporters that are not chosen as mandatory respondents, and thus not asked to cooperate, from being prejudiced by the failure of mandatory respondents to provide certain necessary information.[757]

7.5.3 Main arguments of the parties

7.5.3.1 China

7.395. China's first claim is that the USDOC acted inconsistently with Article 6.1 of the Anti-Dumping Agreement by failing to notify all exporters within the PRC-wide entity of the information necessary to calculate a margin of dumping for that entity in the 30 determinations at issue.[758] According to China, Article 6.1 obliges an investigating authority to give notice of the information objectively needed to make a determination.[759] In the case of a dumping determination, China notes that the scope of the required information is informed by Article 2, which governs such determinations.[760] For entities consisting of multiple exporters, China refers to the Appellate Body's finding in *EC – Fasteners (China)* that the dumping margin for such entities must be based on a weighted average of the export prices of all individual exporters within the entity. China submits that, in the 30 determinations at issue, the USDOC failed to observe this obligation by calculating a margin of dumping for the PRC-wide entity without first requesting the required information from the individual exporters within the entity.[761] Further, China argues that, in these 30 determinations, the USDOC's failure to notify resulted in a failure to give the exporters included in the PRC-wide entity ample opportunity to present relevant evidence, also in violation of Article 6.1.[762]

7.396. China's second claim is that the USDOC's recourse to facts available in the 30 determinations at issue was contrary to Article 6.8 of the Anti-Dumping Agreement and paragraph 1 of its Annex II because the USDOC failed to specify in detail the information required to calculate a margin of dumping for the PRC-wide entity before resorting to facts available to

[757] Appellate Body Report, *US – Hot-Rolled Steel,* para. 123.
[758] China's second written submission, para. 274.
[759] China's second written submission, paras. 231-232.
[760] China's second written submission, para. 232.
[761] China's second written submission, paras. 269-271 and 274 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 384).
[762] China's second written submission, para. 274.

replace that information.[763] In China's view, these provisions permit recourse to facts available only if an interested party fails to provide information that is necessary and that the investigating authority has specified in detail, and only to the extent necessary to replace the missing facts.[764] According to China, the USDOC should have specified the information needed by sending a full dumping questionnaire to all exporters within the PRC-wide entity.[765] In this regard too, China relies on the Appellate Body's finding in *EC − Fasteners (China)* that the determination of a dumping margin for a single entity must be based on a weighted average of the export prices of all individual exporters within the entity.[766]

7.397. China's third claim is that the USDOC's use of adverse facts available is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. This claim has an as such and an as applied aspect. Under the as such aspect, China contends that the USDOC's practice regarding the use of facts available in anti-dumping proceedings involving NMEs − the alleged AFA Norm − constitutes a norm of general and prospective application that can be challenged as such in WTO dispute settlement proceedings.[767] China describes the precise content of the alleged AFA Norm as follows: whenever 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 or exporters included within it.[768]

7.398. As an initial matter, China considers that the alleged AFA Norm is attributable to the United States as it arises from the acts or omissions of the USDOC when it administrates the legal framework for the use of adverse facts available.[769] Moreover, China submits several sets of evidence with a view to demonstrating the alleged AFA Norm's precise content and its general and prospective application. With respect to the Antidumping Manual and the excerpts from the USCIT decisions in *Peer Bearing Co.-Changshan v. United States*, *East Sea Seafoods LLC v. United States*, and *Hubbel Power Systems, Inc. v. United States*, China considers that this evidence confirms its understanding of the precise content of the alleged AFA Norm, and sheds light on the rigidity of the measure.[770] It further argues that this evidence supports the proposition that the alleged AFA Norm has general and prospective application.[771] Finally, China argues that 86 USDOC anti-dumping determinations on the record show the precise content of the alleged AFA Norm[772], as well as its general and prospective application.[773] China submits that an overall assessment of this evidence, as well as the fact that the United States has been unable to identify one single USDOC determination in which the USDOC did not make adverse inferences when an NME-wide entity was found not to cooperate, show that the USDOC's use of adverse inferences and selection of adverse facts available with respect to non-cooperating NME-wide entities is not a case-specific approach, but rather the application of an underlying norm of general and prospective application.[774]

7.399. China claims that the alleged AFA Norm violates Article 6.8 of the Anti-Dumping Agreement and paragraph 7 of its Annex II as such for three reasons: (a) the systematic selection of adverse facts available pursuant to the AFA Norm prevents the USDOC from conducting an evaluative, comparative assessment of all available evidence in order to determine which facts are

[763] China's first written submission, paras. 629 and 637.
[764] China's first written submission, paras. 554-555 and 558-559 (citing Appellate Body Reports, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 459; and *US − Carbon Steel (India)*, para. 4.416, in turn citing Appellate Body Report, *Mexico − Anti-Dumping Measures on Rice*, para. 294).
[765] China's response to Panel question No. 61(c), para. 307.
[766] China's first written submission, para. 553 (citing Appellate Body Report, *EC − Fasteners (China)*, para. 384).
[767] China's first written submission, paras. 428-430 (referring to Appellate Body Report, *US − Zeroing (EC)*, paras. 193 and 198).
[768] China's opening statement at the second meeting of the Panel, para. 63. See also China's first written submission, paras. 15 and 428; response to Panel question Nos. 66(a), 67(a), 78, and 115, paras. 367-368, 376, and 127; and second written submission, paras. 342, 346, 358, 404, 407, 409, and 423.
[769] China's first written submission, para. 431.
[770] China's response to Panel question No. 115(b), paras. 128-129, 132, and 134-135.
[771] China's first written submission, paras. 444-445.
[772] China's first written submission, paras. 436-442.
[773] China's response to Panel question No. 116, para. 157.
[774] China's second written submission, paras. 366 and 370.

"best"[775]; (b) the AFA Norm requires the selection of adverse facts available on the basis of the procedural circumstance of presumed non-cooperation alone, and thus prevents the USDOC from applying special circumspection and taking into account the circumstances of cooperating individual exporters within the NME-wide entity[776]; and (c) the AFA Norm requires the selection of adverse facts available even when the USDOC has failed to request the required information and prevents the USDOC from taking into account the fact that such information was missing due to the USDOC's own failure to request it.[777]

7.400. Under the as applied part of its third claim, China presents two alternative arguments. First, China argues that the application of the alleged AFA Norm in 28 of the challenged 30 determinations rendered such determinations inconsistent with Article 6.8 of the Anti-Dumping Agreement and paragraph 7 of its Annex II, for the same reasons that the Norm itself is inconsistent with these two provisions.[778] Second, regardless of whether the USDOC applied a WTO-inconsistent norm of general and prospective application, China argues that all 30 determinations at issue are inconsistent with Article 6.8 and paragraph 7 of Annex II. In this regard, China puts forward four specific arguments[779]: (a) the USDOC selected adverse facts instead of assessing which were the "best" facts available[780]; (b) the USDOC made an adverse inference on the basis of the procedural circumstance of presumed non-cooperation alone without taking into account the circumstances of the cooperating exporters within the PRC-wide entity[781]; (c) in applying adverse facts available, the USDOC failed to undertake an evaluative, comparative assessment of all available information[782]; and (d) the USDOC failed to provide an adequate explanation of how it exercised special circumspection and selected the "best" facts available.[783]

7.401. China's fourth claim is based on the argument that, although the USDOC purported to determine an individual margin of dumping for the PRC-wide entity in the 30 challenged determinations, the PRC-wide entity was not individually examined and thus was subject to the disciplines set out in Article 9.4 of the Anti-Dumping Agreement.[784] China claims that the duty rates assigned to the PRC-wide entity violated the first sentence of Article 9.4 for three reasons: (a) the USDOC applied a PRC-wide rate exceeding the ceiling set forth in the first sentence of Article 9.4[785]; (b) the USDOC exceeded the discretion provided under the first sentence of Article 9.4 by assigning a PRC-wide rate that was higher than the rate assigned to separate rate respondents also not individually examined[786]; and (c) the USDOC exceeded the discretion provided under the first sentence of Article 9.4 by re-applying a rate calculated in a WTO-inconsistent manner to the PRC-wide entity.[787]

[775] China's first written submission, paras. 642-644 (citing Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 297; and *US – Carbon Steel (India)*, paras. 4.426 and 4.468; and Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238).

[776] China's first written submission, paras. 645-646 and 648 (citing Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422).

[777] China's first written submission, paras. 665-666; and second written submission, para. 409.

[778] China's first written submission, para. 670; and response to Panel question No. 2(b), paras. 10-11 and 15.

[779] With respect to two of the challenged determinations, namely *OTR Tires* AR5 and *Diamond Sawblades* AR4, China bases its claim of inconsistency with Article 6.8 and paragraph 7 of Annex II on the third and fourth arguments only. (China's response to Panel question No. 2(b), para. 18).

[780] China's first written submission, paras. 675 and 678.

[781] China's first written submission, paras. 679-682; and response to Panel question No. 83(b), paras. 844 and 846.

[782] China's first written submission, para. 683.

[783] China's first written submission, paras. 701-702.

[784] China's second written submission, para. 439.

[785] China's second written submission, paras. 468-472 and 478-480. This argument applies to 24 of the challenged determinations, namely *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OTR Tires* AR5, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Bags* OI, *Bags* AR3, *PET Film OI, Furniture* OI, *Furniture* AR7, and *Furniture* AR8.

[786] China's second written submission, paras. 473-475, 483-484, and 490-491. This argument applies to 12 of the challenged determinations, namely *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *Diamond Sawblades* AR2, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, and *Furniture* AR7.

[787] China's second written submission, paras. 481-482 and 488-489. This argument applies to two of the challenged determinations, namely *Diamond Sawblades* AR2 and *Ribbons* AR1.

7.5.3.2 United States

7.402. As an initial matter, the United States argues that a number of the arguments put forward by China under its third and fourth claims in its responses to the Panel's questions following the first substantive meeting of the Panel with the parties are contrary to paragraph 6 of the Panel's Working Procedures which, according to the United States, requires the parties to present their principal arguments in their respective first written submissions.[788]

7.403. In response to China's first claim, the United States argues that Article 6.1 of the Anti-Dumping Agreement only deals with the procedural issue of whether proper notice of the information required has been given, and not the substantive issue of what information is to be required by an investigating authority.[789] Furthermore, the United States asserts that Article 6.1 does not require an investigating authority to request further information from an interested party that has already failed to provide necessary information.[790] Similarly, regarding the requirement to provide ample opportunity to present relevant evidence, the United States argues that an investigating authority is not required to continue to allow an interested party further opportunities to present evidence when this interested party has failed to respond to a request for information.[791]

7.404. In response to China's second claim, the United States argues, as an initial matter, that ten of the challenged determinations do not fall within the scope of Article 6.8 of the Anti-Dumping Agreement since the USDOC did not determine a duty rate for the PRC-wide entity based on facts available in these determinations, but rather re-applied a rate that had been calculated in a prior proceeding[792] or accounted for the cooperation of one of the mandatory respondents, ultimately included within the PRC-wide entity.[793] For the remaining determinations, the United States argues generally that the USDOC had to apply a single duty rate to the PRC-wide entity in order to avoid circumvention in the form of shipments of the subject product through the exporter within the entity subjected to the lowest duty rate.[794] When calculating the single duty rate for the PRC-wide entity, the United States considers that the USDOC was permitted to take into account the non-cooperation of one or more exporters within the entity, and, by extension, that of the PRC-wide entity itself, and resort to facts available on that basis.[795]

7.405. Regarding the as such aspect of China's third claim, the United States contends that China has not demonstrated that the USDOC's use of facts available in assigning duty rates to NME-wide entities represents a norm of general and prospective application.[796] Specifically, the United States asserts that China has failed to describe the precise content of the AFA Norm as the Antidumping Manual merely describes the non-binding nature of the USDOC's practice, by listing the instances in which the USDOC "may" apply adverse inferences in selecting available facts to determine the rate for the NME-wide entity. Moreover, the Antidumping Manual clearly states that it is intended for the internal training of USDOC personnel, and cannot be cited to establish the practice of the USDOC.[797] Furthermore, the United States argues that China has not demonstrated that the excerpts from three USCIT decisions set forth a rule of general and prospective application, and that United States federal courts are limited to deciding the cases before them.[798] Along similar lines, the United States submits that the USDOC anti-dumping determinations on which China relies were based on the specific facts and circumstances of each proceeding and tempered by the

[788] United States' second written submission, paras. 123-125 (referring to Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 300; and *Thailand – Cigarettes (Philippines)*, para. 149).
[789] United States' second written submission, para. 247.
[790] United States' first written submission, paras. 577 and 579.
[791] United States' first written submission, para. 577.
[792] United States' first written submission, paras. 534-536 (referring to Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.234-7.235); and second written submission, paras. 258-259. This argument applies to eight determinations, namely *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, and *Furniture* AR8.
[793] United States' second written submission, paras. 266-269. This argument applies to two determinations, namely *OTR Tires* AR5 and *Diamond Sawblades* AR4.
[794] United States' first written submission, para. 430.
[795] United States' first written submission, paras. 431-433 (referring to Panel Reports, *US – Shrimp (Viet Nam)*, para. 7.263; and *China – Broiler Products*, para 7.306, fn 501).
[796] United States' first written submission, para. 405.
[797] United States' first written submission, para. 415.
[798] United States' comments on China's response to Panel question Nos. 124 and 125, para. 119.

requirement to corroborate selected secondary information.[799] The United States argues that the evidence provided by China does not demonstrate that the USDOC's alleged practice is binding on its future actions. Rather, it shows that the USDOC has discretion when selecting facts available.[800]

7.406. In response to China's first substantive argument regarding the alleged AFA Norm, the United States emphasizes that the USDOC is permitted to take into account the non-cooperation of an exporter within an NME-wide entity, and, by extension, that of the NME-wide entity itself, when selecting facts available for that entity.[801] The United States contends that the USDOC's practice is in accordance with the Anti-Dumping Agreement since, in the application of facts available to an NME-wide entity, the USDOC considers the universe of information on the record[802], corroborates the initially-chosen rate if that rate is based on secondary information, and disregards it if it is found to be unreliable or not relevant or if another rate on the record is considered to have greater probative value.[803] According to the United States, China's second and third substantive arguments constitute claims and fall outside the Panel's terms of reference since they challenge the USDOC's finding of non-cooperation and decision to resort to facts available, whereas China's panel request refers to the alleged AFA Norm only in connection with the selection of facts available by the USDOC.[804] Even if the Panel finds these claims to be within its terms of reference, the United States argues that there is no norm of general and prospective application leading the USDOC to make findings of non-cooperation based on presumptions or following a failure to request the required information.[805]

7.407. Regarding the as applied aspect of China's third claim, the United States submits that this claim is based solely on the existence of the alleged AFA Norm and that the Panel is prevented from examining the WTO consistency of the challenged 30 determinations on another basis.[806] At any rate, the United States repeats its argument that ten challenged determinations[807] fall outside the scope of Article 6.8 because the USDOC did not determine a duty rate based on facts available in these determinations[808] and notes that the alleged AFA Norm was not applied in these determinations, since the USDOC did not make a finding of non-cooperation.[809] With respect to the remaining determinations, the United States argues that the USDOC complied with the requirements of Article 6.8 and Annex II to the Anti-Dumping Agreement by selecting a rate with a factual foundation on the record, which was not contradicted by any substantiated facts or shown to be an unreasonable replacement for the missing information, but rather corroborated by information on the record.[810] According to the United States, the USDOC was permitted to take account of the non-cooperation of exporters within the PRC-wide entity and was not required to disregard this non-cooperation simply because one or more exporters within the entity cooperated.[811]

7.408. In response to China's fourth claim, the United States argues, as an initial matter, that the duty rates assigned to the PRC-wide entity in the 30 challenged determinations fall outside the scope of Article 9.4 of the Anti-Dumping Agreement either because exporters within the PRC-wide entity failed to respond to the USDOC's request for quantity and value (Q&V) information and thereby removed the entity from the pool of respondents from which the USDOC selects

[799] United States' first written submission, para. 412.
[800] United States' first written submission, paras. 408-409 and 412 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 198; *US – Carbon Steel (India)*, paras. 4.467-4.469; and *Argentina – Import Measures*, paras. 5.137-5.143) .
[801] United States' second written submission, paras. 278 and 290.
[802] United States' first written submission, para. 475.
[803] United States' first written submission, para. 470; and second written submission, para. 299.
[804] United States' response to Panel question No. 74, paras. 185-187 (referring to Appellate Body Reports, *Guatemala – Cement I*, para. 72; and *Korea – Dairy*, para. 139).
[805] United States' response to Panel question No. 76, paras. 190-192.
[806] United States' second written submission, para. 174.
[807] *OTR Tires* AR5, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, and *Furniture* AR8.
[808] United States' second written submission, paras. 259-262 (referring to Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.234-7.235); and response to Panel question No. 133, paras. 107-111 and 116.
[809] United States' second written submission, para. 262.
[810] United States' first written submission, para. 540. See also United States' response to Panel question Nos. 85 and 133, paras. 212-315 and 112-114.
[811] United States' second written submission, paras. 308 and 311 (citing Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.468-4.469).

mandatory respondents[812] or by virtue of the fact that one or more exporters that were initially chosen as mandatory respondents and individually examined failed the Separate Rate Test and were included within the PRC-wide entity.[813] For the nine challenged determinations[814] in which the USDOC re-applied a rate from an earlier segment of the proceedings, the United States submits that the USDOC was not obligated to assign a PRC-wide rate different from that assigned to the entity in the earlier segments of the proceedings.[815] Even if Article 9.4 was applicable to these PRC-wide rates, the United States argues that the first sentence of Article 9.4 only imposes a ceiling on the level of "all others" rates and does not prevent an investigating authority from applying multiple rates for different exporters within this ceiling, in particular for exporters that have failed to cooperate.[816]

7.5.4 Main arguments of the third parties

7.5.4.1 European Union

7.409. With respect to China's first claim, the European Union considers that the close relationship necessary for multiple exporters to constitute a single entity will not necessarily imply that such exporters are sufficiently related to communicate and coordinate amongst each other, especially for country-wide entities where there is not necessarily one mother company.[817] The European Union calls on the Panel to strike a balance between conflicting interests by requiring the investigating authority to notify all individual exporters within an entity of basic information about the investigation at the outset of the investigation. Provided this is done, the European Union considers that the investigating authority can legitimately channel subsequent requests for more detailed information through the single entity and that it will be the single entity's task to distribute such requests to the individual exporters within the entity.[818]

7.410. With respect to China's second claim, the European Union submits that information for an entity consisting of multiple exporters is not complete, and that recourse to facts available is thus necessary if information pertaining to some individual exporters is missing.[819] The European Union acknowledges that facts available should only be used to replace information that an interested party has failed to provide following the investigating authority's request[820] but considers that an investigating authority should be permitted to cease communication with interested parties that have made it clear that they do not intend to cooperate and that non-cooperation of some exporters within a single entity can be considered as non-cooperation by the entity itself.[821]

7.411. With respect to China's third claim, the European Union argues that the nature of the alleged AFA Norm and the way it is characterized by China determine the evidence required to prove its existence. In this regard, the European Union notes that, in addition to a norm of general and prospective application, concerted action or practice could also be susceptible to a challenge in WTO dispute settlement.[822] On the substantive issue of the selection of facts available, the European Union argues that an arbitrary exclusion or choice of certain facts aimed at arriving at a

[812] United States' second written submission, paras. 229-230. This argument applies with respect to 14 of the challenged determinations, namely *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, and *Furniture* OI.

[813] United States' second written submission, para. 231. This argument applies with respect to 14 of the challenged determinations, namely *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* AR5, *OCTG* OI, *Diamond Sawblades* OI, *Ribbons* OI, *Bags* OI, *PET Film* OI, *Furniture* OI, and *Furniture* AR7.

[814] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, and *Furniture* AR8.

[815] United States' second written submission, paras. 226 and 232.

[816] United States' first written submission, paras. 398-400 (citing Appellate Body Reports, *US – Hot-Rolled Steel*, para. 116; and *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 452 and 459).

[817] European Union's third-party submission, para. 83.

[818] European Union's third-party submission, para. 84; and third-party statement, para. 11.

[819] European Union's third-party submission, para. 86.

[820] European Union's third-party submission, para. 89 (referring to Panel Report, *China – Autos (US)*, para. 7.136).

[821] European Union's third-party submission, para. 91.

[822] European Union's third-party submission, para. 78 (referring to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 794; and *Argentina – Import Measures*, paras. 5.106, 5.108, and 5.110).

particularly high, punitive margin is not permissible.[823] For NME-wide entities, the European Union submits that the investigating authority should take into account all substantiated facts provided by exporters, even if these do not represent all the information requested, but asserts that this obligation applies only insofar as the failure to provide information by one or more exporters within the NME-wide entity does not render the information provided by cooperating exporters unusable.[824]

7.412. With respect to China's fourth claim, the European Union argues that the first sentence of Article 9.4 of the Anti-Dumping Agreement does not require the application of a single "all others" rate, but rather allows for multiple rates, provided that all such rates remain below the ceiling set forth in that provision.[825]

7.5.4.2 Brazil

7.413. With respect to China's second claim, Brazil agrees with the United States that any instance of failure to respond to requests for necessary information, including initial requests for the purpose of respondent selection pursuant to Article 6.10 of the Anti-Dumping Agreement, justifies recourse to facts available.[826] With respect to China's third claim, Brazil suggests that the "best" information is the most reliable information, regardless of whether this information is positive or negative to the interests of the non-cooperating interested party.[827] With respect to China's fourth claim, Brazil argues that the ceiling provided for in the first sentence of Article 9.4 of the Anti-Dumping Agreement does not apply to exporters that have failed to provide information requested for the purpose of sampling.[828]

7.5.4.3 Viet Nam

7.414. With respect to China's fourth claim, Viet Nam argues that the first sentence of Article 9.4 of the Anti-Dumping Agreement requires the calculation of a single "all others" rate[829] and that this provision governs exclusively the duty rate assigned to exporters not individually examined and does not provide exceptions to the application of the maximum ceiling or impose prerequisites on exporters in order to receive this rate.[830]

7.5.5 Evaluation by the Panel

7.415. In light of the claims and arguments advanced by the parties, we proceed with our analysis as follows: We commence by addressing whether the alleged AFA Norm constitutes a norm of general and prospective application that can be challenged as such in WTO dispute settlement. If, as argued by China, such a norm exists, we will assess China's as such claims under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. We will then proceed with our analysis of China's as applied claims against the 30 challenged determinations under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement.

7.5.5.1 Whether the AFA Norm is inconsistent, as such, with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement

7.416. China claims that, by virtue of the alleged AFA Norm, whenever the USDOC finds that an NME-wide entity has failed to cooperate to the best of its ability, it follows a process designed to

[823] European Union's third-party submission, para. 92 (referring to Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 297; and *US – Carbon Steel (India)*, paras. 4.419 and 4.468).
[824] European Union's third-party submission, para. 92 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 288 and 294).
[825] European Union's third-party submission, para. 68 (referring to Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.217).
[826] Brazil's third-party submission, paras. 26-27.
[827] Brazil's third-party submission, paras. 23 and 25.
[828] Brazil's third-party submission, para. 27 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.431).
[829] Viet Nam's third-party submission, paras. 60 and 63 (citing Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 459).
[830] Viet Nam's third-party submission, paras. 56-57 and 62 (citing Panel Report, *US – Shrimp (Viet Nam)*, para. 7.245).

systematically adopt adverse inferences and select facts that are adverse to the interests of the NME-wide entity and the exporters or producers within it.[831] China argues that the alleged AFA Norm constitutes a norm of general and prospective application, which is, as such, inconsistent with Article 6.8 of and paragraph 7 of Annex II to the Anti-Dumping Agreement.

7.417. The United States challenges the existence of the alleged AFA Norm, noting that China has not met the high burden to show that the measure described amounts to a norm of general and prospective application.[832] The United States further argues that the alleged AFA Norm, as described by China, was not properly identified in the panel request and is therefore outside the terms of reference of the Panel.[833] In addition, the United States submits that even if such a norm exists, it is not inconsistent with its obligations under Article 6.8 of and paragraph 7 of Annex II to the Anti-Dumping Agreement.[834]

7.418. In light of the arguments of the parties, we will first examine whether the alleged AFA Norm, as China submits, exists. Only if it is found to exist will we address the United States' objection that the alleged AFA Norm falls outside our terms of reference, as well as China's as such claims under Article 6.8 of and paragraph 7 of Annex II to the Anti-Dumping Agreement.

7.5.5.1.1 Whether the AFA Norm constitutes a measure that can be challenged as such in WTO dispute settlement

7.419. We recall that, as recognized in previous WTO disputes, WTO Members can challenge, as such, norms of general and prospective application not written in legally binding documents.[835] The Appellate Body has explained that, in such cases, a complaining Member has to demonstrate, at a minimum: (a) that the alleged rule or norm is attributable to the responding Member; (b) its precise content; and (c) that it has general and prospective application.[836]

7.420. With respect to the attribution to the United States, China notes that the alleged AFA Norm arises from acts or omissions of the USDOC, an agency of the United States' government tasked with implementing United States anti-dumping laws and regulations.[837] The United States argues that, as China has not established the precise content of the alleged AFA Norm, the question of whether it is attributable to the United States does not arise.[838] Hence, we find it appropriate to start our assessment with the precise content of the alleged AFA Norm. If we find that China has established the precise content of the alleged AFA Norm, we will proceed with our assessment of whether that Norm is attributable to the United States. If the answer to this question is also in the affirmative, we will analyse whether the alleged AFA Norm has general and prospective application.

7.421. At the outset of our analysis, we note that China has adduced the same evidence in seeking to establish both the precise content and the general and prospective application of the alleged AFA Norm, namely: an excerpt from the Antidumping Manual[839], excerpts from three USCIT decisions[840], and 86 USDOC anti-dumping determinations.[841] We will therefore examine

[831] China's first written submission, paras. 15, 428, 436, 458, 473, 476, 492, 639, and 641; response to Panel question Nos. 64, 67, 77, 78, and 83, paras. 316, 375, 412, 416, and 840; second written submission, paras. 342, 358, 379, and 404; and China's opening statement at the second meeting of the Panel, para. 63.

[832] United States' first written submission, para. 419; and second written submission, para. 177.

[833] United States' comments on China's response to Panel question No. 115, para. 75.

[834] United States' first written submission, paras. 443-502.

[835] See Appellate Body Report, *Argentina – Import Measures*, paras. 5.99-5.111.

[836] Appellate Body Report, *US – Zeroing (EC)*, para. 198. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.104.

[837] China's first written submission, para. 431.

[838] United States' response to Panel question No. 73, para. 182.

[839] China's response to Panel question No. 115(b), paras. 128-131. See also China's first written submission, paras. 444-446.

[840] China's response to Panel question No. 115(c), paras. 132-138. See also China's first written submission, paras. 453-455.

[841] China's response to Panel question No. 116, para. 157. See also China's first written submission, paras. 437-442, 447-452, and 456-472. We note that, in response to Panel question No. 116, China listed 92 determinations as relevant evidence of the existence of the alleged AFA Norm as a norm of general and prospective application. Yet, six of these determinations (*Aluminum* OI, *Diamond Sawblades* OI, *Solar* OI, *Steel Cylinders* OI, *Wood Flooring* OI, and *Ribbons* AR3) were included twice in China's list, which brings the number of determinations down to 86. (China's response to Panel question No. 116, para. 157).

whether the alleged AFA Norm amounts to a norm of general and prospective application on the basis of this evidence.

7.5.5.1.1.1 The precise content of the alleged AFA Norm

7.422. China describes the precise content of the alleged AFA Norm as follows:

> [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.[842] (emphasis original)

7.423. We note, and China has made it clear, that the alleged AFA Norm only applies in anti-dumping proceedings where the USDOC finds that the NME-wide entity failed to cooperate to the best of its ability. China states that this finding of non-cooperation is not part of the alleged AFA Norm.[843] Rather, the finding of non-cooperation delimits the universe of situations in which the alleged AFA Norm applies, i.e. whenever the USDOC finds that the NME-wide entity failed to cooperate to the best of its ability.

7.424. China submits that the alleged AFA Norm consists of a process by which the USDOC systematically[844], mechanically[845], indiscriminately[846] or automatically[847] adopts adverse inferences, and selects adverse facts (or unfavourable facts[848]) from the universe of secondary information on the record of the relevant investigation or administrative review, with respect to the determination of the duty rate for the NME-wide entity. For China, the adoption of adverse inferences and selection of adverse facts are "dictated by the procedural circumstance of non-cooperation alone", irrespective of the particularities and specific circumstances of the non-cooperation by the NME-wide entity.[849]

7.425. As for the meaning of the terms "adverse inferences" and "adverse facts", China argues that, when the USDOC finds that the NME-wide entity has not cooperated to the best of its ability, it draws an inference that the information missing from the record, if produced, would have been

---

[842] China's opening statement at the second meeting of the Panel, para. 63. See also China's first written submission, paras. 15 and 428; response to Panel question Nos. 66(a), 67(a), 78, and 115, paras. 367, 368, 376, and 127; and second written submission, paras. 342, 346, 358, 404, 407, 409, and 423. We observe that China explained its understanding of the alleged AFA Norm at an early stage of the proceedings. Notably, in its first written submission, it presented arguments regarding the precise content of the alleged measure, which, according to China, constitutes a "process" consisting of the following: "whenever USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically uses inferences that are adverse to the interests of the NME-wide entity, and each of the producers/exporters included within that fictional entity, by selecting adverse information from amongst the secondary source information available." (China's first written submission, para. 428. See also ibid. para. 15). We thus disagree with the United States' position that China's arguments relating to the content of the process that forms part of the alleged AFA Norm were not presented in China's first written submission. (United States' second written submission, para. 124).

[843] China's response to Panel question No. 67(b), para. 379.

[844] China's first written submission, para. 428; response to Panel question No. 67(a), para. 375; and second written submission, para. 342.

[845] China's second written submission, paras. 333, 407, and 412.

[846] China's first written submission, para. 493; and response to Panel question No. 77, para. 415.

[847] China's second written submission, paras. 333, 407, and 414.

[848] China's response to Panel question Nos. 66(a) and 67(a), paras. 367, 370, and 376.

[849] China's response to Panel question No. 67(a), para. 379. In its first written submission, China argued that "adverse facts" may be drawn from:

(1) Secondary information, such as information derived from:

(i) The petition;

(ii) A final determination in a countervailing duty investigation or an antidumping investigation;

(iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or

(2) Any other information placed on the record.

(China's first written submission, para. 434 (quoting USDOC Regulations, Section 351-308, (Exhibit CHN-152), Subparagraph (c)). See also ibid. paras. 441-442, and fns 485 and 727).

We thus disagree with the United States' position to the extent that it suggests that China did not explain its understanding of the term "adverse facts" in its first written submission. (United States' second written submission, para. 124).

unfavourable to the NME-wide entity and all the exporters in it.[850] On the basis of such inference, the USDOC selects from the universe of available secondary information, facts "sufficiently adverse" to the interests of the NME-wide entity[851], including the exporters within it, in order to determine the rate for the entity as a whole.[852] According to China, the rate that the USDOC applies to the non-cooperating NME-wide entity is "generally"[853], "frequently"[854] or "typically"[855] the highest rate based on the information from the petition; the highest calculated rate of any respondent; or the highest margin determined for any party in the investigation or any administrative review.[856] Although China argues that in every case the anti-dumping duty rate assigned to the NME-wide entity has been high[857], it does not contend that the alleged AFA Norm requires the USDOC to impose the highest of the rates available on the record.[858] In other words, the assignment of the highest possible duty rate to the NME-wide entity is not a necessary feature of the alleged AFA Norm.

7.426. After these brief explanations, we now turn to the sets of evidence that China submitted in order to demonstrate the precise content of the alleged AFA Norm, namely, certain passages from the USDOC's Antidumping Manual, excerpts from three USCIT decisions, and 86 USDOC anti-dumping determinations.[859] Below, we examine each of these three sets of evidence individually and make our conclusion on the basis of a holistic examination thereof.

Antidumping Manual

7.427. China quotes the following passage from the Antidumping Manual:

> In an antidumping investigation, all companies other than those that have been determined to be eligible for a separate rate are part of the NME entity and receive the NME-wide rate. That rate may be based on adverse facts available if, for example, some exporters that are part of the NME-wide entity do not respond to the antidumping questionnaire. In many cases, the [USDOC] concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded do not account for all imports of subject merchandise.
>
> ...
>
> Occasionally, the NME-wide rate may be changed through an administrative review. This happens when 1) the [USDOC] is reviewing the NME entity because the [USDOC] is reviewing an exporter that is part of the NME entity, and 2) one of the calculated margins for a respondent is higher than the current NME-wide rate.[860] (emphasis added; footnotes omitted)

7.428. This excerpt appears under the heading "NME-Wide Rate" in the Antidumping Manual. The first paragraph begins by recalling that all NME companies, other than those eligible for a separate rate, receive an NME-wide rate. The second paragraph states that the rate "may" be based on "adverse facts available", and gives one example when this may happen, i.e., if exporters that are part of the NME-wide entity do not respond to the dumping questionnaire. It goes on to note that, "[i]n many cases", the USDOC concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded to the questionnaire do not account for all imports of subject merchandise.

7.429. In our view, the quoted part of the Antidumping Manual does not support China's arguments regarding the precise content of the alleged AFA Norm. As an initial matter, we note that the so-called trigger of the alleged AFA Norm (i.e. a finding by the USDOC that the NME-wide

[850] China's response to Panel question No. 66(a), para. 366.
[851] China's first written submission, paras. 437-438.
[852] China's response to Panel question No. 67(a), para. 376.
[853] China's first written submission, para. 448.
[854] China's first written submission, para. 442.
[855] China's response to Panel question No. 67(b), para. 383.
[856] China's response to Panel question No. 65, para. 347; and second written submission, para. 349.
[857] China's response to Panel question No. 65, para. 347.
[858] China's second written submission, para. 350.
[859] China's response to Panel questions No. 123 and 127, paras. 185 and 213, respectively.
[860] Antidumping Manual, Chapter 10, (Exhibit CHN-23), pp. 7-8.

entity has failed to cooperate) is not laid down in the Antidumping Manual in the same way it is laid down in the description put forward by China. We recall that, according to China, the trigger condition is not part of the alleged AFA Norm. Yet, such trigger defines the universe of situations in which the alleged AFA Norm applies and, hence, is an important element to ascertain when seeking to establish the existence of the alleged AFA Norm. In this connection, the Antidumping Manual provides an example of non-cooperation, namely, that some exporters which are part of the NME-wide entity fail to respond to the dumping questionnaire. However, China has observed elsewhere that there are other circumstances under which the USDOC applies the alleged AFA Norm, including for instance, when the exporters that are part of the NME-wide entity do not respond to the Q&V questionnaire.[861] Accordingly, it appears to us that the full spectrum of situations in which the alleged AFA Norm applies is not mentioned in the Antidumping Manual.

7.430. Moreover, China's definition of the alleged AFA Norm refers to a "process" whereby the USDOC, after a finding of non-cooperation by an NME-wide entity, draws an adverse inference and selects facts that are adverse to the interests of the entity and the exporters within it. The quoted passage of the Antidumping Manual, however, does not mention such a process although it states that the duty rate of an NME-wide entity may be based on adverse facts available where some exporters within the entity do not respond to the dumping questionnaire. Thus, the process that informs the alleged AFA Norm does not appear in the Antidumping Manual in the manner described in China's definition of the alleged measure.

7.431. Further, we find the use of the modal verb "may" noteworthy in this particular context because it suggests that the USDOC has discretion to use adverse facts available. China argues that, despite the permissive language, the Antidumping Manual gives an example of when the NME-wide rate "*will* be based on adverse facts available".[862] In our opinion, however, the use of the modal verb in the first clause of the sentence continues to qualify the specific example that ensues. In other words, we read the quoted passage as stating that in cases where, for example, exporters fail to respond to the dumping questionnaire, the USDOC is permitted to (but not necessarily will) base the NME-wide rate on adverse facts available. We are therefore not convinced that the use of such permissive language somehow gives the cited excerpts of the Antidumping Manual normative character, and accordingly, that it demonstrates the precise content of the alleged AFA Norm that China seeks to establish.

7.432. China further contends that the second paragraph of the quote from the Antidumping Manual also demonstrates the existence of the alleged AFA Norm because it shows that in an administrative review where the USDOC does not otherwise determine a duty rate for the entity, it nonetheless modifies the entity's duty rate solely for the purpose of assigning to it a higher rate.[863] We are not convinced by this argument. We note that this part of the quote starts out by saying that, "[o]ccasionally", the NME-wide "may" be changed, and then describes two situations in which such a change is made. The second situation is what China's argument refers to, namely, where the USDOC finds that the dumping margin calculated for a respondent is higher than the duty rate assigned to the NME-wide entity. We note, again, that this statement contains the modal verb "may" which gives the USDOC discretion to act in a particular manner, rather than requiring it to do so. Further, the statement makes no reference to the content of the alleged AFA Norm, namely, a process whereby the USDOC draws adverse inferences and selects facts that are adverse to the interests of the NME-wide entity and the exporters within it.

7.433. In sum, in our view, the Antidumping Manual does not support China's argument regarding the precise content of the alleged AFA Norm.

USCIT decisions

7.434. China submits three decisions by the USCIT that, in its view, "have recognized the existence of a consistent practice in USDOC determinations" in relation to the alleged AFA Norm.[864]

[861] See, for instance, China's response to Panel question Nos. 54, 55, and 78, paras. 280, 281, 284, 285, 286, and 582.
[862] China's response to question No. 70, para. 408. See also China's response to question No. 115(b), para. 128. (emphasis original)
[863] China's response to question No. 70, para. 410. See also China's first written submission, para. 446.
[864] China's first written submission, para. 453.

The first is the USCIT decision in *Peer Bearing Co.-Changshan v. United States* which reads in relevant part:

> In calculating the PRC-wide entity rate, it has been [USDOC's] longstanding practice of assigning to respondents who fail to cooperate with [USDOC's] investigation the highest margin calculated for any party in the less-than-fair-value investigation or in any administrative review.[865] (emphasis added)

7.435. In our opinion, this excerpt from the USCIT decision does not demonstrate the precise content of the alleged AFA Norm described by China. As an initial matter, the trigger for the application of the alleged AFA Norm (i.e. the USDOC's finding of non-cooperation by the NME-wide entity) is not reflected in the quoted excerpt, which refers to non-cooperating respondents, and not to a non-cooperating NME-wide entity. Although China asserts that such trigger is not part of the alleged AFA Norm, we believe that it is important to the extent that it defines the universe of situations in which the alleged AFA Norm applies (i.e. only in those cases where the USDOC finds an NME-wide entity to be non-cooperating). As we see it, the fact that the cited excerpt does not specify the circumstances in which the alleged AFA Norm will apply undermines China's position that this court decision shows the precise content of the alleged measure.

7.436. Furthermore, China's description of the precise content of the alleged AFA Norm entails a "process" whereby the USDOC draws adverse inferences from the non-cooperation of an NME-wide entity and selects adverse facts available in the calculation of the NME-wide anti-dumping duty rate. We also recall China's statement that the alleged AFA Norm does not necessarily require the assignment of the highest rate on the record to the NME-wide entity.[866] Yet, this court decision does not mention the process of drawing adverse inferences and the consequent selection of adverse facts, but rather refers to the "long-standing practice" of assigning the highest margin in either the original investigation or any prior administrative review.

7.437. The second court decision is the USCIT decision in *Hubbel Power Systems, Inc. v. United States*. The part of this decision that China cites reads:

> Furthermore, in NME reviews, respondents not individually examined must demonstrate independence from state control in order to receive the all-other's rate and avoid a prohibitive PRC-wide rate.[867] (emphasis added)

7.438. This excerpt refers to "respondents not individually examined" as the subjects of the PRC-wide "prohibitive" duty rate. However, the alleged AFA Norm, as described by China, applies in the determination of the duty rate for the NME-wide entity when the latter is found to have failed to cooperate. As we understand from the facts put before us and from the parties' arguments, not all unexamined respondents become necessarily part of the NME-wide entity[868]; nor are all the exporters within such an entity necessarily unexamined.[869]

7.439. Moreover, we note that the quoted excerpt appears in a section of the decision where the USCIT explains the different types of anti-dumping duty rates that the USDOC normally determines in NME proceedings. In that context, the decision refers to an NME-wide rate as "prohibitive". Elsewhere in its decision, the USCIT alludes to a prohibitive rate as one that "may

[865] USCIT, Peer Bearing Co.-Changshan v. United States, 587 F.Supp.2d 1319 (CIT 2008), (Exhibit CHN-163), p. 1327 (quoting USCAFC, Sigma Corp v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), p. 1411).

[866] China's second written submission, para. 350.

[867] USCIT, Hubbel Power Systems, Inc. v. United States, 884 F.Supp.2d 1283 (CIT 2012), (Exhibit CHN-148), p. 1288.

[868] In fact, whenever the USDOC limits its examination to a few respondents, it determines a rate for all the unexamined exporters that pass the Separate Rate Test. This rate is calculated, according to the USDOC's "usual practice", by averaging "the margins for the selected companies, excluding margins that are zero, *de minimis,* or based entirely on facts available". (See, for instance, *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145).

[869] In *OTR Tires* AR5, for instance, the USDOC selected, as a mandatory respondent, a company that was found to be part of the PRC-wide entity. (*OTR Tires* AR5, Decision Memorandum, (Exhibit CHN-478), p. 11).

prevent importation entirely".[870] Thus, the use of the adjective "prohibitive" seems to pertain to the level of a duty, and not to the process of drawing adverse inferences and selecting adverse facts, which is the stated precise content of the alleged AFA Norm. Thus, the quoted excerpt from this court decision does not appear to describe the precise content of the alleged AFA Norm.

7.440. The third court decision is the USCIT decision in *East Sea Seafoods LLC v. United States*, which reads, in the relevant part, as follows:

> [The USCIT] notes that in most, if not all, cases involving a country-wide NME antidumping duty rate, the country-wide margin has been calculated using adverse inferences.[871] (emphasis added)

7.441. This excerpt states that in most, if not all, cases involving an NME-wide entity, the USDOC has calculated the duty rate using adverse inferences. It does not, however, reflect what China describes as the trigger for the application of the alleged AFA Norm (i.e. the USDOC's finding of non-cooperation by the NME-wide entity). As explained in paragraph 7.435 above, although China asserts that this trigger is not part of the alleged AFA Norm, we believe it is an important element as it defines the universe of situations in which the alleged AFA Norm applies. Furthermore, the excerpt refers to the dumping margin for the NME-wide entity being calculated using adverse inferences "in most, if not all, cases involving a country-wide NME antidumping duty rate". When describing the alleged AFA Norm, however, China argues that the USDOC adopts adverse inferences "whenever" it makes a finding of non-cooperation with respect to the NME-wide entity.[872] The excerpt from the USCIT decision therefore does not correspond to China's description of the USDOC's use of adverse inferences under the alleged AFA Norm. We note China's argument that the reference to "'most' cases involving determination of an NME-wide entity" in the USCIT decision is consistent with China's description of the alleged AFA Norm since this Norm does not involve the use of adverse inferences or selection of adverse facts available when the NME-wide entity is considered to have cooperated.[873] We do not find this argument convincing. As mentioned above, the excerpt does not mention the trigger for the application of the alleged AFA Norm (i.e. the USDOC's finding of non-cooperation by the NME-wide entity) and we see nothing in the excerpt that would suggest that the reference to "most" cases was meant as a reference to all cases where the USDOC makes a finding of non-cooperation by the NME-wide entity. In fact, China's argument only serves to highlight the importance of the lack of a reference to the trigger. Therefore, we do not consider that this USCIT decision supports the description of the precise content of the alleged AFA Norm presented by China.

7.442. On this basis, we find that none of the three USCIT decisions examined above supports China's arguments regarding the precise content of the alleged AFA Norm.

USDOC anti-dumping determinations

7.443. In addition to the Antidumping Manual and three USCIT decisions, China has submitted 86 anti-dumping determinations to demonstrate the precise content of the alleged AFA Norm. Of these, 47 relate to investigations and 39 to administrative reviews. China argues that in all 47 investigations, the USDOC made a finding that the NME-wide entity failed to cooperate. In 26 of the 39 administrative reviews, the USDOC made a finding of non-cooperation by the NME-wide entity. In the remaining 13 administrative reviews, the USDOC did not make a finding of non-cooperation with respect to the NME-wide entity, but re-applied a rate imposed in a previous segment of the proceeding after finding that at least one exporter, for which a review was requested, had failed to pass the Separate Rate Test and was for that reason included in the NME-wide entity during the administrative review.[874]

[870] USCIT, Hubbel Power Systems, Inc. v. United States, 884 F.Supp.2d 1283 (CIT 2012), (Exhibit CHN-148), p. 1289.

[871] USCIT, East Sea Seafoods LLC v. United States, 703 F.Supp.2d 1336 (CIT 2010), (Exhibit CHN-134), p. 1354, fn 15.

[872] China's opening statement at the second meeting of the Panel, para. 63.

[873] China's response to Panel question No. 68, para. 393.

[874] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8, *Steel Nails* AR 2011-2012, *Warmwater Shrimp*

7.444. We recall that the alleged AFA Norm is triggered by the USDOC's finding that the NME-wide entity failed to cooperate in an anti-dumping proceeding. Thus, the 13 administrative reviews in which the USDOC did not make such a finding are not relevant to our inquiry into the precise content of the alleged AFA Norm. Accordingly, we base our examination on the remaining 73 determinations (47 original investigations[875] and 26 administrative reviews[876]).

7.445. In all of these 73 determinations, the USDOC recalled that section 776(b) of the *Tariff Act of 1930* provides that, if an interested party fails to cooperate, the USDOC may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.[877] Next, the USDOC discussed, in each of the determinations, the specific situation of the NME-wide entity and the reasons why it was found not to have cooperated to the best of its ability. After making a finding of non-cooperation by the NME-wide entity, the USDOC explicitly stated that the drawing of adverse inferences was "appropriate"[878], "necessary"[879] or "warranted"[880] in

---

from Vietnam AR 2009-2010, *Polyester Staple Fiber* AR 2008-2009, *Cased Pencils* AR 2006-2007, and *Cased Pencils* AR 2007-2008.

[875] *Aluminum* OI, *Coated Paper* OI, *OCTG* OI, *Diamond Sawblades* OI, *Ribbons* OI, *Bags* OI, *PET Film* OI, *Furniture* OI, *Grain Oriented Steel* OI, *Monosodium Glutamate* OI, *Silica Bricks* OI, *Hardwood and Decorative Plywood* OI, *Polyethylene Retail Carrier Bags from Viet Nam* OI, *Kitchen Appliance Shelving and Racks* OI, *Sodium Nitrite* OI, *Circular Welded Carbon Quality Steel Pipe* OI, *Activated Carbon* OI, *Lined Paper Products* OI, *Shrimp* OI, *OTR Tires* OI, *Solar* OI, *Wood Flooring* OI, *Xanthan Gum* OI, *Drawn Stainless Steel Sinks* OI, *Steel Cylinders* OI, *Steel Wheels* OI, *Drill Pipe* OI, *Copper Pipe and Tube* OI, *Woven Electric Blankets* OI, *Citric Acids and Certain Citrate Salts* OI, *Small Diameter Graphite Electrodes* OI, *Lightweight Thermal Paper* OI, *Sodium Hexametaphosphate* OI, *Coated Free Sheet Paper* OI, *Polyester Staple Fiber* OI, *Artist Canvas* OI, *Chlorinated Isocyanurates* OI, *Tissue Paper Products* OI, *Hand Trucks* OI, *Color TV Receivers* OI, *Malleable Iron Pipe Fittings* OI, *Barium Carbonate* OI, *Lawn and Garden Steel Fence Posts* OI, *Silicon Metal from Russia* OI, *Cold-Rolled Carbon Steel Flat Products* OI, *Folding Metal Tables and Chairs* OI, and *Automotive Replacement Glass Windshields* OI. The determinations pertaining to these anti-dumping proceedings are listed in China's response to Panel question No. 116, para. 157.

[876] *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *Furniture* AR7*, Lined Paper Products* AR 2010-2011, *Lined Paper Products* AR 2011-2012, *Glycine* AR 2011-2012, *Polyester Staple Fiber* AR 2010-2011, *Laminated Woven Sacks* AR 2009-2010, *Honey* AR 2001-2002, *Honey* AR 2002-2003, *Honey* AR 2004-2005, *Honey* AR 2006-2007, *Honey* AR 2007-2008, *Tapered Roller Bearings* AR 2005-2006, *Freshwater Crawfish Tail Meat* AR 1999-2000, *Freshwater Crawfish Tail Meat* AR 2000-2001, *Freshwater Crawfish Tail Meat* AR 2002-2003, *Freshwater Crawfish Tail Meat* AR 2004-2005, *Petroleum Wax Candles* AR 2004-2005, *Cased Pencils* AR 2003-2005, *Porcelain-on-Steel Cooking Ware* AR 2003-2004, *Brake Rotors* AR 2003-2004, *Solar* AR1, and *Ribbons* AR3. The determinations pertaining to these anti-dumping proceedings are listed in China's response to Panel question No. 116, para. 157.

[877] See, for instance, *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), pp. 16-17; *Iron Pipe Fittings* OI, Notice of Preliminary Determination, (Exhibit CHN-423), p. 33915; *Barium Carbonate* OI, Notice of Preliminary Determination, (Exhibit CHN-424), p. 12667; *Lawn and Garden Steel Fence Posts* OI, Notice of Preliminary Determination, (Exhibit CHN-425), p. 72143; *Cold-Rolled Carbon Steel Flat Products* OI, Notice of Preliminary Determination, (Exhibit CHN-427), p. 31237; *Polyester Staple Fiber* AR 2010-2011, Preliminary Results, (Exhibit CHN-159), p. 39993; *Petroleum Wax Candles* AR 2004-2005, Preliminary Results, (Exhibit CHN-440), pp. 35614-36615; *Honey* AR 2001-2002, Preliminary Results, (Exhibit CHN-443), p. 69991; *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389), pp. 38879-38880; *Freshwater Crawfish Tail Meat* AR 2000-2001, Notice of Preliminary Results, (Exhibit CHN-444), pp. 63881-63882; *Cased Pencils* AR 2003-2004, Preliminary Results, (Exhibit CHN-322), p. 76761; and *Brake Rotors* AR 2003-2004, Final Results, (Exhibit CHN-388), p. 69939.

[878] See, for instance, *Solar* OI, Final Determination, (Exhibit CHN-44), p. 63794; *Aluminum* OI, Final Determination, (Exhibit CHN-32), p. 18529; *Woven Electric Blankets* OI, Final Determination, (Exhibit CHN-334), p. 38461; *Lined Paper Products* OI, Preliminary Determination, (Exhibit CHN-420), p. 19701; *PET Film* OI, Preliminary Determination, (Exhibit CHN-112), p. 24557; *Automotive Replacement Glass Windshields* OI, Notice of Preliminary Determination, (Exhibit CHN-429), p. 48237; *Folding Metal Tables and Chairs* OI, Notice of Preliminary Determination, (Exhibit CHN-428), p. 60189; *Steel Nails* AR 2008-2009, Issues and Decision Memorandum, (Exhibit CHN-431), p. 28; *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389), p. 38879; and *Tapered Roller Bearings* AR 2005-2006, Preliminary Results, (Exhibit CHN-438), p. 14079.

[879] *Lined Paper Products* AR 2011-2012, Decision Memorandum, (Exhibit CHN-432), p. 9; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-439), pp. 59435-59436; *Cased Pencils* AR 2003-2004, Preliminary Results, (Exhibit CHN-322), p. 76761; and *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389), p. 38879.

[880] *Citric Acids and Certain Citrate Salts* OI, Final Determination, (Exhibit CHN-337), p. 16841; *Sodium Nitrite* OI, Final Determination, (Exhibit CHN-339), p. 38985; *Chlorinated Isyocianurates* OI, Notice of Preliminary Determination, (Exhibit CHN-422), p. 75299; *Steel Nails* AR 2008-2009, Issues and Decision Memorandum, (Exhibit CHN-431), p. 28; *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 6; *Laminated Woven Sacks* AR 2009-2010, Final Results, (Exhibit CHN-367), p. 21334; *Freshwater Crawfish Tail Meat* AR 2000-2001, Notice of Preliminary Results, (Exhibit CHN-444), p. 63881; and *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 18.

view of section 776(b) of the *Tariff Act of 1930*. In several of these 73 determinations, the USDOC noted that the drawing of adverse inferences aimed at "ensur[ing] that the party d[id] not obtain a more favorable result by failing to cooperate than if it had cooperated fully".[881] In several other determinations, the USDOC referred to its "practice" to ensure that the margin is "sufficiently adverse as to effectuate the purpose of the facts available role to induce respondents to provide the [USDOC] with complete and accurate information in a timely manner".[882]

7.446. After having determined that adverse inferences were appropriate, necessary or warranted with respect to the non-cooperating NME-wide entity, the USDOC proceeded to determine, in each of the 73 determinations, the rate applicable to the entity as a whole. The USDOC noted that, in selecting available facts as "adverse facts available" or "AFA", section 776(b) of the *Tariff Act of 1930* authorized the USDOC to rely on information derived from the petition; the final determination; a previous administrative review; or other information placed on the record.[883] In

[881] See, for instance, *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), p. 17; *Xanthan Gum* OI, Issues and Decision Memorandum, (Exhibit CHN-410), p. 6; *Solar* OI, Final Determination, (Exhibit CHN-44), pp. 63794-63795; *Wood Flooring* OI, Final Determination, (Exhibit CHN-49), p. 64322; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77971; *Aluminum* OI, Final Determination, (Exhibit CHN-32), p. 18529; *Copper Pipe and Tube* OI, Final Determination, (Exhibit CHN-333), p. 60729; *Carrier Bags from Viet Nam* OI, Preliminary Determination, (Exhibit CHN-416), p. 56818; *Thermal Paper* OI, Preliminary Determination, (Exhibit CHN-418), p. 27509; *Iron Pipe Fittings* OI, Notice of Preliminary Determination, (Exhibit CHN-423), p. 33915; *Barium Carbonate* OI, Notice of Preliminary Determination, (Exhibit CHN-424), p. 12667; *Lawn and Garden Steel Fence Posts* OI, Notice of Preliminary Determination, (Exhibit CHN-425), p. 72143; *Silicon Metal from Russia* OI, Notice of Preliminary Determination, (Exhibit CHN-426), p. 59259; *Cold-Rolled Carbon Steel Flat Products* OI, Notice of Preliminary Determination, (Exhibit CHN-427), p. 31237; *Polyester Staple Fiber* AR 2010-2011, Preliminary Results, (Exhibit CHN-159), p. 39993; *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 7; *Honey* AR 2007-2008, Preliminary Results, (Exhibit CHN-313), p. 68252; *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389), p. 38878; *Honey* AR 2001-2002, Preliminary Results, (Exhibit CHN-443), p. 69991; *Tapered Roller Bearings* AR 2005-2006, Preliminary Results, (Exhibit CHN-438), p. 14080; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, *(*Exhibit CHN-439), p. 59436; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results, (Exhibit CHN-441), p. 76029; *Brake Rotors* AR 2003-2004, Final Results, (Exhibit CHN-388), p. 69939; and *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 18.

[882] See, for instance, *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77971; *Xhantan Gum* OI, Issues and Decision Memorandum, (Exhibit CHN-410), p. 6; *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), pp. 16-17; *Solar* OI, Final Determination, (Exhibit CHN-44), p. 63794; *Wood Flooring* OI, Final Determination, (Exhibit CHN-49), p. 64322; *Aluminum* OI, Final Determination, (Exhibit CHN-32), p. 18529; *Copper Pipe and Tube* OI, Final Determination, (Exhibit CHN-333), p. 60729; *Carrier Bags from Viet Nam* OI, Preliminary Determination, (Exhibit CHN-416), p. 65818; *Thermal Paper* OI, Preliminary Determination, (Exhibit CHN-418), p. 27509; *Circular Welded Carbon Quality Steel Pipe* OI, Preliminary Determination, (Exhibit CHN-314), p. 2452; *Coated Free Sheet Paper* OI, Preliminary Determination, (Exhibit CHN-317), p. 30762; *Activated Carbon* OI, Preliminary Determination, (Exhibit CHN-321), p. 59731; *Lined Paper Products* OI, Preliminary Determination, (Exhibit CHN-420), p. 19701; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77128; *Folding Metal Tables and Chairs* OI, Notice of Preliminary Determination, (Exhibit CHN-428), p. 30189; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-439), p. 59436; *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389), p. 38880; *Honey* AR 2007-2008, Preliminary Results, (Exhibit CHN-313), p. 68252; *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 7; *Honey* AR 2001-2002, Preliminary Results, (Exhibit CHN-443), p. 69991; *Tapered Roller Bearings* AR 2005-2006, Preliminary Results, (Exhibit CHN-438), p. 14080; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results,(Exhibit CHN-441), p. 76029; and *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 18.

[883] See, for instance, *Hardwood* OI, Decision Memorandum, (Exhibit CHN-409), p. 19; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77970; *Drill Pipe* OI, Preliminary Determination, (Exhibit CHN-413), p. 51008; *Kitchen Appliances Shelving and Racks* OI, Preliminary Determination, (Exhibit CHN-312), p. 9596; *Drawn Stainless Steel Sinks* OI, Decision Memorandum, (Exhibit CHN-412), p. 13; *Steel Wheels* OI, Preliminary Determination, (Exhibit CHN-309), p. 67711; *Xhantan Gum* OI, Issues and Decision Memorandum, (Exhibit CHN-410), pp. 13-14; *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), p. 16; *Solar* OI, Final Determination, (Exhibit CHN-44), p. 63794; *Aluminum* OI, Final Determination, (Exhibit CHN-32), p. 18529; *Copper Pipe and Tube* OI, Final Determination, (Exhibit CHN-333), p. 60729; *Woven Electric Blankets* OI, Preliminary Results, (Exhibit CHN-334), p. 38461; *Carrier Bags from Viet Nam* OI, Preliminary Determination, (Exhibit CHN-416), p. 65818; *Small Diameter Graphite Electrodes* OI, Final Determination, (Exhibit CHN-338), p. 2053; *Thermal Paper* OI, Preliminary Determination, (Exhibit CHN-418), p. 27509; *Circular Welded Carbon Quality Steel Pipe* OI, Preliminary Determination, (Exhibit CHN-314), p. 2452; *Coated Free Sheet Paper* OI, Preliminary Determination, (Exhibit CHN-317), p. 30762; *Activated Carbon* OI, Preliminary Determination, (Exhibit CHN-321), p. 59731; *Lined Paper Products* OI, Preliminary Determination, (Exhibit CHN-420), pp. 19701-19702; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77128; *Folding Metal Tables and Chairs* OI, Notice of Preliminary Determination, (Exhibit CHN-428), p. 30189; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-

each of the 47 original investigations included in the pool of 73 determinations, the USDOC assigned to the NME-wide entity either a rate alleged in the petition[884] or the highest transaction-specific margin determined for an individually-examined respondent in the same investigation.[885] In the USDOC's view, selecting the highest margin from any segment of the proceedings "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".[886]

7.447. The United States criticizes China's reliance on these 73 determinations in describing the precise content of the alleged AFA Norm on three grounds. First, the United States considers that the USDOC's selection of facts available in cases of non-cooperation is case-specific.[887] We observe in this respect that, while the nature and magnitude of the rate applied by the USDOC to the non-cooperating NME-wide entity may vary from case to case, it appears from the review of the 73 anti-dumping determinations discussed above that the precise content of the alleged AFA Norm corresponds to China's description, namely, that, upon a finding of non-cooperation for the NME-wide entity, the USDOC systematically adopted adverse inferences and selected facts that were adverse to the interests of the entity and the exporters within it. In other words, although the rates determined for the NME-wide entity varied in these determinations, the USDOC described the process that led to the determination of those rates in the same way, which paralleled China's description of the alleged AFA Norm.

7.448. Second, the United States posits that the USDOC's selection of facts available in cases of non-cooperation is tempered by the requirement to corroborate the applicable rate if drawn from secondary information.[888] We observe that, pursuant to section 776(c) of the *Tariff Act of 1930*, when the USDOC relies on secondary information rather than on information obtained in the course of an investigation or review, the USDOC must, to the extent practicable, corroborate the information selected with the information obtained in the course of an investigation or review.[889] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act[890] stipulates that the statutory requirement to corroborate the secondary information selected aims to ensure that such information has probative value. The USDOC has understood that information has probative value insofar as it is both reliable and relevant.[891]

---

439), p. 59436; *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389), p. 38880; *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 7; *Honey* AR 2007-2008, Preliminary Results, (Exhibit CHN-313), p. 68252; *Honey* AR 2001-2002, Preliminary Results, (Exhibit CHN-443), p. 69991; *Tapered Roller Bearings* AR 2005-2006, Preliminary Results, (Exhibit CHN-438), p. 14080; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results, (Exhibit CHN-441), p. 76029; and *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 18.

[884] See, for instance, *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), p. 17; *Monosodium Glutamate* OI, Decision Memorandum, (Exhibit CHN-407), p. 13; *Solar* OI, Final Determination, (Exhibit CHN-44), p. 63794; *Polyester Staple Fiber* OI, Preliminary Determination, (Exhibit CHN-419), p. 77377; *Lined Paper Products* OI, Preliminary Determination, (Exhibit CHN-420), p. 19702; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77129; and *Artist Canvas* OI, Preliminary Determination, (Exhibit CHN-421), p. 67418.

[885] See, for instance, *Silica Bricks* OI, Decision Memorandum, (Exhibit CHN-408), pp. 12-13; and *Wood Flooring* OI, Final Determination, (Exhibit CHN-49), p. 64322.

[886] *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 7; *Honey* AR 2007-2008, Preliminary Results, (Exhibit CHN-313), p. 68252; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results, (Exhibit CHN-441), p. 76029; *Tapered Roller Bearings* AR 2005-2006, Preliminary Results, (Exhibit CHN-438), p. 14080; and *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-439), p. 59436.

[887] United States' first written submission, para. 412.

[888] United States' first written submission, para. 412.

[889] United States Tariff Act of 1930, Section 776(c), *United States Code*, Title 19, Section 1677e, (Exhibit CHN-153).

[890] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act "represents an authoritative expression by the Administration regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 64; and Panel Reports, *US – Export Restraints*, para. 2.4; and *US – Upland Cotton*, fn 701).

[891] See, for instance, *Steel Nails* AR 2008-2009, Issues and Decision Memorandum, (Exhibit CHN-431), pp. 29-30; *Woven Electric Blankets* OI, Preliminary Results, (Exhibit CHN-334), p. 38461; *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), p. 17; *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389),

7.449. In the determinations on the record where the USDOC found the NME-wide entity to be non-cooperating, the USDOC corroborated the rate selected on the basis of adverse facts available only when such rate was chosen from what the USDOC considered to be secondary information. In contrast, in certain determinations, the USDOC did not corroborate the facts selected because in its view such information did not stem from secondary sources. For example, in the original investigation in *Wood Flooring*, the USDOC considered that because the AFA rate chosen was ultimately obtained in the course of that investigation (i.e. the highest calculated transaction-specific rate among mandatory respondents), and not from secondary information, corroboration of the selected AFA rate was not necessary.[892]

7.450. Importantly, the anti-dumping determinations on the record show that the corroboration exercise was limited to determining whether the facts selected from a secondary source had a basis on the record, and were both reliable and relevant to the issue at hand, but was not concerned with whether the facts selected were adverse or not. Hence, regardless of corroboration, the facts ultimately selected gave effect to the USDOC's prior decision to draw adverse inferences and select facts that were adverse to the interests of the non-cooperating NME-wide entity. We therefore consider that corroboration is a constituent part of the selection of facts that are adverse to the NME-wide entity and the exporters within it, and does not remove the adverse character of the facts selected.

7.451. Third, the United States argues that China has not explained what it means by "sufficiently adverse" facts, a term the United States finds to be subjective and vague.[893] For the United States, the USDOC selects facts available with respect to a non-cooperating party that has withheld certain facts and, consequently, the USDOC does not know whether the information it has selected is indeed adverse or potentially unfavourable, since the information requested is missing.[894] The United States further submits that facts are simply facts and that no fact is inherently adverse or non-adverse.[895]

7.452. We note that in the 73 determinations on the record where the NME-wide entity was found to be non-cooperating, the USDOC referred to "adverse facts available", or its acronym "AFA", when selecting the rate for the NME-wide entity. When describing such adverse facts, the USDOC alluded to section 776(b) of the *Tariff Act of 1930*, which (a) gives the USDOC the authority to employ adverse inferences; and (b) states that, in selecting from among the facts otherwise available, the USDOC may rely on information from the petition, any segment of the proceeding or any other information on the record. Instructive in this regard is the statement by the USCAFC, quoted by the USCIT, that "[adverse facts available] rates must be reasonably accurate estimates of respondents' rates with some built-in increase as a deterrent for non-compliance".[896] The United States has also explained to the Panel that, in selecting facts available, the USDOC must take into account the party's failure or refusal to provide necessary information[897], and does so in order to induce cooperation by respondents.[898]

7.453. Therefore, the USDOC used the term "adverse facts" in its anti-dumping determinations, and, based on section 776(b) of the *Tariff Act of 1930*, described what those facts were in every determination. Although the USDOC may not have known whether the facts it selected were actually adverse or less favourable than the missing facts, the USDOC, after finding non-cooperation, adopted "adverse inferences" and selected, under the term "adverse facts", those facts that sought to induce respondents to provide the USDOC with complete and accurate information in a timely manner. As such, we are persuaded that the USDOC ascribed a particular

p. 38880; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-439), p. 59436; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results, (Exhibit CHN-441), p. 76029; *Brake Rotors* AR 2003-2004, Final Results, (Exhibit CHN-388), p. 69940; and *Petroleum Wax Candles* AR 2004-2005, Preliminary Results, (Exhibit CHN-440), p. 46615.

[892] *Wood Flooring* OI, Final Determination, (Exhibit CHN-49), p. 64322. See also *Silica Bricks* OI, Decision Memorandum, (Exhibit CHN-408), pp. 12-13.

[893] United States' first written submission, para. 412.

[894] United States' opening statement at the first meeting of the Panel, para. 60.

[895] United States' opening statement at the first meeting of the Panel, para. 60.

[896] USCIT, Lifestyle Enterprise, Inc. v United States, 768 F.Supp.2d 1286 (CIT 2011), (Exhibit CHN-301), p. 1298 (quoting USCAFC, De Cecco Di Filippo Fara. S. Martino v. United States, 216 F.3d 1027 (Fed. Cir. 2000), p. 1032).

[897] United States' response to Panel question No. 72, para. 173.

[898] United States' first written submission, paras. 415 and 419.

meaning to the term "adverse facts" as referring to those facts that would lead to a result that was not more favourable than that where the NME-wide entity had cooperated fully, and that operated as a deterrent for non-cooperation. Accordingly, we are of the view that the meaning of "adverse facts", as part of the precise content of the alleged AFA Norm, is clear and substantiated by the practice of the USDOC.

7.454. Based on the foregoing, we conclude that the 73 determinations put on record by China suffice to demonstrate the precise content of the alleged AFA Norm. 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.

7.455. In closing, we recall that in our analysis concerning the precise content of the alleged AFA Norm, we have examined the parts of the Antidumping Manual and three USCIT decisions, identified by China, in addition to the 73 determinations made by the USDOC. We have found that neither the Antidumping Manual nor the court decisions support China's description of the precise content of the alleged AFA Norm. By contrast, we have found that the 73 determinations made by the USDOC, also submitted as evidence by China, do support China's contention regarding the precise content of the alleged AFA Norm. We find that the language in these determinations is clear enough to support China's description of the precise content of the alleged AFA Norm. We also consider that neither the Antidumping Manual nor the USCIT decisions contain elements that would undermine our conclusion that these 73 determinations show the precise content of the AFA Norm as described by China.

7.5.5.1.1.2 Attribution of the alleged AFA Norm to the United States

7.456. With respect to the issue of attribution, we are of the view that, since the USDOC is an organ of the United States Government, the acts that give rise to the alleged AFA Norm are attributable to the United States. We also note that this aspect has not been contested by the United States.

7.5.5.1.1.3 General and prospective application of the alleged AFA Norm

7.457. In addition to ascertaining the precise content and its attribution to the United States, we recall that the alleged AFA Norm may only be challenged as such, and we can only proceed to China's claims with respect to this measure, if we find it to be of a general and prospective nature. In this respect, the Appellate Body in *US – Underwear* agreed, in the context of Article X:3(a) of the GATT 1994, with the statement of the panel in that dispute that a measure has general application to the extent that it "affects an unidentified number of economic operators, including domestic and foreign producers".[899] Moreover, the Appellate Body has clarified that a measure has prospective application if it is intended to apply in "future situations" after its issuance.[900] The Appellate Body has also noted that, for a measure to have prospective character, it must provide "the same level of security and predictability of continuation into the future typically associated with rules or norms".[901]

7.458. The parties disagree on whether the alleged AFA Norm has general and prospective application. China argues that it does and, to this end, presents the same evidence it submitted to establish the precise content of the alleged AFA Norm, namely, an excerpt from the Antidumping Manual, excerpts from three USCIT decisions, and 86 USDOC determinations demonstrating the "systematic and consistent" application of the Norm in anti-dumping proceedings since 2001.[902] Below, we examine these various pieces of evidence individually and make our conclusion on the basis of a holistic assessment thereof.

[899] Appellate Body Report, *US – Underwear*, p. 13, DSR 1997:I, p. 21; and Panel Report, *US – Underwear*, para. 7.65. See also Appellate Body Report, *EC – Poultry*, para. 113; and Panel Reports, *EC – Poultry*, para. 7.65; and *EC – IT Products*, para. 7.159.

[900] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para 172.

[901] Appellate Body Report, *Argentina – Import Measures*, para. 5.182.

[902] China's first written submission, para. 443; and second written submission, para. 362.

Antidumping Manual

7.459. We examine first China's contention that the Antidumping Manual is evidence of the general and prospective application of the alleged AFA Norm.[903] We recall our earlier finding that the Antidumping Manual does not describe the precise content of the alleged AFA Norm.[904] In our view, however, that finding does not necessarily preclude us from analysing whether the Antidumping Manual provides an indication of the general and prospective nature of the AFA Norm, whose precise content we have discerned from the 73 USDOC determinations examined above.

7.460. In this respect, we recall that the excerpt from the Antidumping Manual on which China relies explains that, in an anti-dumping investigation, all NME companies other than those entitled to a separate rate are part of the NME-wide entity and receive the NME-wide rate. The excerpt then points out that such rate "may be based on adverse facts available if, for example, some exporters that are part of the NME-wide entity do not respond to the antidumping questionnaire".[905] The excerpt also states that "[i]n many cases" the USDOC finds that a part of the NME-wide entity has not cooperated because the exporters that responded do not account for all imports of the subject merchandise. Finally, the excerpt states that "[o]cassionally", the NME-wide rate may be changed in an administrative review if the USDOC is reviewing the NME-wide entity because one exporter within such entity is under review, or, one of the calculated margins for a respondent is higher than the NME-wide rate.[906]

7.461. In China's view, the auxiliary verb "may" suggests that, if the NME-wide entity is found to be cooperating, the USDOC "may not" base the rate on adverse facts available. In contrast, according to China, the Antidumping Manual gives an example of when the rate for the NME-wide entity "*will* be based on adverse facts available", namely, when exporters within the entity fail to respond to the dumping questionnaire.[907] We find China's understanding of the text of the Antidumping Manual to be unconvincing. By its terms, the relevant excerpt merely states that a single rate will be assigned to the NME-wide entity and that such rate "may" be based on adverse facts available in certain situations. The use of the auxiliary verb "may" when describing the type of action that the document lays down (i.e. the selection of adverse facts available in NME cases) affords a discretionary, permissive authority to the USDOC to select adverse facts available in cases where, for example, some exporters within the entity fail to respond to the dumping questionnaire. In other words, the use of "may" serves, if anything, as an enabling device; it does not express what approach the USDOC will, or should, adopt with respect to the use of adverse facts available in NME proceedings. As we see it, China's suggestion to replace "may" with "will" would transform the sentence from a permissive sentence into a normative one.

7.462. To us, the permissive language used in the Antidumping Manual recognizes the *authority* of the USDOC to base an NME-wide rate on adverse facts available. It further provides an example of when such authority may (but not necessarily will) be exercised. Contrary to China's position, we do not read these excerpts as supportive of China's view that the alleged AFA Norm will be applied generally and prospectively.

USCIT decisions

7.463. Relying on the same excerpts from the three USCIT decisions examined in our analysis of the precise content of the alleged AFA Norm, China asserts that the USCIT has confirmed and endorsed the application of this measure to NME-wide entities[908], which strengthens the expectations that the USDOC will continue to apply the alleged AFA Norm.[909] The United States disagrees with the argument that these court decisions are pertinent to the inquiry at hand, noting that such decisions were made in light of the specific circumstances surrounding those proceedings, and do not reflect what the USDOC will do generally in the future.[910] Moreover, the

[903] China's first written submission, paras. 444-446.
[904] See para. 7.433 above.
[905] Antidumping Manual, Chapter 10, (Exhibit CHN-23), pp. 7-8. (footnotes omitted; emphasis added)
[906] Antidumping Manual, Chapter 10, (Exhibit CHN-23), p. 8. (footnotes omitted)
[907] China's response to Panel question No. 70, para. 408. (emphasis original)
[908] China's second written submission, para. 362.
[909] China's response to Panel question No. 125, para. 192.
[910] United States' response to Panel question No. 68, para. 160.

United States argues that, in terms of their content, none of these three court decisions weighs in favour of the general and prospective character of the alleged AFA Norm.[911]

7.464. We are not persuaded that the quoted excerpts from the three court decisions at issue contain language attesting to the general and prospective character of the alleged AFA Norm. First, the excerpt from the USCIT's decision in *Peer Bearing Co.-Changshan v. United States* refers to the USDOC's "longstanding practice" of calculating the rate for a PRC-wide entity based on "the highest margin calculated for any party in the less-than-fair-value investigation or in any administrative review'".[912] This "longstanding practice" relates to the nature or magnitude of the duty and thus differs from the precise content of the alleged AFA Norm, which consists of a process that leads to the drawing of adverse inferences and the selection of facts that are adverse to the interests of the NME-wide entity and the exporters within it.

7.465. Along the same lines, the excerpt from the USCIT's decision in *Hubbel Power Systems, Inc. v. United States* speaks solely of the nature or level of the PRC-wide rate (as being "prohibitive"[913]), but is silent on the process of which the alleged AFA Norm consists. Moreover, we fail to see language in the excerpt to the effect that the assignment of prohibitive rates to exporters that do not show independence from state control has general and prospective application. We observe in particular that this excerpt does not refer to any statutory, regulatory or administrative basis for the assignment of a prohibitive rate to unexamined respondents that do not show independence from government control in NME administrative reviews.

7.466. Similarly, the excerpt from the USCIT's decision in *East Sea Seafoods LLC v. United States* points out that "in most, if not all, cases involving a country-wide NME antidumping duty rate, the country-wide margin has been calculated using adverse inferences".[914] The recognition that, in such cases, the NME-wide margin has been calculated using adverse inferences seems to be a statement regarding the basis used for the calculation of such margin up to present, but does not shed light on the prospective application of the same method of calculation. Thus, we are of the view that this excerpt does not support China's position that the alleged AFA Norm has general and prospective application.

7.467. For the foregoing reasons, we conclude that the USCIT excerpts that China relies upon do not support its assertion that the alleged AFA Norm has general and prospective application. In so holding, we are aware that in our analysis of whether the Single Rate Presumption has general and prospective application, we relied on a number of court decisions as relevant evidence. In that context, both the USCIT and the USCAFC had delineated the precise content of the measure and had considered it to be "settled"[915], "established and judicially affirmed"[916], "not in conflict with the Statute"[917], "sanctioned"[918], "upheld"[919] or "approv[ed by the USCAFC]".[920] We found that the court decisions on the record reinforced the view that the norm, as prescribed in the Policy Bulletin No. 05.1 and the Antidumping Manual, had general and prospective application. However, the USCIT excerpts cited in the context of the alleged AFA Norm are of a different nature and they do not exhibit the general and prospective character of the alleged AFA Norm when viewed either singly or conjointly.

[911] United States' response to Panel question No. 68, paras. 161-163.
[912] USCIT, Peer Bearing Co.-Changshan v. United States, 587 F.Supp.2d 1319 (CIT 2008), (Exhibit CHN-163), p. 1327 (quoting USCAFC, Sigma Corp v. United States, 117 F.3d 1401 (Fed. Cir. 1997), (Exhibit CHN-131), p. 1411).
[913] USCIT, Hubbel Power Systems, Inc. v. United States, 884 F.Supp.2d 1283 (CIT 2012), (Exhibit CHN-148), p. 1288.
[914] USCIT, East Sea Seafoods LLC v. United States, 703 F.Supp.2d 1336 (CIT 2010), (Exhibit CHN-134), p. 1354, fn 15.
[915] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1312.
[916] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1310.
[917] USCIT, Peer Bearing Co.-Changshan v. United States, 587 F.Supp.2d 1319 (CIT 2008), (Exhibit CHN-163), p. 1325.
[918] USCIT, East Sea Seafoods LLC v. United States, 703 F.Supp.2d 1336 (CIT 2010), (Exhibit CHN-134), p. 1354.
[919] USCIT, Jiangsu Changbao Steel Tube Co., Ltd. v. United States, 884 F.Supp.2d 1295 (CIT 2012), (Exhibit CHN-123), p. 1311.
[920] USCAFC, Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369 (Fed. Cir. 2003), (Exhibit CHN-132), p.1378.

USDOC anti-dumping determinations

7.468. Finally, with respect to the 73 determinations on the record where the USDOC found that the NME-wide entity had failed to cooperate to the best of its ability, we recall our previous finding that such determinations show the precise content of the alleged AFA Norm put forward by China. Specifically, we found that in each of these cases the USDOC adopted an invariable approach to its treatment of non-cooperating NME-wide entities, namely, whenever it found that the NME-wide entity had failed to cooperate to the best of its ability, the USDOC determined that the drawing of adverse inferences was appropriate, necessary or warranted. It then selected adverse facts from the body of information available on the record. Such information was, pursuant to section 776(b) of the *Tariff Act of 1930*, obtained from the petition, a previous administrative review or any other information placed on the record and corroborated if emanating from secondary sources.

7.469. Several of the 73 determinations refer to the USDOC's "practice" of selecting a rate for the non-cooperating NME-wide entity that is "sufficiently adverse" to ensure that it does not obtain a result more favourable than if it had fully cooperated.[921] The USDOC also described the selection of the highest margin alleged in the petition or the highest rate calculated in any of the proceedings as a "practice"[922], "standard practice"[923], or "normal practice"[924], which according to several of these determinations, "ha[s] consistently [been] upheld" by the USCIT and the USCAFC.[925]

---

[921] *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), p. 17; *Monosodium Glutamate* OI, Decision Memorandum, (Exhibit CHN-407), p. 13; *Silica Bricks* OI, Decision Memorandum, (Exhibit CHN-408), p. 12; *Hardwood* OI, Decision Memorandum, (Exhibit CHN-409), p. 17; *Xanthan Gum* OI, Issues and Decision Memorandum, (Exhibit CHN-410), p. 6; *Drawn Stainless Steel Sinks* OI, Decision Memorandum, (Exhibit CHN-412), p. 13; *Solar* OI, Final Determination, (Exhibit CHN-44), p. 63794; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77970; *Steel Wheels* OI, Preliminary Determination, (Exhibit CHN-309), p. 67711; *Wood Flooring* OI, Final Determination, (Exhibit CHN-49), p. 64322; *Lined Paper Products* OI, Preliminary Determination, (Exhibit CHN-420), p. 19702; *Activated Carbon* OI, Preliminary Determination, (Exhibit CHN-321), p. 59731; *Polyester Staple Fiber* OI, Preliminary Determination, (Exhibit CHN-419), p. 77377; *Aluminum* OI, Final Determination, (Exhibit CHN-32), p. 18529; *Drill Pipe* OI, Notice of Preliminary Determination, (Exhibit CHN-413), p. 51008; *Copper Pipe and Tube* OI, Final Determination, (Exhibit CHN-333), p. 60729; *Carrier Bags from Viet Nam*, Preliminary Determination, (Exhibit CHN-416), p. 56818; *Folding Metal Tables and Chairs* OI, Notice of Preliminary Determination, (Exhibit CHN-428), p. 60189; *Kitchen Appliances Shelving and Racks* OI, Preliminary Determination, (Exhibit CHN-312), p. 9596; *Graphite Electrodes* OI, Final Determination, (Exhibit CHN-338), p. 2053; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77128; *Thermal Paper* OI, Preliminary Determination, (Exhibit CHN-418), p. 27509; *Circular Welded Carbon Quality Steel Pipe* OI, Preliminary Determination, (Exhibit CHN-314), p. 452; *Sodium Hexametaphosphate* OI, Preliminary Determination, (Exhibit CHN-318), p. 52548; *Coated Free Sheet Paper* OI, Preliminary Determination, (Exhibit CHN-317), p. 30762; *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 7; *Lined Paper Products* AR 2010-2011, Final Results, (Exhibit CHN-128), p. 61393; *Honey* AR 2007-2008, Preliminary Results, (Exhibit CHN-313), p. 68252; *Honey* AR 2001-2002, Preliminary Results, (Exhibit CHN-443), p. 69991; *Honey* AR 2002-2003, Final Results, (Exhibit CHN-389), p. 38880; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-439), pp. 59435-59436; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results, (Exhibit CHN-441), p. 76029; *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 18; and *Polyester Staple Fiber* AR 2010-2011, Preliminary Results, (Exhibit CHN-159), p. 39993.

[922] *Polyester* AR 2010-2011, Preliminary Results, (Exhibit CHN-159), p. 39993; *Honey* AR 2007-2008, Preliminary Results, (Exhibit CHN-313), p. 68252; *Honey* AR 2006-2007, Preliminary Results, (Exhibit CHN-316), p. 66224; *Honey* AR 2001-2002, Preliminary Results, (Exhibit CHN-443), p. 69991; *Tapered Roller Bearings* AR 2005-2006, Preliminary Results, (Exhibit CHN-438), p. 14080; *Case Pencils* AR 2003-2004, Preliminary Results, (Exhibit CHN-322), p. 76761; *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results, (Exhibit CHN-441), p. 76029; and *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 18.

[923] *Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-119), p. 42662; *Tissue Paper Products* OI, Notice of Preliminary Determinations, (Exhibit CHN-324), p. 56413; and *Color TV Receivers* OI, Notice of Final Determination, (Exhibit CHN-323), p. 20596.

[924] *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 6; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-439), p. 59436; *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205), p. 17; *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-167), p. 8; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-120), p. 7; and *Furniture* AR7, Decision Memorandum, (Exhibit CHN-298), p. 15.

[925] *Glycine* AR 2011-2012, Decision Memorandum, (Exhibit CHN-433), p. 7; *Tapered Roller Bearings* AR 2005-2006, Preliminary Results, (Exhibit CHN-438), pp. 14080-14081; *Freshwater Crawfish Tail Meat* AR 2004-2005, Preliminary Results, (Exhibit CHN-439), pp. 59435-59436; and *Porcelain-on-Steel Cooking Ware* AR 2003-2004, Notice of Preliminary Results, (Exhibit CHN-441), p. 76029. See also *Grain Oriented Steel* OI, Decision Memorandum, (Exhibit CHN-404), p. 17; *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205),

7.470. Given that the Antidumping Manual and the USCIT decisions referred to by China do not support China's assertion that the alleged AFA Norm has general and prospective application[926], the question is whether the 73 anti-dumping determinations where the USDOC made a finding of non-cooperation by the NME-wide entity provide sufficient evidence that the alleged AFA Norm has general and prospective application. In this regard, China puts forth three reasons for its assertion that they do, namely, (a) the USDOC's anti-dumping determinations are evidence of "invariable application" of the alleged AFA Norm over a long period of time[927]; (b) the USDOC refers to its own past practice as a justification and motivation for the decision made in particular cases[928]; and (c) the fact that the USDOC refers to its "practice" further confirms that the 73 determinations on the record show considerably more than a string of cases or repeat action.[929]

7.471. As an initial matter, we note that none of the 73 determinations on the record lays down in general terms the full content of the alleged AFA Norm as described by China.[930] Rather, it is through the assessment of the USDOC's conduct in every determination that we have been able to ascertain the different elements of the alleged AFA Norm. Each of the 73 determinations shows that the USDOC followed the same course of action, namely, that upon finding non-cooperation by the NME-wide entity, the USDOC drew adverse inferences and, in so doing, selected facts that were adverse to the interests of such entity and the exporters within it.

7.472. We agree with China that the USDOC's treatment of a non-cooperating NME-wide entity in the 73 determinations reflects more than mere repetition of conduct. The 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*).[931] In adopting the same course of action when determining the rate applicable to a non-cooperating NME-wide entity, the USDOC referred in several such determinations to its practice of "select[ing] a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated".[932] We also find it significant that there is no evidence of determinations made during that period in which the USDOC did not follow the process of which the alleged AFA Norm consists, namely, that upon finding that an NME-wide entity had failed to cooperate to the best of its ability, the USDOC drew adverse inferences and selected adverse

p. 18; *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-167), p. 8; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-120), p. 7; and *Furniture* AR7, Decision Memorandum, (Exhibit CHN-298), p. 15. In so stating, the USDOC has referred to a number of decisions by the USCIT and the USCAFC. However, these decisions have not been submitted as evidence in this dispute.

[926] We note China's argument that the Antidumping Manual and the USCIT decisions "reinforce the normative character ascribed by USDOC to its conduct in the determinations at hand, and have together set expectations amongst producers and exporters from NME countries that past is indeed prologue". (China's response to Panel question No. 117(a), para. 159). In this respect, we have pointed out that the Antidumping Manual does not describe the precise content of the alleged AFA Norm and that the passages on which China relies are couched in permissive, discretionary language. Along similar lines, the excerpts of the USCIT decisions fail to describe the alleged AFA Norm and are limited to noting the USDOC practice without passing judgement on the soundness of such practice under United States law. Accordingly, the Antidumping Manual and the court decisions do not lend probative force to China's position that the conduct emanating from the practice of the USDOC has general and prospective application.

[927] China's response to Panel question No. 117(a), paras. 160-164.

[928] China's response to Panel question No. 117(a), paras. 165-171.

[929] China's response to Panel question No. 117(a), paras. 172-173.

[930] This stands in contrast to the manner in which the USDOC lays down the Single Rate Presumption, in general terms, before applying it to the particular fact pattern of each case. Specifically, when assessing whether NME exporters are entitled to a separate rate, the USDOC begins by noting that "[i]n proceedings involving NME countries, [the USDOC] begins with a rebuttable presumption that all companies within the NME country are subject to government control and, thus, should be assigned a dumping duty [deposit] rate"; and that "[i]t is the [USDOC's] policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate". (See China's first written submission, Annex 2: Table SRP, pp. 46-70).

[931] *Solar* AR1, Decision Memorandum, (Exhibit CHN-487), pp. 15-17.

[932] *Monosodium Glutamate* OI, Decision Memorandum, (Exhibit CHN-407), p. 13; *Silica Bricks and Shapes* OI, Decision Memorandum, (Exhibit CHN-408), p. 12; *Hardwood and Decorative Plywood* OI, Decision Memorandum, (Exhibit CHN-409), p. 19; *Drawn Stainless Steel Sinks* OI, Decision Memorandum, (Exhibit CHN-412), p. 13; *Certain Steel Wheels* OI, Notice of Preliminary Determination, (Exhibit CHN-309), p. 67711; *Drill Pipe* OI, Preliminary Determination, (Exhibit CHN-413), pp. 51008; *Certain Kitchen Appliance Shelving and Racks* OI, Preliminary Determination, (Exhibit CHN-312), p. 9596; and *Sodium Hexametaphosphate* OI, Preliminary Determination, (Exhibit CHN-318), p. 52548

facts.[933] Finally, in our view, the fact that the USDOC referred to its practice in every determination indicates that the conduct reflected a standard approach whenever USDOC found that an NME-wide entity failed to cooperate to the best of its ability. The issue, therefore, is whether this suffices to establish that the alleged AFA Norm has general and prospective application.

7.473. In addressing this issue, we find the Appellate Body's findings in *Argentina – Import Measures* instructive. To recall, the panel in that dispute found the so-called "TRRs measure" to be an unwritten measure consisting of several elements, including systematic and continued application.[934] Based on that characterization, the panel found that the measure was inconsistent with Articles XI:1 and III:4 of the GATT 1994. The panel proceeded to address one of the complainants' alternative arguments, i.e. that the measure also constituted a rule or norm of general and prospective application. In agreeing with this proposition, the panel relied on the same evidence and arguments used in its analysis of the existence of a measure with several constituent elements, including systematic and continued application.[935]

7.474. The Appellate Body declined to endorse the panel's finding that the measure constituted a rule or norm of general and prospective application.[936] In particular, the Appellate Body criticised the fact that the panel had based its finding that the TRRs measure had prospective application on "no more than that the TRRs measure will continue to be applied in the future".[937] Importantly, the Appellate Body stated 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".[938] As we see it, the reasoning of the Appellate Body stands for the proposition that not every norm that may continue to be applied in the future amounts, for that reason alone, to a measure of prospective nature. Rather, the future application of a measure must achieve a certain degree of security and predictability typically associated with rules or norms.

7.475. Applying this guidance to the facts in this dispute, we are not persuaded that the practice reflected in the 73 anti-dumping determinations on the record is sufficient to demonstrate that the alleged AFA Norm has general and prospective application. What we discern from the 73 relevant determinations on the record is a practice that the USDOC has followed in every such determination.[939] This practice constitutes evidence that the USDOC has invariably engaged in the same conduct; it may even constitute evidence that the USDOC is likely to engage in that same conduct in the future. In our view, however, this does not suffice to show that the alleged AFA Norm has prospective application because it does not demonstrate that the USDOC *will* continue to follow the same course of action in the future.[940] The USDOC's practice emanating from these 73

[933] In response to Panel question No. 69, the United States provided two examples where a party failed to cooperate and the USDOC did not apply an adverse inference. Such cases, however, concerned a countervailing duty investigation and a countervailing duty administrative review involving products originating in Italy and Iran. (United States' response to Panel question No. 69, paras. 166-167 (referring to Final Affirmative Countervailing Duty Determination: Stainless Steel Bar from Italy, Issues and Decision Memorandum, (Exhibit USA-54), and Final Results of Countervailing duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran, (Exhibit USA-55))). These cases did not involve an NME-wide entity and therefore are not relevant to our assessment. When asked for examples of anti-dumping investigations or administrative reviews involving NME countries where the USDOC made a finding of non-cooperation by the NME-wide entity and yet did not use an adverse inference, during the second substantive meeting of the Panel with the parties, the United States did not provide any such examples.

[934] Appellate Body Report, *Argentina – Import Measures*, para. 5.152.

[935] Appellate Body Report, *Argentina – Import Measures*, para. 5.153.

[936] The Appellate Body stated that it "did not wish to be seen as endorsing the Panel's additional findings" regarding the general and prospective application of the TRRs measure. (Appellate Body Report, *Argentina – Import Measures*, para. 5.181.)

[937] Appellate Body Report, *Argentina – Import Measures*, para. 5.182.

[938] Appellate Body Report, *Argentina – Import Measures*, para. 5.182.

[939] China agrees that the USDOC statements in the anti-dumping determinations on the record demonstrate that the USDOC has developed a "practice" with respect to the use of adverse inferences to select adverse facts available in individual cases. (China's comments on the United States' response to Panel question No. 117(b), para. 91).

[940] We note that the record shows that, in some cases, the USDOC referred to a certain "practice", while later in the same case it departed from it in light of the attendant circumstances. For instance, in at least one determination on the record, the USDOC recalled its "practice to select, as AFA, the higher of the (a) Highest margin alleged in the petition, or (b) the highest calculated rate of any respondent in the investigation", and referred in a footnote, as support, to a previous anti-dumping determination. (*Wood Flooring* OI, Preliminary

determinations does not provide "the [] level of security and predictability of continuation into the future typically associated with rules or norms."[941]

7.476. China further argues that the "invariable application" of the alleged AFA Norm and the reference to previous determinations provides "administrative guidance" and "sets expectations" among interested parties.[942] We do 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. We also do not disagree that prior practice may provide the USDOC with administrative guidance for future action. However, 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.[943] The relevant inquiry here is whether the evidence on the record demonstrates the level of security and predictability described by the Appellate Body that the alleged AFA Norm will be applied generally and prospectively at the level "typically associated with rules or norms".[944] As noted above, we are unable to identify in the 73 determinations any elements that attest to the requisite level of security and predictability. In our opinion, finding that the USDOC's practice at issue has general and prospective application 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. Accordingly, we consider that the evidence on the record does not support China's assertion that the alleged AFA Norm has prospective application. In the light of this finding, we do not consider it necessary to assess whether the alleged AFA Norm has general application.

Conclusion on the general and prospective application of the alleged AFA Norm

7.477. Our analysis above shows that the conduct that flows from the alleged AFA Norm has not been recognized explicitly, implicitly or by reference as a norm in administrative documents or actions of general and prospective nature.[945] Nor have the USCIT decisions on the record enunciated, let alone endorsed, the alleged AFA Norm in the manner China has described it, namely, "whenever [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".[946] Similarly, the 73 determinations presented by China do not show that the alleged AFA Norm has prospective application. Although unwritten measures that derive exclusively from administrative action could potentially rise to the level of a norm of general and prospective application, we are of the view that the underlying administrative action must exhibit the general and prospective application of such a norm. China has not demonstrated that the alleged AFA Norm exhibits such characteristics.

Determination, (Exhibit CHN-158), p. 30662). On the basis of this practice, it identified the rates in the petition of 194.49 and 280.60% as higher than any of the calculated rates assigned to individually-examined companies. Critically, the USDOC stated that, in light of the facts before it, its "practice would be to assign the rate of 280.60 percent to the PRC-wide entity", but that, upon corroborating it, the rate ultimately chosen was a lower rate of 82.56%. (Ibid.). In other words, even if the USDOC recalled its practice of imposing the highest rate, it moved away from it by assigning a lower rate. While China does not argue that the alleged AFA Norm necessarily imposes the highest rate possible, this example shows that it is not uncommon that the USDOC adopt a course of action that is different from its stated practice.

[941] Appellate Body Report, *Argentina – Import Measures*, para. 5.182.

[942] China's response to Panel question No. 117(a), paras. 160-171.

[943] We observe, in this respect, that the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* considered that whether an alleged measure creates expectations and provides administrative guidance may be relevant to determining whether such measure has normative value. Next, the Appellate Body reasoned, in the same paragraph, that the measure at issue in that dispute had general application to the extent that it was intended to "apply to all the sunset reviews conducted in the United States"; and prospective application insofar as it was intended to "apply to sunset reviews taking place after its issuance". (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187).

[944] Appellate Body Report, *Argentina – Import Measures*, para. 5.182. See also Appellate Body Report, *US – Zeroing (EC)*, para. 198.

[945] We recall in this respect that, by contrast, our finding that the Single Rate Presumption is a norm of general and prospective application is grounded on, *inter alia*, the description found in general documents such as the Policy Bulletin No. 05.1 and the Antidumping Manual.

[946] China's opening statement at the second meeting of the Panel, para. 63. (emphasis original)

7.478. In so concluding, we are mindful of the statement by the Appellate Body that the notion of a "rule or norm of general and prospective application" does not exhaust the universe of potential unwritten measures challengeable in WTO dispute settlement[947], and that "ongoing conduct"[948], "concerted action or practice"[949], "non-binding administrative guidance"[950], or a measure that "is applied systematically and will continue to be applied in the future"[951] can also be challenged as unwritten measures. At the same time, we also take note of the Appellate Body's statement that "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant".[952] In this dispute, China has characterized the alleged AFA norm as a norm of general and prospective application[953], and is therefore called upon to meet a "high threshold" in order to satisfy the legal standard set out in *US – Zeroing (EC)*.[954] However, for the reasons explained above, we believe that the evidence on the record falls short of meeting that standard.

7.5.5.1.1.4 Overall conclusion

7.479. In the light of the foregoing, we find that China has not demonstrated that the alleged AFA Norm constitutes a norm of general and prospective application. There is therefore no need to examine whether it falls within our terms of reference or whether it is as such inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.[955]

7.5.5.2 China's as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement concerning 30 determinations

7.480. At the outset, we recall that the 30 determinations, challenged by China under its as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement, have been found inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.[956] We recall that in our findings with respect to the USDOC's

[947] Appellate Body Report, *Argentina – Import Measures*, para. 5.107.
[948] Appellate Body Report, *US – Continued Zeroing*, para. 181.
[949] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.
[950] Appellate Body Reports, *Guatemala – Cement I*, fn 47 to para. 69; and *US – Corrosion Resistant Steel Sunset Review*, para. 85.
[951] Appellate Body Report, *Argentina – Import Measures*, para. 5.139.
[952] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.
[953] WT/DS471/5, para. 22. See also China's first written submission, para. 492. China has confirmed that it relies upon the USDOC's practice as evidence of the existence of a norm of general and prospective application and not as a specific measure at issue in itself. (China's comments on the United States' response to Panel questions Nos. 117(c) and (d), para. 104).
[954] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[955] Nevertheless, we note that the precise content of the alleged AFA Norm is premised on the existence of a non-cooperating *NME-wide entity* (see paragraph 7.454 above). We also observe that the evidence that China has put forth to substantiate the existence of the alleged AFA Norm as a norm of general and prospective application refers to NME-wide entities as formed through the application of the Single Rate Presumption, a measure which we have found to be inconsistent, as such, with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Although we are aware of this interlinkage between the Single Rate Presumption and China's description of the alleged AFA Norm, we have found it more appropriate to evaluate China's claim regarding the existence of the alleged AFA Norm before considering whether it would be necessary or useful to address China's as such claims with respect to that Norm.
[956] See paras. 7.382 and 7.388 above. The 38 determinations, which were found to be inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement due to the USDOC's application of the Single Rate Presumption in these determinations, consist of: *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* OI, *OTR Tires* AR3, *OTR Tires* AR5, *OCTG* OI, *OCTG* AR1, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *Bags* AR4, *PET Film* OI, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* OI, *Furniture* AR7, *Furniture* AR8, and *Furniture* AR9. These 38 determinations thus include the 30 determinations challenged by China under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement, namely *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OTR Tires* AR5, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *PET Film* OI, *Furniture* OI, *Furniture* AR7, and *Furniture* AR8.

application of the Single Rate Presumption, these 30 challenged determinations were found to be WTO inconsistent since the USDOC did not establish the existence of a PRC-wide entity in a WTO-consistent manner, and the USDOC was therefore not permitted to assign a single PRC-wide rate to the multiple exporters comprising this entity.[957] Furthermore, we recall that China's as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement take issue with the manner in which the USDOC determined a single anti-dumping duty rate for the PRC-wide entity and the level of these PRC-wide rates in the 30 challenged determinations.[958] The relevant issue under China's as applied claims therefore is whether the USDOC acted in accordance with the Anti-Dumping Agreement when it determined a single PRC-wide rate for the multiple exporters, with regard to which we have already found that the USDOC was not permitted to assign a single PRC-wide rate.

7.481. Bearing this in mind, we recall that the function of panels is defined in Article 11 of the DSU, which reads as follows:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

7.482. Furthermore, Article 3.7 of the DSU states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." In accordance with this objective, the Appellate Body has clarified that:

> [T]he principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute." Thus, panels need address only those claims "which must be addressed in order to resolve the matter in issue in the dispute", and panels "may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'."[959] (emphasis original)

7.483. In our view, our findings that the USDOC did not establish the existence of the PRC-wide entity in a WTO-consistent manner in the 30 challenged determinations and that the USDOC was therefore not permitted to assign a single PRC-wide rate to the multiple exporters comprising this entity are intrinsically linked to the question of whether the USDOC determined these PRC-wide rates in a WTO-consistent manner and at a WTO-consistent level. More specifically, we do not consider that an anti-dumping duty rate is determined or assigned in the abstract. Rather, it is determined *for* or assigned *to* a specific exporter or an entity consisting of multiple exporters. The issue of whether an anti-dumping duty rate is determined in a WTO-consistent manner therefore cannot be assessed in disjunction from the exporter or entity for which it is determined. The relevant question is whether, having found that the USDOC was not permitted to assign a single PRC-wide rate to the multiple exporters comprising the PRC-wide entity in the 30 challenged determinations, it is necessary for us to consider whether the USDOC determined these PRC-wide rates in a WTO-consistent manner and at a WTO-consistent level.

7.484. In this regard, we note the as applied nature of China's claims. The issue is therefore not a general one of the conduct required, under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement, of investigating authorities when determining a single anti-dumping duty rate for any entity consisting of multiple exporters. Rather, the issue is whether the conduct of the USDOC, when assigning the single PRC-wide rate to the multiple exporters comprising the PRC-wide entity in the 30 challenged determinations, was in accordance with these provisions. We note that the Appellate Body has cautioned that:

[957] See para. 7.382 above.

[958] China's response to Panel question No. 128(a), paras. 215-216.

[959] Appellate Body Report, *Argentina – Import Measures*, para. 5.190 (quoting Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at p. 340; *US – Tuna II (Mexico)*, paras. 403-404; and *US – Upland Cotton*, para. 732).

> Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute.[960] (emphasis original)

7.485. We agree with this statement and note that the context of this dispute is the acts of the USDOC as they apply to the specific situations involved in the 30 challenged determinations. In fact, we do not consider that questions such as how to notify an entity consisting of multiple exporters of required information under Article 6.1; when recourse to facts available is permitted with respect to such an entity and how to select among the available facts under Article 6.8 and paragraphs 1 and 7 of Annex II; and whether such an entity can be considered as having been individually examined under Article 9.4, are questions that can be answered in the abstract. In our view, the conduct required, under these provisions, by an investigating authority when determining a single anti-dumping duty rate for an entity consisting of multiple exporters will depend on the factual circumstances of each case, including the nature and significance of the relationship established between the multiple exporters comprising the entity. At any rate, our findings under Articles 6.10 and 9.2 of the Anti-Dumping Agreement make clear that, in the 30 challenged determinations, the USDOC did not establish the existence of a PRC-wide entity consisting of multiple exporters in a WTO-consistent manner and therefore was not permitted to assign a single PRC-wide rate to the multiple exporters comprising this entity.[961]

7.486. In light of our findings that the USDOC did not establish the existence of a PRC-wide entity consisting of multiple exporters in the 30 challenged determinations in a WTO-consistent manner and therefore was not permitted to assign a single PRC-wide rate to the multiple exporters comprising this entity, as well as the nature and object of China's claims, we do not see how additional findings regarding the level of and the manner in which the USDOC determined this single PRC-wide rate in the same 30 determinations would be necessary or useful for the positive resolution of the dispute.

7.487. We note, however, that China has argued that it is necessary and essential for the Panel to rule on all of China's claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement in order to secure a positive resolution of the dispute and avoid a partial resolution, contrary to Article 11 of the DSU.[962] We agree with China that, should the Panel fail to make findings that are necessary to resolve this dispute, it would constitute false judicial economy and an error of law.[963] Below, we therefore examine each of China's arguments with a view to assessing whether findings on China's as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement are, in fact, necessary for the positive resolution of this dispute.

7.488. First, China considers that the "USDOC may seek to maintain a practice of treating multiple Chinese exporters as part of an NME-wide entity or similar entity based on asserted State control of prices and output, even if the Single Rate Presumption is withdrawn" and that it is "essential that any *rate applied* to an entity maintained in this way, and any *process* for determining such a rate, complies with the disciplines of Articles 6.1, 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II."[964]

7.489. We note that the Appellate Body rejected an argument, which was based on similar considerations, in *Argentina – Import Measures*, stating that:

> We disagree with Japan's argument to the extent that it may be understood as suggesting that a finding under Article X:1 of the GATT 1994 is necessary to ensure that Argentina is subject to an obligation to publish promptly any implementing measures that may be adopted to bring the TRRs measure into conformity with the GATT 1994. In our view, the obligation to publish promptly any new or modified laws of general application does not stem from the implementation of a finding of

[960] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at p. 340.
[961] See para. 7.382 above.
[962] China's response to Panel question No. 132, paras. 254-255.
[963] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133 (referring to Appellate Body Report, *Australia – Salmon*, para. 223).
[964] China's response to Panel question No. 132, para. 260. (emphasis original)

> inconsistency of the current TRRs measure with Article X:1. Rather, for any new or modified implementing measures that fall within the scope of Article X:1, the publication obligation stems from Article X:1 itself.[965]

7.490. We consider this reasoning by the Appellate Body pertinent to the situation before us. Any new or modified measure that the United States may adopt to implement the Panel's findings regarding the application of the Single Rate Presumption in the 30 challenged determinations must accord with Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement. These obligations stem from the cited provisions themselves and therefore apply regardless of whether we make additional findings on the consistency of the 30 current, WTO-inconsistent determinations with these provisions. In fact, we note the Appellate Body's statement in *Argentina – Import Measures* that:

> While the implementation of DSB recommendations and rulings under Articles III:4 and XI:1 of the GATT 1994 may require changes to the TRRs measure in order for Argentina to bring itself into compliance with those provisions, compliance with a finding of inconsistency under Article X:1 would lead only to publication of the existing measure.[966]

7.491. Similarly, compliance with findings of inconsistency under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement would lead only to the determination of a WTO-consistent anti-dumping duty rate for the existing, WTO-inconsistent PRC-wide entity. China's argument, on the other hand, relates to any rate determined for any "NME-wide entity or similar entity" maintained by the United States when implementing our findings regarding the application of the Single Rate Presumption in the 30 challenged determinations. In this regard, we recall that the Appellate Body has cautioned against speculation on the ways in which a respondent might choose to implement the recommendations and rulings of the DSB.[967] It was on this basis that the Appellate Body in *US – Wheat Gluten* upheld the panel's exercise of judicial economy with respect to the European Communities' claims under Article I of the GATT 1994 and Article 5 of the Agreement on Safeguards, rejecting the argument by the European Communities that "the Panel has not clarified whether the US could simply repeat the serious injury determination and then still proceed to apply the measure in the same way."[968]

7.492. Moreover, we reiterate our view that the issue of how an anti-dumping duty rate is to be determined cannot be assessed in disjunction from the exporter or entity for which this duty rate is determined. We are aware of China's argument that the obligations under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 apply "in exactly the same way" to the current PRC-wide entity as well as any entity consisting of multiple exporters that the United States may maintain when implementing the Panel's findings on the application of the Single Rate Presumption.[969] While we agree that these provisions apply to investigating authorities' determinations of anti-dumping duty rates for entities consisting of multiple exporters, China itself has argued, and the Panel agreed, that the USDOC did not establish the existence of a WTO-consistent PRC-wide entity consisting of multiple exporters in the 30 challenged determinations.[970] Having already found that the USDOC did not establish the existence of the PRC-wide entity in a WTO-consistent manner, and therefore was not permitted to assign a single anti-dumping duty rate to the multiple exporters comprising this entity, we do not see how the fact that Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 apply to entities consisting of multiple exporters makes findings under these provisions necessary for purposes of resolving this particular dispute. In this respect, we recall that the precise manner of implementation is a matter to be determined in the first instance by the Member concerned and

[965] Appellate Body Report, *Argentina – Import Measures*, para. 5.198.
[966] Appellate Body Report, *Argentina – Import Measures*, para. 5.198.
[967] Appellate Body Reports, *US – FSC*, para. 175; and *US – Wheat Gluten*, para. 185.
[968] Appellate Body Report, *US – Wheat Gluten*, para. 185 (quoting European Communities' other appellant's submission, para. 108).
[969] China's comments on the United States' response to Panel question No. 119, paras. 145-148.
[970] See para. 7.382 above.

that it would not be appropriate for us to speculate on the ways in which the United States might choose to implement the DSB's recommendations and findings in the context of this dispute.[971]

7.493. Second, China argues that "[i]mplementation of findings under Articles 6.10, 9.2 and the second sentence of Article 9.4 regarding the Single Rate Presumption would raise questions regarding how the rights of [the individual producers/exporters that are grouped into the fictional PRC-wide entity] should be given effect following withdrawal of the Single Rate Presumption" and that "a finding that individual respondents were denied access to individual rates by virtue of the Single Rate Presumption provides no clarification of the basis upon which a rate, if any, should be determined for such individual respondents during implementation."[972]

7.494. We note that China's argument may be understood to refer to: (a) how individual rates should have been determined for each of the multiple exporters comprising the WTO-inconsistent PRC-wide entity in the 30 challenged determinations; or (b) how the rights of the multiple exporters comprising the WTO-inconsistent PRC-wide entity in the 30 challenged determinations should have been taken into account when determining a single PRC-wide rate for those exporters.

7.495. Insofar as China is arguing that the Panel should make findings regarding the manner in which individual anti-dumping duty rates should have been determined for each of the multiple exporters comprising the WTO-inconsistent PRC-wide entity, we note that China itself has explained that its as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement relate to the PRC-wide entity and the PRC-wide rates assigned to this entity.[973] While we are aware that China has made references to certain individual exporters within the PRC-wide entity or groups thereof throughout its written submissions and responses to Panel questions[974], we note that China has clarified that such references do not change the thrust of China's as applied claims. Rather, they constitute reasons in support of China's assertion that the USDOC acted in a WTO-inconsistent manner when determining a PRC-wide rate for the PRC-wide entity in the 30 challenged determinations.[975] In addition to, and perhaps because of, this, China has not provided the Panel with sufficient facts and arguments regarding the manner in which individual anti-dumping duty rates should have been determined for each of the multiple exporters comprising the WTO-inconsistent PRC-wide entity. We therefore do not consider it necessary or appropriate for the Panel to assess this issue.

7.496. To the extent that China's argument should be understood as a reiteration of the assertion, set forth on numerous occasions by China, that the rights of the multiple exporters comprising the PRC-wide entity are relevant when assessing whether the USDOC determined the PRC-wide rate for this entity in a WTO-consistent manner[976], we do not consider that such an argument would preclude us from exercising judicial economy with respect to these claims because it too concerns the manner in which the USDOC determined the PRC-wide rates in the 30 challenged determinations. It thus does not affect our view that it is not necessary or useful for us to assess whether the USDOC determined the PRC-wide rate for the PRC-wide entity in a WTO-consistent manner in the 30 challenged determinations once we have already found that the USDOC was not permitted to assign a single PRC-wide rate to the multiple exporters comprising this entity in these determinations in the first place.

7.497. Third, China notes that "during its accession negotiations, China expressed concern that there had been 'measures taken by certain WTO Members which had treated China as a non-market economy and imposed anti-dumping duties on Chinese companies … without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair

[971] Appellate Body Reports, *US – FSC*, para. 175; and *US – Wheat Gluten*, para. 185.
[972] China's response to Panel question No. 132, para. 264.
[973] China's response to Panel question No. 128(a), para. 215.
[974] See, e.g. China's second written submission, para. 291 (regarding the cooperating exporter Double Coin in the fifth administrative review in *OTR Tires*); second written submission, para. 305 (regarding the cooperating exporter AT&M in the *Diamond Sawblades* investigation and all other exporters than JJ New Material in the *PET Film* investigation, which had not been requested to provide any information); second written submission, para. 420 (regarding the cooperating exporter AT&M in the *Diamond Sawblades* investigation); and second written submission, paras. 453 and 466-467 (regarding the groups of exporters within the PRC-wide entity in the 30 challenged determinations, which were not selected as mandatory respondents).
[975] China's response to Panel question No. 128(b), para. 218.
[976] See, e.g. China's response to Panel question No. 128(b), paras. 220-225.

manner'"[977], and that "Members agreed to address this problem by affirming that importing WTO Members should 'give notice of information which it required and provide Chinese producers and exporters ample opportunity to present evidence in writing in a particular case' and 'provide Chinese producers and exporters a full opportunity for the defense of their interests in a particular case'."[978] China argues that "[g]iven the manner in which the US position deviates fundamentally from specific requirements that China was assured would apply, resolution of these issues is crucial for reaching a positive solution to the dispute."[979]

7.498. In this regard, we note that the fact that certain issues were discussed during China's accession negotiations does not directly relate to the question of whether these issues must be addressed in order to resolve this particular dispute and therefore has no bearing on the question of whether we should exercise judicial economy. We furthermore reiterate our view that the issue before us is not to determine how the USDOC is required to act under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement with respect to Chinese exporters, be it individual or in the form of entities consisting of multiple exporters. Rather, the issue is whether the USDOC violated these provisions when it determined the single PRC-wide rate for the multiple exporters comprising the PRC-wide entity in the 30 challenged determinations.

7.499. Thus, we are not persuaded that it is necessary for us to make findings on China's as applied claims against the 30 challenged determinations regarding the level of and the manner in which the USDOC determined a single PRC-wide rate for the multiple exporters comprising the PRC-wide entity, having already found that the USDOC was not permitted to assign a single PRC-wide rate to these multiple exporters. Bearing this in mind, as well as the objective of "prompt settlement" of disputes, contained in Article 3.3 of the DSU, we exercise judicial economy with respect to China's as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement.[980] In light of our decision to exercise judicial economy with respect to China's as applied claims under these provisions, there is no need for us to assess the objection of the United States that certain arguments put forward by China are contrary to paragraph 6 of the Panel's Working Procedures.

7.500. At the same time, we note that panels have the discretion to make additional findings beyond those strictly necessary to resolve a dispute.[981] Such additional findings could include, for example, alternative factual findings that could serve to assist the Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by the panel.[982] While we note that our findings on the WTO inconsistency of the Single Rate Presumption and its application are based on established jurisprudence[983], we have decided to make alternative factual findings in order to assist the Appellate Body in completing the legal analysis under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping

[977] China's response to Panel question No. 132, para. 267 (quoting China's Accession Working Party Report, para. 151). (omission by China)

[978] China's response to Panel question No. 132, para. 267 (quoting China's Accession Working Party Report, paras. 151(d) and (e)).

[979] China's response to Panel question No. 132, para. 269.

[980] In its comments on China's response to the Panel's question asking whether findings on China's as such and as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement would contribute to the positive resolution of the dispute, the United States commented:

> At present, significant concerns have been raised regarding WTO resources and delays in the resolution of disputes. While the conversation to address these concerns is ongoing, clearly one long standing mechanism can be part of the solution: judicial economy. Using judicial economy where appropriate − as it is here − promotes parties to have greater focus in considering the claims and ensures limited resources are effectively allocated. (United States' comments on China's response to Panel question No. 132, para. 144).

[981] Appellate Body Reports, *US − Softwood Lumber IV*, para. 118; *US − Gambling*, para. 344; and *US − Carbon Steel (India)*, para. 4.274.

[982] See, e.g. Appellate Body Reports, *US − Softwood Lumber IV*, para. 118; *Canada − Wheat Exports and Grain Imports*, para. 126; *China − Auto Parts*, para. 208; *US − Tuna II (Mexico)*, para. 405; and *US − Carbon Steel (India)*, para. 4.274.

[983] See paras. 7.349-7.351 above (referring to Appellate Body Report, *EC − Fasteners (China)*, paras. 363-365; and Panel Reports, *EU − Footwear (China)*, paras. 7.63-7.147; and *US − Shrimp II (Viet Nam)*, paras. 7.122, 7.149, and 7.154-7.155).

Agreement, should it consider such analysis necessary or useful. In this regard, we consider the following factual aspects to be the relevant ones:

7.501. In 20 of the challenged determinations, exporters within the PRC-wide entity were requested to respond to Q&V questionnaires for purposes of mandatory respondent selection.[984] In the remaining ten challenged determinations, the USDOC selected mandatory respondents based on import data from the United States Customs and Border Protection and therefore did not request responses to Q&V questionnaires from the exporters within the PRC-wide entity.[985]

7.502. Since one or more mandatory respondents were ultimately included within the PRC-wide entity in 17 of the challenged determinations, one or more exporters within the PRC-wide entity were requested to respond to a full dumping questionnaire in these determinations.[986] All mandatory respondents passed the Separate Rate Test in the remaining 13 challenged determinations and therefore none of the exporters within the PRC-wide entity were requested to respond to a full dumping questionnaire in these determinations.[987]

[984] *Aluminum* OI, Notice of Preliminary Determination, (Exhibit CHN-111), p. 69406; *Aluminum* AR1, Decision Memorandum, (Exhibit CHN-213), pp. 2-3; *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205), pp. 2-3; *Coated Paper* OI, Notice of Preliminary Determination, (Exhibit CHN-63), p. 24897; *Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-215), p. 42655; *OTR Tires* OI, Preliminary Determination, (Exhibit CHN-122), p. 9278; *OCTG* OI, Notice of Preliminary Determination, (Exhibit CHN-62), p. 59118; *Solar* OI, Preliminary Determination, (Exhibit CHN-241), p. 31309; *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 2; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77121; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77965; *Wood Flooring* OI, Preliminary Determination, (Exhibit CHN-158), p. 30657; *Ribbons* OI, Preliminary Determination, (Exhibit CHN-170), p. 7245; *Ribbons* AR1, Preliminary Results, (Exhibit CHN-171), p. 47363; *Ribbons* AR3, Decision Memorandum, (Exhibit CHN-156), p. 2; *Bags* OI, Notice of Preliminary Determination, (Exhibit CHN-267), p. 3545; *Bags* AR3, Preliminary Results, (Exhibit CHN-274), p. 52283; *Furniture* OI, Notice of Preliminary Determination, (Exhibit CHN-283), p. 35313; *Furniture* AR7, Decision Memorandum, (Exhibit CHN-298), pp. 6-7; and *Furniture* AR8, Decision Memorandum, (Exhibit CHN-302), p. 6. See also China's response to Panel question No. 53, paras. 275 and 277; and United States' response to Panel question No. 53, para. 140.

[985] *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-167), pp. 2-3; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-120), p. 2; *OTR Tires* AR5, Respondent Selection Memorandum, (Exhibit CHN-504), pp. 2 and 6-7; *Diamond Sawblades* AR1, Initiation of Administrative Reviews, (Exhibit CHN-196), p. 81566; *Diamond Sawblades* AR2, Decision Memorandum, (Exhibit CHN-252), p. 5; *Diamond Sawblades* AR3, Respondent Selection Memorandum, (Exhibit CHN-255), p. 4; *Diamond Sawblades* AR4, Respondent Selection Memorandum, (Exhibit CHN-505), p. 6; *Wood Flooring* AR1, Decision Memorandum, (Exhibit CHN-263), pp. 4-5; *Wood Flooring* AR2, Decision Memorandum, (Exhibit CHN-117), pp. 4-5; and *PET Film* OI, Preliminary Determination, (Exhibit CHN-112), p. 24553. See also China's response to Panel question No. 53, paras. 275 and 277; and United States' response to Panel question No. 53, para. 140.

[986] *Aluminum* OI, Notice of Preliminary Determination, (Exhibit CHN-111), pp. 69406 and 69409; *Aluminum* AR1, Decision Memorandum, (Exhibit CHN-213), pp. 3 and 14; *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205), pp. 4 and 14-16; *Coated Paper* OI, Final Determination, (Exhibit CHN-12), p. 59220; *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-167), pp. 3 and 7; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-304), p. 1; *OTR Tires* AR5, Issues and Decision Memorandum, (Exhibit CHN-472), p. 12; *OCTG* OI, Final Determination, (Exhibit CHN-13), p. 20339; *Diamond Sawblades* OI, Final Determination, (Exhibit CHN-45), p. 29308; *Diamond Sawblades* AR3, Decision Memorandum, (Exhibit CHN-256), pp. 8-9; *Ribbons* OI, Preliminary Determination, (Exhibit CHN-170), pp. 7245 and 7250; *Ribbons* AR3, Decision Memorandum, (Exhibit CHN-156), p. 5; *Bags* OI, Notice of Final Determination, (Exhibit CHN-53), p. 34127; *PET Film* OI, Preliminary Determination, (Exhibit CHN-112), pp. 24553 and 24557; *Furniture* OI, Notice of Preliminary Determination, (Exhibit CHN-283), p. 35313, and Final Determination, (Exhibit CHN-58), p. 67315; *Furniture* AR7, Preliminary Results, (Exhibit CHN-469), p. 8494; and *Furniture* AR8, Decision Memorandum, (Exhibit CHN-302), pp. 1 and 12. See also China's response to Panel question No. 53, paras. 276-277; and United States' response to Panel question No. 53, para. 140.

[987] *Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-215), pp. 42656 and 42661; *OTR Tires* OI, Preliminary Determination, (Exhibit CHN-122), p. 9283, and Final Determination, (Exhibit CHN-41), p. 40487; *Solar* OI, Preliminary Determination, (Exhibit CHN-241), pp. 31309 and 31322; *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 1, and Final Results, (Exhibit CHN-489), pp. 41001-41002; *Diamond Sawblades* AR1, Preliminary Results, (Exhibit CHN-249), pp. 76135 and 76141-76142; *Diamond Sawblades* AR2, Decision Memorandum, (Exhibit CHN-137), pp. 1, 4-7, and 14; *Diamond Sawblades* AR4, Decision Memorandum, (Exhibit CHN-481), pp. 1-2 and 7-9; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), pp. 77965 and 77970; *Wood Flooring* OI, Preliminary Determination, (Exhibit CHN-158), pp. 30658 and 30665; *Wood Flooring* AR1, Decision Memorandum, (Exhibit CHN-263), pp. 6-8; *Wood Flooring* AR2, Decision Memorandum, (Exhibit CHN-117), pp. 5 and 8; *Ribbons* AR1, Preliminary Results, (Exhibit CHN-171), p. 47364, and Final Results, (Exhibit CHN-51), pp. 10132-10133; and *Bags* AR3, Preliminary Results,

7.503. The USDOC made a finding of non-cooperation by the PRC-wide entity in 20 of the challenged determinations: In seven of these determinations, the USDOC's finding of non-cooperation was based solely on the failure of one or more exporters within the PRC-wide entity to respond to the Q&V questionnaire.[988] In six of the challenged determinations, the USDOC's finding of non-cooperation was based solely on the failure of one or more mandatory respondents, ultimately included within the PRC-wide entity, to respond to the full dumping questionnaire or allow verification of the information provided.[989] In seven of the challenged determinations, the USDOC's finding of non-cooperation was based on both the failure of some exporters within the PRC-wide entity to respond to the Q&V questionnaire, and the failure of one or more mandatory respondents, ultimately included within the PRC-wide entity, to respond to the full dumping questionnaire or allow verification of the information provided.[990] In addition, in three of the challenged determinations, the USDOC's finding of non-cooperation was also based on the failure of the Government of China to respond to requests for information.[991]

7.504. The USDOC did not make an explicit finding of non-cooperation in ten of the challenged determinations: The USDOC re-applied a rate, which was determined on the basis of facts available in a prior segment of the proceedings, in eight of the challenged determinations.[992] In one of the challenged determinations, the USDOC determined a rate based on a simple average of the previously assigned facts available rate and the margin of dumping calculated for a cooperating mandatory respondent, which had ultimately been included within the PRC-wide entity[993], and in yet another of the challenged determinations, the USDOC re-applied a rate calculated in this manner.[994]

7.505. In the 20 challenged determinations where the USDOC made a finding of non-cooperation by the PRC-wide entity, the USDOC explicitly stated that it was making an adverse inference in

---

(Exhibit CHN-274), pp. 52283-52284. See also China's response to Panel question No. 53, paras. 276-277; and United States' response to Panel question No. 53, para. 140.

[988] *Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-215), p. 42661; *OTR Tires* OI, Preliminary Determination, (Exhibit CHN-122), p. 9285; *Solar* OI, Preliminary Determination, (Exhibit CHN-241), p. 31317; *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), pp. 17-18; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77970; *Wood Flooring* OI, Preliminary Determination, (Exhibit CHN-158), p. 30662; and *Ribbons* AR3, Decision Memorandum, (Exhibit CHN-156), pp. 6-7.

[989] *Aluminum* AR1, Decision Memorandum, (Exhibit CHN-213), pp. 14-15; *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205), p. 17; *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-167), p. 7; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-120), pp. 6-7; *PET Film* OI, Preliminary Determination, (Exhibit CHN-112), p. 24557; and *Furniture* AR7, Decision Memorandum, (Exhibit CHN-298), p. 13.

[990] *Aluminum* OI, Notice of Preliminary Determination, (Exhibit CHN-111), p. 69410; *Coated Paper* OI, Notice of Preliminary Determination, (Exhibit CHN-63), pp. 24900-24901, and Final Determination, (Exhibit CHN-12), pp. 59220-59221; *OCTG* OI, Final Determination, (Exhibit CHN-13), p. 20339; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77128; *Ribbons* OI, Preliminary Determination, (Exhibit CHN-170), p. 7251; *Bags* OI, Notice of Preliminary Determination, (Exhibit CHN-267), p. 3548; and *Furniture* OI, Notice of Preliminary Determination, (Exhibit CHN-283), p. 35321, and Issues and Decision Memorandum, (Exhibit CHN-463), p. 97.

[991] *Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-215), p. 42661; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77128; and *Furniture* OI, Notice of Preliminary Determination, (Exhibit CHN-283), p. 35321.

[992] *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145; *Diamond Sawblades* AR2, Decision Memorandum, (Exhibit CHN-137), p. 8; *Diamond Sawblades* AR3, Decision Memorandum, (Exhibit CHN-256), p. 10; *Wood Flooring* AR1, Decision Memorandum, (Exhibit CHN-263), p. 11; *Wood Flooring* AR2, Decision Memorandum, (Exhibit CHN-117), p. 10; *Ribbons* AR1, Preliminary Results, (Exhibit CHN-171), p. 47369; *Bags* AR3, Final Results, (Exhibit CHN-54), p. 6858; and *Furniture* AR8, Decision Memorandum, (Exhibit CHN-302), pp. 2 and 14. See also China's second written submission, para. 254; and United States' second written submission, fn 415 and para. 259.

[993] *OTR Tires* AR5, Final Results, (Exhibit CHN-486), p. 20199. In this respect, the USDOC stated:

> Because Double Coin [the mandatory respondent ultimately included within the PRC-wide entity] provided the [USDOC] with its verified sales and production data, we are able to calculate a margin for an unspecified portion of a single PRC-wide entity, but cannot do so for the remaining unspecified portion of the entity. As the [USDOC] must calculate a single margin for the PRC-wide government controlled entity and there is insufficient information on the record with respect to the composition of the PRC-wide entity, as facts available pursuant to section 776(a)(1) of the Act, we calculated a simple average of the previously assigned PRC-wide rate (210.48 percent) and Double Coin's calculated margin (0.14 percent) as the rate applicable to the PRC-wide entity. Accordingly, the [USDOC] revised the PRC-wide entity rate to 105.31 percent for these final results. (Ibid.). (footnotes omitted)

[994] *Diamond Sawblades* AR4, Issues and Decision Memorandum, (Exhibit CHN-473), p. 11.

selecting among the facts available.[995] In these 20 challenged determinations, the USDOC corroborated the initially selected facts available by comparing the initially selected rate either to transaction-specific or CONNUM-specific dumping margins of mandatory respondents, to transaction-specific prices and normal values for mandatory respondents, or to information provided in the petition or in the petitioners' responses to supplementary requests for information, or by referring to its pre-initiation analysis or its corroboration in a prior segment of the proceedings.[996]

[995] *Aluminum* OI, Notice of Preliminary Determination, (Exhibit CHN-111), p. 69411; *Aluminum* AR1, Decision Memorandum, (Exhibit CHN-213), p. 15; *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205), p. 17; *Coated Paper* OI, Final Determination, (Exhibit CHN-12), p. 59221; *Shrimp* OI, Notice of Preliminary Determination, (Exhibit CHN-215), p. 42662; *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-167), p. 7; *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-120), p. 7; *OTR Tires* OI, Preliminary Determination, (Exhibit CHN-122), p. 9285; *OCTG* OI, Notice of Preliminary Determination, (Exhibit CHN-62), p. 59125; *Solar* OI, Final Determination, (Exhibit CHN-44), p. 63794; *Solar* AR1, Decision Memorandum, (Exhibit CHN-488), p. 18; *Diamond Sawblades* OI, Preliminary Determination, (Exhibit CHN-135), p. 77128; *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77970; *Wood Flooring* OI, Preliminary Determination, (Exhibit CHN-158), p. 30662; *Ribbons* OI, Preliminary Determination, (Exhibit CHN-170), p. 7251; *Ribbons* AR3, Decision Memorandum, (Exhibit CHN-156), p. 7; *Bags* OI, Notice of Preliminary Determination, (Exhibit CHN-267), p. 3548; *PET Film* OI, Preliminary Determination, (Exhibit CHN-112), p. 24557; *Furniture* OI, Notice of Preliminary Determination, (Exhibit CHN-283), p. 35321; and *Furniture* AR7, Decision Memorandum, (Exhibit CHN-298), p. 13.

[996] *Aluminum* OI, Final Determination, (Exhibit CHN-32), pp. 18529-18530 (comparing the initially selected rate from the petition with CONNUM-specific margins of dumping for mandatory respondents and referring to its pre-initiation analysis of information from the petition); *Aluminum* AR1, Decision Memorandum, (Exhibit CHN-213), p. 16 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for a mandatory respondent); *Aluminum* AR2, Decision Memorandum, (Exhibit CHN-205), p. 19 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for a mandatory respondent); *Coated Paper* OI, Final Determination, (Exhibit CHN-12), pp. 59221-59222 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for a mandatory respondent); *Shrimp* OI, Corroboration Memorandum, (Exhibit CHN-157), pp. 2-3 (comparing the initially selected rate from the petition with CONNUM-specific margins of dumping for a mandatory respondent); *Shrimp* AR7, Decision Memorandum, (Exhibit CHN-209), pp. 20-23 (comparing the initially selected rate from the petition with CONNUM-specific margins of dumping for mandatory respondents in the original investigation); *Shrimp* AR8, Decision Memorandum, (Exhibit CHN-304), pp. 9-10 (referring to its corroboration in prior administrative reviews, where the USDOC compared the initially selected rate from the petition with CONNUM-specific margins of dumping for mandatory respondents in the original investigation); *OTR Tires* OI, Corroboration Memorandum, (Exhibit CHN-208), p. 2, and Preliminary Determination, (Exhibit CHN-122), p. 9286 (comparing the initially selected rate from the petition with transaction-specific prices and normal values and margins of dumping for mandatory respondents); *OCTG* OI, Final Determination, (Exhibit CHN-13), pp. 20339-20340 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for mandatory respondents); *Solar* OI, Preliminary Determination, (Exhibit CHN-241), p. 31318 (comparing the initially selected rate from the petition with transaction-specific prices and normal values and margins of dumping for mandatory respondents); *Solar* AR1, Decision Memorandum, (Exhibit CHN-487), pp. 16-17 (referring to its corroboration in the original investigation and comparing the initially selected rate from the petition with transaction-specific margins of dumping for a mandatory respondent in this administrative review); *Diamond Sawblades* OI, Final Determination, (Exhibit CHN-45), p. 29308 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for mandatory respondents); *Steel Cylinders* OI, Preliminary Determination, (Exhibit CHN-65), p. 77971 (comparing the initially selected transaction-specific rate to other transaction-specific margins of dumping for a mandatory respondent); *Wood Flooring* OI, Preliminary Determination, (Exhibit CHN-158), p. 30662 (comparing the initially selected rate from the petition with transaction-specific prices and normal values for mandatory respondents, finding that the former did not have probative value and instead selecting the highest transaction-specific rate for a mandatory respondent, which was not considered secondary information and therefore not corroborated); *Ribbons* OI, Final Determination, (Exhibit CHN-33), p. 41811 (comparing the initially selected rate from the petition with CONNUM-specific margins of dumping for mandatory respondents); *Ribbons* AR3, Decision Memorandum, (Exhibit CHN-156), pp. 8-9 (referring to its pre-initiation analysis, where the USDOC compared the rate from the petition with information in the petition and in petitioners' responses); *Bags* OI, Notice of Preliminary Determination, (Exhibit CHN-267), p. 3549 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for mandatory respondents); *PET Film* OI, Preliminary Determination, (Exhibit CHN-112), pp. 24557-24558, and Final Determination, (Exhibit CHN-56), p. 55041 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for mandatory respondents and referring to its pre-initiation analysis, where the USDOC compared the rate from the petition with information in the petition and in petitioners' responses); *Furniture* OI, Final Determination, (Exhibit CHN-58), pp. 67316-67317 (comparing the initially selected rate from the petition with transaction-specific margins of dumping for mandatory respondents); and *Furniture* AR7, Issues and Decision Memorandum, (Exhibit CHN-151), pp. 9-10 (referring to its corroboration in a previous administrative review, where the USDOC compared the selected rate, which was based on a weighted average of margins of dumping

7.506. In 18 of the challenged determinations, the USDOC determined margins of dumping for one or more of the mandatory respondents that were not zero, *de minimis* or based on facts available.[997] The PRC-wide rate, assigned to the PRC-wide entity by the USDOC in these 18 determinations, was higher than the highest margin of dumping calculated for a mandatory respondent in the same determination.[998]

7.507. In two of the challenged determinations, the USDOC initially determined margins of dumping for mandatory respondents that were not zero, *de minimis* or based on facts available, but ultimately amended these margins to zero or *de minimis*.[999] In four of the challenged determinations, the USDOC did not determine margins of dumping for mandatory respondents that were not zero, *de minimis* or based on facts available, but such margins of dumping were determined for mandatory respondents in prior segments of the proceedings.[1000] The PRC-wide rate, assigned to the PRC-wide entity by the USDOC in these six determinations, was higher than the highest margin of dumping initially determined for a mandatory respondent in the same determination or the highest margin of dumping determined for a mandatory respondent in a prior segment of the proceedings.[1001]

---

for mandatory respondents in prior administrative reviews, with transaction-specific margins of dumping for mandatory respondents).

[997] *Coated Paper* OI, Amended Final Determination, (Exhibit CHN-34), p. 70204; *OTR Tires* OI, Notice of Amended Final Determination, (Exhibit CHN-231), pp. 51626-51627; *OTR Tires* AR5, Amended Final Results, (Exhibit CHN-482), p. 26231; *OCTG* OI, Amended Final Determination, (Exhibit CHN-237), pp. 28551-28552; *Solar* OI, Amended Final Determination, (Exhibit CHN-242), pp. 73020-73021; *Solar* AR1, Final Results, (Exhibit CHN-489), pp. 41001-41002; *Diamond Sawblades* OI, Notice of Amended Final Determination, (Exhibit CHN-244), p. 35865; *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145; *Diamond Sawblades* AR3, Final Results, (Exhibit CHN-48), p. 35724; *Diamond Sawblades* AR4, Final Results, (Exhibit CHN-485), pp. 32344-32345; *Steel Cylinders* OI, Final Determination, (Exhibit CHN-14), p. 26742; *Wood Flooring* AR1, Amended Final Results, (Exhibit CHN-464), p. 35316; *Wood Flooring* AR2, Final Results, (Exhibit CHN-490), p. 41478; *Bags* OI, Notice of Amended Final Determination, (Exhibit CHN-306), p. 42420; *Bags* AR3, Final Results, (Exhibit CHN-54), p. 6858; *PET Film* OI, Final Determination, (Exhibit CHN-56), p. 55041; *Furniture* OI, Notice of Amended Final Determination, (Exhibit CHN-288), pp. 67100-67102; and *Furniture* AR8, Final Results, (Exhibit CHN-60), p. 51955.

[998] *Coated Paper* OI, Amended Final Determination, (Exhibit CHN-34), p. 70204; *OTR Tires* OI, Notice of Amended Final Determination, (Exhibit CHN-231), pp. 51626-51627; *OTR Tires* AR5, Amended Final Results, (Exhibit CHN-482), p. 26231; *OCTG* OI, Amended Final Determination, (Exhibit CHN-237), pp. 28551-28552; *Solar* OI, Amended Final Determination, (Exhibit CHN-242), pp. 73020-73021; *Solar* AR1, Final Results, (Exhibit CHN-489), pp. 41001-41002; *Diamond Sawblades* OI, Notice of Amended Final Determination, (Exhibit CHN-244), p. 35865; *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145; *Diamond Sawblades* AR3, Final Results, (Exhibit CHN-48), p. 35724; *Diamond Sawblades* AR4, Final Results, (Exhibit CHN-485), pp. 32344-32345; *Steel Cylinders* OI, Final Determination, (Exhibit CHN-14), p. 26742; *Wood Flooring* AR1, Amended Final Results, (Exhibit CHN-464), p. 35316; *Wood Flooring* AR2, Final Results, (Exhibit CHN-490), p. 41478; *Bags* OI, Notice of Amended Final Determination, (Exhibit CHN-306), p. 42420; *Bags* AR3, Final Results, (Exhibit CHN-54), p. 6858; *PET Film* OI, Final Determination, (Exhibit CHN-56), p. 55041; *Furniture* OI, Notice of Amended Final Determination, (Exhibit CHN-288), pp. 67100-67102; and *Furniture* AR8, Final Results, (Exhibit CHN-60), p. 51955.

[999] *Shrimp* OI, Notice of Amended Final Determination, (Exhibit CHN-216), p. 5151, and Notice of Implementation of Determinations, (Exhibit CHN-220), p. 18959; and *Wood Flooring* OI, Final Determination, (Exhibit CHN-49), pp. 64323-64324, Amended Final Determination, (Exhibit CHN-150), pp. 76692-76693, and Amended Final Determination, (Exhibit CHN-258), p. 25110.

[1000] *Shrimp* AR7: compare *Shrimp* AR7, Final Results, (Exhibit CHN-38), p. 56210 with *Shrimp* AR3, Final Results, (Exhibit CHN-223), p. 46568; *Shrimp* AR8: compare *Shrimp* AR8, Final Results, (Exhibit CHN-39), p. 57872 with *Shrimp* AR3, Final Results, (Exhibit CHN-223), p. 46568; *Diamond Sawblades* AR2: compare *Diamond Sawblades* AR2, Final Results, (CHN-47), p. 36167 with *Diamond Sawblades* OI, Notice of Amended Final Determination, (Exhibit CHN-247), p. 65290, and *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145; and *Furniture* AR7: compare *Furniture* AR7, Final Results, (Exhibit CHN-59), p. 35250 with *Furniture* OI, Notice of Amended Final Determination, (Exhibit CHN-288), pp. 67100-67102, *Furniture* AR1, Amended Final Results, (Exhibit CHN-290), p. 46964, *Furniture* AR2, Final Results, (Exhibit CHN-291), pp. 49166-49167, *Furniture* AR3, Notice of Amended Final Results, (Exhibit CHN-509), pp. 68410-68411, *Furniture* AR4, Notice of Amended Final Results, (Exhibit CHN-510), p. 4871, and *Furniture* AR5, Final Results, (Exhibit CHN-294), pp. 49733-49734.

[1001] *Shrimp* OI, Notice of Amended Final Determination, (Exhibit CHN-216), p. 5151; *Shrimp* AR7: compare *Shrimp* AR7, Final Results, (Exhibit CHN-38), p. 56210 with *Shrimp* AR3, Final Results, (Exhibit CHN-223), p. 46568; *Shrimp* AR8: compare *Shrimp* AR8, Final Results, (Exhibit CHN-39), p. 57872 with *Shrimp* AR3, Final Results, (Exhibit CHN-223), p. 46568; *Diamond Sawblades* AR2: compare *Diamond Sawblades* AR2, Final Results, (CHN-47), p. 36167 with *Diamond Sawblades* OI, Notice of Amended Final Determination, (Exhibit CHN-247), p. 65290, and *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145; *Wood*

7.508. The USDOC assigned a so-called "all others" rate to exporters that passed the Separate Rate Test but were not individually examined in 25 of the challenged determinations.[1002] The PRC-wide rate, assigned to the PRC-wide entity by the USDOC in these 25 determinations, was higher than the "all others" rate in the same determination.[1003]

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

a. With respect to the USDOC's use of the WA-T methodology in the *OCTG*, *Coated Paper* and *Steel Cylinders* 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 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 and because of the first SAS programming error that occurred in the application of the price gap test;

ii. 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 USDOC's explanations which were premised on the use of the WA-T methodology with zeroing and because of its failure to provide an explanation as to why the T-T

Flooring OI, Final Determination, (Exhibit CHN-49), pp. 64323-64324; and *Furniture* AR7: compare *Furniture* AR7, Final Results, (Exhibit CHN-59), p. 35250 with *Furniture* OI, Notice of Amended Final Determination, (Exhibit CHN-288), pp. 67100-67102, *Furniture* AR1, Amended Final Results, (Exhibit CHN-290), p. 46964, *Furniture* AR2, Final Results, (Exhibit CHN-291), pp. 49166-49167, *Furniture* AR3, Notice of Amended Final Results, (Exhibit CHN-509), pp. 68410-68411, *Furniture* AR4, Notice of Amended Final Results, (Exhibit CHN-510), p. 4871, and *Furniture* AR5, Final Results, (Exhibit CHN-294), pp. 49733-49734.

[1002] *Aluminum* OI, Final Determination, (Exhibit CHN-32), pp. 18530-18531; *Aluminum* AR1, Final Results, (Exhibit CHN-35), p. 100; *Aluminum* AR2, Final Results, (Exhibit CHN-36), pp. 78786-78787; *Coated Paper* OI, Amended Final Determination, (Exhibit CHN-34), p. 70204; *Shrimp* OI, Notice of Amended Final Determination, (Exhibit CHN-216), p. 5151, and Amended Final Determination, (Exhibit CHN-221), p. 13039; *OTR Tires* OI, Notice of Amended Final Determination, (Exhibit CHN-231), pp. 51626-51627; *OTR Tires* AR5, Amended Final Results, (Exhibit CHN-482), p. 26231; *OCTG* OI, Amended Final Determination, (Exhibit CHN-237), pp. 28551-28552; *Solar* OI, Amended Final Determination, (Exhibit CHN-242), pp. 73020-73021; *Solar* AR1, Final Results, (Exhibit CHN-489), pp. 41001-41002; *Diamond Sawblades* OI, Final Determination, (Exhibit CHN-45), p. 29309; *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145; *Diamond Sawblades* AR2, Final Results, (Exhibit CHN-47), p. 36167, and Amended Final Results, (Exhibit CHN-253), p. 42931; *Diamond Sawblades* AR3, Final Results, (Exhibit CHN-48), p. 35724; *Diamond Sawblades* AR4, Final Results, (Exhibit CHN-485), pp. 32344-32345; *Steel Cylinders* OI, Final Determination, (Exhibit CHN-14), p. 26742; *Wood Flooring* OI, Amended Final Determination, (Exhibit CHN-150), pp. 76692-76693, and Notice of Amended Final Determination, (Exhibit CHN-258), p. 25110; *Wood Flooring* AR1, Amended Final Results, (Exhibit CHN-464), p. 35316; *Wood Flooring* AR2, Final Results, (Exhibit CHN-490), pp. 41477-41478; *Ribbons* OI, Final Determination, (Exhibit CHN-33), p. 41812; *Ribbons* AR1, Final Results, (Exhibit CHN-51), p. 10133; *Bags* OI, Notice of Amended Final Determination, (Exhibit CHN-306), p. 42420; *PET Film* OI, Final Determination, (Exhibit CHN-56), p. 55041; *Furniture* OI, Notice of Amended Final Determination, (Exhibit CHN-288), pp. 67100-67102; and *Furniture* AR7, Final Results, (Exhibit CHN-59), p. 35250.

[1003] *Aluminum* OI, Final Determination, (Exhibit CHN-32), pp. 18530-18531; *Aluminum* AR1, Final Results, (Exhibit CHN-35), p. 100; *Aluminum* AR2, Final Results, (Exhibit CHN-36), pp. 78786-78787; *Coated Paper* OI, Amended Final Determination, (Exhibit CHN-34), p. 70204; *Shrimp* OI, Notice of Amended Final Determination, (Exhibit CHN-216), p. 5151, and Amended Final Determination, (Exhibit CHN-221), p. 13039; *OTR Tires* OI, Notice of Amended Final Determination, (Exhibit CHN-231), pp. 51626-51627; *OTR Tires* AR5, Amended Final Results, (Exhibit CHN-482), p. 26231; *OCTG* OI, Amended Final Determination, (Exhibit CHN-237), pp. 28551-28552; *Solar* OI, Amended Final Determination, (Exhibit CHN-242), pp. 73020-73021; *Solar* AR1, Final Results, (Exhibit CHN-489), pp. 41001-41002; *Diamond Sawblades* OI, Final Determination, (Exhibit CHN-45), p. 29309; *Diamond Sawblades* AR1, Final Results, (Exhibit CHN-46), p. 11145; *Diamond Sawblades* AR2, Final Results, (Exhibit CHN-47), p. 36167, and Amended Final Results, (Exhibit CHN-253), p. 42931; *Diamond Sawblades* AR3, Final Results, (Exhibit CHN-48), p. 35724; *Diamond Sawblades* AR4, Final Results, (Exhibit CHN-485), pp. 32344-32345; *Steel Cylinders* OI, Final Determination, (Exhibit CHN-14), p. 26742; *Wood Flooring* OI, Amended Final Determination, (Exhibit CHN-150), pp. 76692-76693, and Notice of Amended Final Determination, (Exhibit CHN-258), p. 25110; *Wood Flooring* AR1, Amended Final Results, (Exhibit CHN-464), p. 35316; *Wood Flooring* AR2, Final Results, (Exhibit CHN-490), pp. 41477-41478; *Ribbons* OI, Final Determination, (Exhibit CHN-33), p. 41812; *Ribbons* AR1, Final Results, (Exhibit CHN-51), p. 10133; *Bags* OI, Notice of Amended Final Determination, (Exhibit CHN-306), p. 42420; *PET Film* OI, Final Determination, (Exhibit CHN-56), p. 55041; *Furniture* OI, Notice of Amended Final Determination, (Exhibit CHN-288), pp. 67100-67102; and *Furniture* AR7, Final Results, (Exhibit CHN-59), p. 35250.

methodology could not take into account appropriately the significant differences in the relevant export prices;

iii. The United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG*, *Coated Paper* and *Steel Cylinders* investigations by applying the WA-T methodology to all export transactions;

iv. 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 use of zeroing in the dumping margin calculations made through the WA-T methodology;

v. China has not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *Steel Cylinders* investigation by reason 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;

vi. 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 by reason of the first, second and third alleged quantitative flaws with the Nails test;

vii. China has not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by reason of the second alleged SAS programming error that occurred in the application of the price gap test in the *OCTG* and *Coated Paper* investigations;

viii. 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; and

ix. 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 by finding the relevant pattern on the basis of purchaser or time period averages as opposed to individual export transaction prices.

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 use of zeroing in the dumping margin calculations made through the WA-T methodology.

c. With respect to the Single Rate Presumption:

i. The six administrative review determinations introduced at the Panel's first substantive meeting with the parties are within the Panel's terms of reference;

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;

iii. The United States acted inconsistently with Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the application of the Single Rate Presumption in the 38 determinations challenged by China under these provisions; and

iv. In light of the findings set out in paragraphs ‍8.1c.ii and ‍8.1c.iii, we make no findings, based on judicial economy, 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.

d. With respect to China's claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement:

   i. The four of the six administrative review determinations introduced at the Panel's first substantive meeting with the parties, which are relevant to these claims, are within the Panel's terms of reference;

   ii. China has not demonstrated that the alleged AFA Norm constitutes a norm of general and prospective application and there is therefore no need to examine whether that Norm falls within the Panel's terms of reference nor to address China's as such claims under Article 6.8 of the Anti-Dumping Agreement and paragraph 7 of its Annex II against that Norm; and

   iii. In light of the findings set out in paragraph 8.1c.iii, we make no findings, based on judicial economy, with respect to China's as applied claims under Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement concerning the 30 determinations challenged by China under these provisions.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. Thus, we conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994, they have nullified or impaired benefits accruing to China under those Agreements. On this basis, pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.

WORLD TRADE ORGANIZATION

WT/DS471/R/Add.1

19 October 2016

(16-5650)

Original: English

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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS471/R.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

CHINA

UNITED STATES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 11 February 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

.....

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by China. If the United States chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the

floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 7 paper copies of all documents it submits to the Panel. However, Exhibits may be filed in 3 CD-ROMs or DVDs and 4 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to Gabrielle.Marceau@wto.org, Muslum.Yilmaz@wto.org and Sagnik.Sinha@wto.org. CD-ROMs or DVDs shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 16 February 2015

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by the U.S. Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping duty proceedings relevant to this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the relevant proceedings agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI, as defined above, from an entity that submitted that information in one of the relevant proceedings, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both China and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those proceedings.

3. If an entity refuses to grant the authorization letter, a party may bring the situation to the attention of the Panel. The Panel shall consider what steps to take, which may include requesting information pursuant to Article 13 of the DSU.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the proceedings relevant to this dispute.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the

Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

CHINA

UNITED STATES

ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. USDOC's Application of its Targeted Dumping Methodology in Three Original Investigations

A. USDOC failed to comply with the conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence

1. According to Article 2.4.2, second sentence, the *first* condition under which a Member may depart from the "normal" symmetrical comparison methodologies – i.e., when it may depart from using the weighted average-to-weighted average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies, and instead use the exceptional weighted-average-to-transaction ("W-T") comparison methodology – is that there must exist "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Once a relevant "pattern" has been identified, an investigating authority must satisfy the *second* condition, which is to *explain* why the pattern "cannot be taken into account appropriately" through the application of the symmetrical comparison methodologies.

2. In evaluating an investigating authority's approach to determining whether these two conditions are satisfied, a WTO panel must apply the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*. In particular, "panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts was *unbiased and objective*".[1]

3. For the below reasons, USDOC failed to comply with the two conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence, in each of the three challenged determinations.

1. USDOC's failed to comply with the condition to identify a relevant pricing pattern

a. USDOC used the statistical tools of its own choice in an arbitrary and biased manner

4. An investigating authority is not obliged under the *Anti-Dumping Agreement* to have recourse to any *specific* statistical tools in addressing the first condition under Article 2.4.2, second sentence. However, China argues that the United States failed to use the tools of its own choice in a manner that would have enabled it to establish the facts properly and to evaluate them in an unbiased and objective manner.

5. In order to assess whether the first condition for having recourse to the exceptional W-T comparison methodology was met, i.e., to assess the existence of a "pattern", USDOC applied the so-called Nails Test in the three challenged determinations.[2] However, to be potentially meaningful as an analytical tool, the Nails Test hinges on the assumption that the distribution of the examined export prices was, at the minimum, single-peaked and symmetric around the mean. Across the three challenged determinations, although in some CONNUMs the export price data came close to being normally distributed, this was not generally the case. Thus, China's claims as to USDOC's failure to demonstrate that the identified export price differences were "significant" in a quantitative sense, are not dependent on the assumption that the observed export prices were "normally distributed". Rather, it is the Nails Test, and therefore the validity of the US position, that depends on that assumption.

6. China's three main substantive criticisms of the Nails Test can be summarized as follows:

7. *First*, the threshold of a single standard deviation from the mean, USDOC's primary tool for its Pattern Test, is insufficient for reaching a reliable conclusion that an observed set of prices differ in a relevant way. Such a low threshold is insufficient to draw a conclusion that a random

[1] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56 (emphasis original).
[2] *OCTG* OI, *Coated Paper* OI, and *Steel Cylinders* OI.

price observation is significantly different from other price observations in a given distribution, or whether, by contrast, it falls within that distribution. If USDOC had instead used thresholds consistent with the established statistical conventions for determining quantitative significance, *none of the alleged-target units in any of the three challenged determinations* would have fallen below the threshold price.

8. *Second*, it was inappropriate for USDOC to attribute "significance" to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean, because this is an *inherent feature* of every peaked distribution with tails.

9. *Third*, the US approach to consider only the gap between non-targeted weighted-average export prices which are greater than the weighted-average export prices to the allegedly "targeted" group led to an inherent bias in the design of the Nails Test, unduly increasing the likelihood of a finding that a price difference was "significant", and hence of an ultimate finding of "targeted dumping".

b. USDOC's reliance, in the Nails Test, on weighted-average prices instead of individual export transactions runs afoul of the treaty text and biased the test towards finding a "pattern"

10. USDOC's use of weighted-average prices for purposes of the Nails Test was inconsistent with Article 2.4.2, second sentence, for two reasons: *first*, the US approach is inconsistent with the legal requirement to focus on individual export prices; and, *second*, USDOC's reliance on customer or time period averages ignored within-customer and within time-period price variances. As a result, USDOC systematically biased the standard deviation used in the Pattern Test, drawing it closer to the mean, which improperly qualified more sales as "targeted" than would have been the case had USDOC calculated the one-standard-deviation threshold based on individual transaction prices.

c. USDOC failed to assess whether export prices differed "significantly" in a qualitative sense

11. Both a *quantitative* and a *qualitative* dimension are inherent in the concept of "significance". Variations in prices that can be explained by reference to normal factors in the relevant market are not "prices which differ significantly", in *qualitative* terms, for purposes of Article 2.4.2. USDOC's application, in the three challenged determinations, of its Pattern and Price Gap Tests did not consider *any* qualitative factors in determining whether prices to the alleged target should be considered "low" relative to any other prices charged by the exporter under investigation. Instead of considering what price differences might be normal within an industry or over time, USDOC mechanically applied the Nails Test and did not provide any explanation as to why prices passing its various thresholds could not arise from normal market dynamics undistorted by "targeted dumping".

2. USDOC failed to comply with the condition to provide a reasoned and adequate explanation as to why the relevant pricing pattern could not appropriately be taken into account using the symmetrical comparison methodologies

12. The explanation provided by USDOC as to why the relevant pricing pattern could not appropriately be addressed using a symmetrical comparison methodology in the three challenged determinations suffer from three fundamental flaws:

13. *First*, the explanation provided by USDOC in each of the three challenged determinations was excessively brief; it consisted of a single assertion as to the reason why a symmetrical comparison methodology was inappropriate. The "explanation" provided no analysis whatsoever of the characteristics of the identified "pattern" that led USDOC to the conclusion that it could not use the symmetrical comparison methodologies.

14. *Second*, contrary to the US argument, the "explanation" required by the second sentence of Article 2.4.2 must include a discussion of *both* the W-W and T-T comparison methodologies. In order properly to interpret the "or" in the second sentence of Article 2.4.2, one must take into account the context provided by the first sentence of Article 2.4.2, which contains the general rule, which is that "normally" an authority is to use a symmetrical comparison methodology to calculate a margin of dumping. Hence, recourse to the exceptional W-T comparison methodology is only

allowed if *neither* of the symmetrical comparison methodologies can take into account appropriately the identified pricing pattern.

15. *Third*, USDOC's explanation is based on the untenable assumption that, under the W-T comparison methodology under Article 2.4.2, second sentence, the application of zeroing procedures is somehow permissible. However, the US position disregards that, for the W-T comparison methodology, the *Anti-Dumping Agreement* imposes the same prohibition against the use of zeroing as in the context of both the W-W or T-T comparison methodologies. A fundamental principle undergirding the *Agreement* is that a margin of dumping must be calculated for the product as a whole, regardless whether the calculation is under the first or second sentence of Article 2.4.2 (or in a review under Article 9.3). And zeroing impermissibly prevents the determination of a margin of dumping for the product as a whole.

B. USDOC violated the treaty limits on an authority's discretion when applying the W-T comparison methodology pursuant Article 2.4.2, second sentence

1. USDOC unduly applied the W-T comparison methodology to all export sales instead of limiting the application of W-T to those sales that comprise the relevant pricing pattern

16. An investigating authority must limit the application of the W-T comparison methodology solely to those sales that comprise the relevant pricing pattern. China's position rests on the following grounds:

17. *First*, the express textual connection in Article 2.4.2 between the concepts of the "export prices which differ significantly" and "the prices of individual export transactions" denotes a parallelism between the scope of those transactions which fall into the relevant pricing pattern and the scope of application of the W-T comparison methodology.

18. Second, Article 2.4.2 limits the scope of application of the W-T comparison methodology to the extent necessary to "take into account appropriately" a relevant pricing pattern. The second sentence allows price differences to be taken into account "appropriately", and not in a generalized or excessive manner. Again, there is parallelism between the scope of the problem (a relevant pricing pattern that cannot be taken into account "appropriately") and the exceptional remedy provided.

19. *Third*, a general principle in WTO law is that an exception takes precedence over a general rule only to the extent of the conflict between the two provisions. Like other provisions of the covered agreements, Article 2.4.2 lays down a general rule that a symmetrical methodology should "normally" be used. The exception allowing use of the W-T comparison methodology takes precedence over this general rule only to the extent necessary to "take{} into account appropriately" a relevant pricing pattern. For sales outside this pattern (for example, sales to customers, regions or time periods other than those found to be targeted, or sales of models or types of the product for which no relevant pricing pattern has been found), no conflict between the first and second sentences of Article 2.4.2 exists, and therefore, an authority must use a symmetrical comparison methodology. The results of all intermediate comparison results must then be aggregated in order to generate a margin of dumping for the product as a whole.

20. *Finally*, China notes that a "relevant pricing pattern" necessarily can exist only in a *subset* of export sales. The process of discerning a "pattern" serves to *distinguish* prices that fall *within* the pattern from those that fall *outside* the pattern. Indeed, the United States' position that the pattern must include all sales because "an export price cannot 'differ significantly' on its own"[3] is at odds with the pattern of prices actually identified by the Nails Test applied by USDOC in the three challenged determinations. A fundamental element of the Nails Test is that it seeks to find "patterns" by reference to models, as well as by time (in *OCTG* and *Steel Cylinders*) or by customer (in *Coated Paper*). In this way, USDOC identified pricing patterns in respect of some models and not others. Having isolated the pattern in this limited way, USDOC was obliged to apply the exceptional W-T comparison methodology solely to the pattern it had identified, i.e., to a subset of the observed export sales.

[3] US First Written Submission, para. 202.

21. For all these reasons, there was no basis for USDOC in the three challenged determinations to apply the W-T comparison methodology to all sales of an exporter.

2. The United States' reliance on the concept of mathematical equivalence is unavailing to justify its use of zeroing when applying the W-T comparison methodology in investigations

22. Zeroing is not permissible when applying the W-T comparison methodology in investigations, just as it is impermissible when using the W-T comparison methodology in reviews. The contrary position is inconsistent with the "exporter-specific" and "product-related" aspects[4] of the foundational concept of dumping, which, as the Appellate Body has consistently explained, is *not* a transaction-specific concept. Since "dumping" cannot be found to exist at the level of individual transactions, there is no justification for failing to take account of any transaction-specific intermediate comparison results when aggregating comparison results in order to yield a margin of "dumping".

23. The United States attempts in vain to re-litigate the "mathematical equivalence" argument, which has consistently been rejected by the Appellate Body.[5] As the Appellate Body has explained, it is possible to generate results using the W-T comparison methodology that are different from those arising from the use of the W-W comparison methodology. For instance, nothing in Article 2.4.2 prevents an investigating authority from dividing the period of investigation into several time periods for purposes of calculating weighted average normal values to compare with individual export transactions under the W-T comparison methodology. As China has demonstrated, using different temporal bases for normal value means that mathematically *different* results will generally arise.

24. Although it is true that the earlier disputes in which the Appellate Body addressed the "mathematical equivalence" argument did not involve an actual application of the W-T comparison methodology under Article 2.4.2, second sentence, the disciplines that constrain how to use the W-T comparison methodology (including the prohibition on the use of zeroing procedures) apply equally regardless of the proceedings in which that methodology is used.

II. USDOC's Application of its Targeted Dumping Methodology in an Administrative Review

A. USDOC's application of zeroing procedures in *PET Film* AR3 is inconsistent with Article 9.3 of the *Anti-Dumping Agreement*

25. Although the *Anti-Dumping Agreement* does not restrict the ability of an investigating authority to use the W-T comparison methodology in administrative reviews, the use of *zeroing* "for purposes of assessing final liability for payment of anti-dumping duties" in an administrative review is prohibited.[6] Instead, as detailed in several Appellate Body Reports, duty liability must not exceed the *margin of dumping* determined for the product as a whole.[7] Accordingly, it is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 to disregard intermediate comparison results yielding negative margins when aggregating the results of multiple comparisons of normal value and export prices. USDOC's resort to zeroing to assess liability for anti-dumping duties in *PET Film* AR3 is, therefore, inconsistent with the United States' obligations under the WTO agreements.

[4] See, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[5] See, e.g., Appellate Body Report, *US – Softwood Lumber V (Article 21.5 Canada)*, paras. 97-100; Appellate Body Report, *US – Zeroing (Japan)*, para. 146; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126; Appellate Body Report, *US – Continued Zeroing*, paras. 296-298.

[6] Appellate Body Report, *US – Continued Zeroing*, para. 285.

[7] See, e.g., Appellate Body Reports, *US – Zeroing (EC)*, paras. 132-133; *US – Zeroing (Japan)*, paras. 108-115, 166 and 174-176; *US – Stainless Steel (Mexico)*, paras. 97-139; and *US – Continued Zeroing*, paras. 276-287 and 314-316.

B. The US argument depends on the untenable assumption that the second sentence of Article 2.4.2 somehow applies not only to original investigations, but also to administrative reviews

26. As regards the third administrative review in *PET Film*, China's challenge focuses on USDOC's application of zeroing procedures in connection with applying the W-T comparison methodology. Thus, China's claim must be analyzed pursuant to Article 9.3 of the *Anti-Dumping Agreement*, which governs reviews. China considers that, while investigating authorities may apply the W-T comparison methodology in administrative reviews, there is no doubt that the WTO disciplines on *how* an investigating authority may apply the W-T comparison methodology govern the application of that methodology in all types of proceedings (reviews and investigations) equally.

27. The US defense against China's claim appears to depend on the untenable assumption that the second sentence of Article 2.4.2 somehow applies to administrative reviews and not only to original investigations. Yet, the precise terms of the treaty text ("…during the investigation phase . . .") allow only one conclusion: recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations. Thus, even if the use of zeroing were permitted in original investigations in connection with applying the W-T comparison methodology under Article 2.4.2, second sentence, which is *not* the case, such permission would not extend to the duty assessment phase governed by Article 9.3 of the *Anti-Dumping Agreement*.

III. The Single Rate Presumption for Non-Market Economies, As Such, and As Applied in 38 Challenged Determinations is Inconsistent with Articles 6.10, 9.2 and 9.4 of the *Anti-Dumping Agreement*

28. In anti-dumping proceedings involving countries considered by USDOC to be "non-market economies" (or "NMEs"), USDOC presumes that all producers/exporters from the country concerned are part of a single, government controlled entity to which USDOC assigns a single rate. In order to rebut this presumption, a producer/exporter must prove both *de jure* and *de facto* absence of government control. China shows − by reference to evidence including USDOC Policy Bulletin 05.01, USDOC's Antidumping Manual, the records of the proceedings at issue, rulings of US courts and a sample of 40 original investigations and 52 administrative reviews issued by USDOC in proceedings involving NMEs since 2001 − that this "Single Rate Presumption", including the "Separate Rate Test" through which it may be rebutted, is a norm of general and prospective application that may be challenged as such in WTO dispute settlement. This norm is materially the same as the norm proven to exist and successfully challenged by Viet Nam in *US − Shrimp II (Viet Nam)* and is closely analogous to the EC measure that was found to be WTO-inconsistent by the Appellate Body in *EC − Fasteners*.

29. Article 6.10 requires that, for "each known exporter or producer ... of the product under consideration", an authority shall "determine an individual margin of dumping" unless an exception specifically contemplated by the *Agreement* applies. The Single Rate Presumption, as such and as applied in the 38 challenged determinations,[8] violates Article 6.10 because USDOC does not determine an individual margin of dumping for each of the known producers/exporters who are grouped into the single NME-wide entity by means of the presumption. Instead, in order to qualify for an individual margin, all producers/exporters from China, or any other country deemed to be an NME by USDOC, must rebut the presumption that they are part of the single NME-wide entity by demonstrating that they satisfy USDOC's Separate Rate Test. Although it is clear that authorities may, based on facts and evidence, determine that two or more respondents in an anti-dumping proceeding have such close affiliations that they may be treated as a single exporter, USDOC's *presumption* of singularity in NME cases, and the imposition of the burden on Chinese producers/exporters to rebut it, have no basis in the covered agreements. In particular, paragraph 15 of China's *Protocol of Accession* does *not* justify the Single Rate Presumption in relation to China. The exception to the generally applicable anti-dumping rules contained in

[8] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* OI, *OTR Tires* AR5, *OTR Tires* AR3, *OCTG* OI, *OCTG* AR1, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *Bags* AR4, *PET Film* OI, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* OI, *Furniture* AR7, *Furniture* AR8, *Furniture* AR9.

paragraph 15 of that *Protocol* is limited to certain matters relating to the determination of Chinese normal values.

30. Article 9.2 requires that, when imposing anti-dumping duties, an authority must "name the supplier or suppliers of the product concerned", thereby specifying such suppliers, in order to collect duties in "the appropriate amounts" from each supplier or suppliers.[9] In other words, the authority must apply individual duties to each individually-identified producer/exporter unless an exception specifically contemplated by the *Agreement* applies. The Single Rate Presumption, as such and as applied in the 38 challenged determinations, violates Article 9.2 because USDOC does not name each of the producers/exporters that are grouped into the single NME-wide entity for purposes of imposing anti-dumping duties, and thereby fails to apply to them individual duties and duties in the appropriate amounts. Instead, in order to be named and to qualify for individual anti-dumping duties, a distinct producer/exporter must rebut the presumption that it is part of the single NME-wide entity by means of the Separate Rate Test. Again, this presumption and the requirement to rebut it have no basis in the covered agreements.

31. Article 9.4, second sentence, applies when the authority has exercised its discretion to limit the investigation under the second sentence of Article 6.10. It confers additional rights upon producers and exporters who are "not included in the examination" and who would ordinarily, therefore, be the subject of an anti-dumping duty that complies with the disciplines prescribed by the first sentence of Article 9.4. The second sentence provides, in relevant part, that such producers/exporters must receive an individual duty in cases where they "provide{} the necessary information" to allow the authority to determine an individual margin for such a respondent "as provided for in subparagraph 10.2 of Article 6". Article 6.10.2, in turn, requires the calculation of individual margins of dumping for non-selected respondents who voluntarily submit the necessary information in a timely manner, unless it would be unduly burdensome to do so.

32. The Separate Rate Test violates Article 9.4, second sentence, because − regardless of whether a fictional NME-wide *entity* is considered to be "included in the examination" − at least some of the producers/exporters *included within* the NME-wide entity are *not* included in the examination in a manner that generates an individual margin of dumping or individual duty for them. Such respondents cannot receive an individual margin of dumping or anti-dumping duty rate by submitting the "necessary information", as contemplated by Article 9.4. Instead, such respondents must *additionally* meet the Separate Rate Test. By imposing an *additional* condition for receipt of individual duties that is not contemplated by Article 9.4, the Single Rate Presumption, including the Separate Rate Test, as such and as applied in the 38 challenged determinations, violates Article 9.4, second sentence.

IV. The Methodology through which USDOC Determined the Rate for the Fictional PRC-Wide Entity in 30 Challenged Determinations was Inconsistent with Articles 6.1, 6.8, 9.4 and Annex II of the *Anti-Dumping Agreement*

33. Having presumed, in each of the 13 challenged investigations, the existence of a PRC-wide entity, USDOC proceeded to determine a single dumping rate for the PRC-wide entity, including all of the producers/exporters included within it.[10] A PRC-wide entity rate was also determined in 17 challenged reviews.[11] In the remaining 8 challenged determinations, USDOC did not determine a PRC-wide entity rate.[12]

34. Pursuant to Article 6.10, investigating authorities must, as a rule, determine an *individual margin of dumping* for each known producer/exporter of the product under investigation. China understands that, in each determination, USDOC purported to determine an individual rate for the fictional PRC-wide entity, including *all* of the distinct producers/exporters included within it. In determining such an individual margin of dumping, investigating authorities must observe the procedural requirements set forth in Article 6 of the *Anti-Dumping Agreement.* These procedural

[9] Appellate Body Report, *EC − Fasteners*, para. 339.

[10] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *Pet Film* OI, *Furniture* OI.

[11] *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

[12] *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* AR9.

protections seek to ensure that authorities make an *accurate determination* of whether, and if so, in what magnitude, there is dumping by an individual producer/exporter.

35. In pursuit of an accurate determination, the *Anti-Dumping Agreement* expresses a preference in favor of information submitted by the individual producer/exporter concerned (primary information). In order to obtain primary information from the respondent and accord the respondent due process, the first step required of an authority in connection with the evidence to be used in a determination of dumping is to give *notice of the information that it requires* from interested parties, followed by the grant of *ample opportunity* for interested parties to *present evidence* in writing (Article 6.1). China claims that, in the determinations in which it determined a PRC-wide entity rate, USDOC acted inconsistently with Article 6.1. This is because, in order to determine an individual rate for the fictional PRC-wide entity, including all of the respondents grouped into it, the information that USDOC "require{d}" included all of the information regarding the US sales and the normal value comparators for all those distinct respondents. Only by obtaining this information could USDOC calculate a margin of dumping for an entity comprised of all those distinct respondents. Yet, USDOC: (i) failed to request the detailed information necessary to calculate a margin of dumping for the PRC-wide entity, including from the distinct respondents comprising the entity, and thereby failed to give notice of the required information; and (ii) failed to give the PRC-wide entity, including the distinct respondents comprising it, ample opportunity to submit relevant evidence for that determination.

36. The *Anti-Dumping Agreement* recognizes, in its Article 6.8, that an interested party might refuse access to, or otherwise not provide, primary information that is necessary for the authority to make preliminary or final determinations, including in respect of the existence and magnitude of dumping. Article 6.8 establishes that, in such cases, the authority may resort to "facts available", including secondary source information, to replace missing information, provided that the authority observes the requirements of Annex II of the *Anti-Dumping Agreement*. Like the facts available provision of the *SCM Agreement*, Article 6.8 and Annex II allow an authority to "'*reasonably replace* the information that an interested party failed to provide', with a view to arriving at an accurate determination".[13]

37. Consistent with the objective of ensuring *accurate* determinations, Annex II provides for authorities to use the "Best Information Available in Terms of Paragraph 8 of Article 6", and lays down specific requirements that must be observed: (i) before an authority may resort to facts available at all; and, (ii) if the conditions for resorting to facts available have been met, in selecting amongst the facts available.

38. With respect to (i) − that is, the pre-conditions for resort to facts available − Paragraph 1 of Annex II echoes a requirement of Article 6.1. It conditions recourse to "facts available" in respect of an interested party upon the authority having "specif{ied} in detail the information required" from that interested party. Additionally, the authority must have informed the interested party concerned that facts available may be used if the required information is not supplied within a reasonable period of time. In other words, there is no basis for recourse to facts available, if the required information has not, first, been *requested* by the authority. Further, facts available may only be used to replace the specific information that the authority required but did not receive from an interested party. In this way, Article 6.8 and Annex II of the *Anti-Dumping Agreement* are concerned with overcoming the absence of information that is *necessary* to complete a determination. According to the Appellate Body, "{i}t is the absence of *this particular information* that the use of the 'facts available' is designed to mitigate".[14]

39. China claims that, although USDOC purported to determine an individual rate for the entire PRC-wide entity (including *all* of the respondents grouped into it), USDOC failed to "specify in detail" the information that it required to determine an individual margin of dumping for the PRC-wide entity in each of the relevant determinations, as required by Article 6.8 and Annex II(1). Accordingly, USDOC did not have a valid basis to resort to facts available in setting a rate for the fictional PRC-wide entity and the respondents it contained in the challenged determinations in which it determined a PRC-wide entity rate.

[13] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.178 (emphasis added by the Appellate Body, footnotes omitted); see also and Appellate Body Report, *US − Carbon Steel (India)*, para. 4.416.

[14] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.416 (emphasis added, footnote omitted).

40. With respect to (ii) – that is, the criteria for selecting amongst the facts available once the conditions for resorting to facts available have been met by the authority – Annex II specifies that the "facts to be employed are expected to be 'best information available'",[15] which is to say, the "most fitting or 'most appropriate' information",[16] such that "there can be no better information available to be used in the particular circumstances".[17] In this way, Article 6.8 and Annex II contemplate selection of *reasonable* replacements for missing facts, so as to allow the authority to render an *accurate* determination. The *Anti-Dumping Agreement* imposes obligations on the process followed by an investigating authority to identify the *best* available information. Specifically, paragraph 7 of Annex II requires that an authority exercise "special circumspection" in the selection of facts available where such facts are drawn from secondary sources. This requires a comparative evaluation of all the information that is available, in which "all substantiated facts on the record must be taken into account".[18] Thus, where inferences must be drawn from the facts and circumstances of the case at hand, these need to take account of *all* the facts and circumstances, including the circumstances by virtue of which information is missing. Inferences made by the investigating authority must be *reasonable*, so that they allow the authority reasonably to replace the necessary information that is missing. For this reason, the Appellate Body has emphasized that such inferences "cannot be made on the basis of procedural circumstances alone".[19] Negative inferences based solely on the procedural circumstance of non-cooperation, without considering the circumstances in which non-cooperation arose, as well as all the other facts and circumstances, cannot qualify selected information as the "best" information, as required under Article 6.8 and Annex II.

41. China claims that, when selecting the secondary source information to use as facts available to determine a rate for an NME-wide entity, USDOC applies the Use of Adverse Facts Available norm. Under this norm, whenever USDOC finds non-cooperation by the NME-wide entity, it follows a process that selects *adverse* information from amongst the available secondary source information to set the rate for the fictional entity. It does not use a process that selects reasonable replacements, using the best information available, so as to render an accurate determination. Instead, USDOC selects adverse information because it makes an *adverse* inference based solely on the finding of non-cooperation and without regard to the circumstances under which the finding of non-cooperation was made, which frequently include that USDOC *presumes* non-cooperation. USDOC selects adverse facts to set the rate for the fictional NME-wide entity, even in cases where it has not sought the information required to calculate a rate for such an entity, meaning it does so even where the conditions for resort to facts available have not been met at all.

42. China demonstrates the existence of the Use of Adverse Facts Available norm by reference to USDOC's practice in anti-dumping proceedings, the Antidumping Manual, statements by USDOC, statements by US courts, as well as a sample of 64 determinations in which USDOC determined an NME-wide entity rate. This evidence, which indicates that USDOC always selects adverse facts to determine the NME-wide entity rate whenever it deems an NME-wide entity to be non-cooperative, shows the precise content of the norm, that it is attributable to the United States, and that it has general and prospective application in anti-dumping proceedings involving countries considered by USDOC to be NMEs.

43. China claims that this norm (both as such and as applied in 28 of the 30 determinations in which it determined a rate for the PRC-wide entity)[20] is inconsistent with Article 6.8 and Annex II, because the norm establishes a process that, by design, causes USDOC rigidly to select *adverse* information, which, in turn, leads USDOC not to engage in a process to identify the *best* information through an exercise "special circumspection". Contrary to the duty of "special circumspection", the norm effectively prevents USDOC from exploring relevant facts and

[15] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[16] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[17] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[18] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419, referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.
[19] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[20] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *Pet Film* OI, *Furniture* OI, *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

circumstances other than its finding of non-cooperation when selecting the PRC-wide entity rate. USDOC thus does not select replacements for missing facts because they are *reasonable*; instead it selects facts because they yield a rate for an NME-wide entity that is *adverse* – i.e., an "adverse facts available" rate, in USDOC parlance.

44. China also shows that USDOC violated the requirements of Article 6.8 and Annex II in each of the challenged determinations in which it determined a rate for the PRC-wide entity, regardless of whether or not USDOC applied a norm of general and prospective application. Specifically, in 28 of the 30 relevant determinations, USDOC violated Article 6.8 and Annex II because it failed to use a process that selected reasonable replacements, using the best information available, so as to render an accurate determination. Instead, it selected adverse information to assign the rate for the PRC-wide entity due to an *adverse* inference based on the finding of non-cooperation, and without regard to the circumstances under which the finding of non-cooperation was made. Further, in all 30 of the determinations in which it determined a rate for the PRC-wide entity, USDOC selected information to replace missing information in determining the PRC-wide entity rate from among the available secondary sources without conducting the comparative, evaluative process required. USDOC also failed, in each relevant determination, to provide a reasoned and adequate explanation as to how the secondary source information it selected was the *best* available information, in terms of Article 6.8 and Annex II.

45. Finally, where an investigating authority relies upon Article 6.10 to sample a subset of all producers/exporters for individual examination, Article 9.4 establishes disciplines upon *any* anti-dumping duty that is applied to producers/exporters *not* included in the examination. Thus, when an authority resorts to sampling, a rate must be either an *individual rate*, complying with the procedural requirements relating to the determination of an individual margin of dumping in Article 6, or it may be an *"all others" rate* that is subject to Article 9.4.

46. USDOC used sampling in each of the challenged determinations in which it determined a PRC-wide entity rate. The rate assigned to the PRC-wide entity – including each of the distinct respondents that was grouped into the fictional entity – in each of these determinations was different from and higher than the rate assigned to the non-individually investigated separate rate respondents. The rule in Article 9.4 governs "any" anti-dumping duty applied to *non-individually investigated* producers/exporters, whenever sampling is used, and does not permit such rates to exceed the calculated ceiling level or otherwise vary in a manner inconsistent with Article 9.4. Accordingly, to the extent that the PRC-wide entity and the respondents included within it were not the subject of individual examination in any of the challenged determinations in which a PRC-wide entity rate was determined, USDOC failed to observe the requirements of Article 9.4 with respect to the rate assigned to the PRC-wide entity, including the producers/exporters within that fictional entity.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. USDOC'S APPLICATION OF ITS TARGETED DUMPING METHODOLOGY IN THREE ORIGINAL INVESTIGATIONS VIOLATES ARTICLE 2.4.2

A. The United States misunderstands the relevance of the standard of factual review under Article 17.6(i) of the *Anti-Dumping Agreement* for the Panel's assessment of USDOC's application of the Nails Test

1. China does not rely on Article 17.6(i) of the *Anti-Dumping Agreement* as an independent basis for any of its legal claims. China's claims against USDOC's application of the Nails Test in the three challenged determinations are claims of violation of Article 2.4.2 of the *Anti-Dumping Agreement*. However, contrary to the United States' view, Article 17.6(i) does more than merely establish limits for a panel's review of the factual assessment undertaken by investigating authorities in the context of domestic anti-dumping proceedings. The standard of factual review for panels necessarily also illuminates the substantive requirements incumbent upon an investigating authority when it establishes and evaluates the facts. China has demonstrated that, when applying the Nails Test in the three challenged determinations, USDOC's establishment of the facts was not proper, and its evaluation of the facts fell short of being unbiased and objective, as contemplated by Article 17.6(i). Accordingly, the Panel must conclude that USDOC failed to identify a relevant pricing pattern consistent with Article 2.4.2, second sentence.

B. USDOC failed to comply with the conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence

1. USDOC failed to comply with the condition to identify a relevant pricing pattern due to three sets of fundamental flaws

a. USDOC used its chosen statistical tools in an arbitrary and biased manner

2. Having chosen to employ particular statistical tools to assist in its analysis, USDOC failed to use those tools in a manner that permits a proper establishment of the facts, and an unbiased and objective evaluation of those facts. It therefore failed to establish the existence of a relevant pricing pattern consistently with Article 2.4.2, second sentence.

3. China's claim does not rest on the assumption that the data in any of the challenged proceedings establish a particular price distribution. Rather, it is the Nails Test, and therefore the validity of the US arguments, that depends on that assumption, despite the United States' protestations to the contrary. Depending on the actual form of the price distribution in a given case, the multiplicity of flaws affecting the Nails Test becomes manifest, as follows:

4. In all instances in which a given price distribution is *not* single-peaked and symmetrical around the mean, and hence may not necessarily have a left-hand tail, the first stage of the Nails Test (i.e., the Pattern Test) is plagued by the initial fundamental flaw identified by China. This flaw is that without a symmetrical, single-peaked distribution, the concept of a standard deviation cannot function as a meaningful threshold for determining whether or not a relevant pricing pattern exists.

5. Alternatively, even in instances involving a distribution that *is* single-peaked and symmetrical around the mean and thus has a left-hand tail, a fundamental flaw infects the second stage of the Nails Test (i.e., the Price Gap Test). This flaw exists because the Test treats as significant something that is inherent in distributions that are single-peaked and symmetric around the mean. Specifically, the Price Gap Test treats the occurrence of wider price gaps among the ATs in the left-hand tail of the distribution (after discarding equally low-priced NTs) as significant, even though wider price gaps in the tails are an inherent characteristic of distributions with tails.

6. The United States does not contest the accuracy of China's statistical arguments but asserts that they are irrelevant as USDOC did not rely on the one-standard deviation threshold as a tool to draw statistical inferences. Yet, USDOC's *subjective* characterization of the Nails Test is no substitute for the Panel's obligation to engage in an *objective* assessment of the nature of that Test. An objective evaluation reveals that the Nails Test uses both the terminology and tools of

statistical analysis, albeit in an arbitrary and inadequate fashion. Having decided to apply an approach that usurps statistical concepts to assess whether sets of observed export prices differ in a relevant way, the United States cannot avoid the legal consequences by pretending that this approach was used for some other purpose.

b. USDOC's reliance, in the Nails Test, on weighted-average prices instead of individual export transactions is inconsistent with the treaty text and biased the Nails Test towards finding the presence of a "pattern"

7. USDOC's application of the Nails Test in the three challenged determinations further failed to identify a relevant pricing pattern consistently with Article 2.4.2, second sentence, because it relied on weighted-average prices instead of individual export transactions.

8. There are two reasons why the US approach is inconsistent with Article 2.4.2. *First*, the US approach is inconsistent with the treaty requirement that an investigating authority focus on individual export prices for purposes of identifying a relevant pricing pattern. *Second*, USDOC's reliance on customer or time period averages ignored within-customer and within time-period price variances. As a consequence, USDOC systematically drew the one-standard-deviation threshold too close to the mean, which caused USDOC to improperly qualify more sales as "targeted" than would have properly been the case.

c. USDOC failed to assess whether the observed export prices differed "significantly" in a qualitative sense

9. Variations in export prices that can be explained by factors that are normal in the relevant market are not "prices which differ significantly", in *qualitative* terms, for purposes of Article 2.4.2, second sentence. Yet, in the three challenged determinations, USDOC mechanically applied the Nails Test and did not provide any explanation as to why prices passing its various thresholds could not arise from market dynamics undistorted by "targeted dumping". Contrary to the United States' insistence, there is no reason why a proper consideration of the *qualitative* dimension of "significance" would prevent an investigating authority from identifying a relevant pricing pattern in a situation in which the exporter concerned has actually engaged in targeted dumping.

10. In at least one of the three challenged determinations, *Steel Cylinders* OI, the exporter advanced a plausible explanation of the observable price fluctuations in the steel market. USDOC's summary dismissal of these arguments as an unsupported assumption was insufficient. USDOC, in its role as the investigating authority, could easily have requested the exporter to supplement the record with evidence necessary to make an informed determination regarding this critical issue. USDOC could have done so even if it were true that the exporter's initial case brief failed to cite record evidence to support the assertion that the increase in underlying steel prices had an impact on the prices of steel cylinders. At the very least, in order to demonstrate, in a WTO-consistent manner, the existence of a pattern of export prices that differ "significantly", USDOC would have had to provide a reasoned and adequate explanation as to why the dynamics in the steel market identified by the exporter could not have been the reason for the observed export price differences.

2. USDOC failed to comply with the condition to provide a reasoned and adequate explanation as to why the relevant pricing pattern could not be taken into account appropriately using the symmetrical comparison methodologies

11. Once a relevant pricing pattern has been identified, an investigating authority must satisfy the *second* condition of Article 2.4.2, second sentence, and *explain* why the pattern "cannot be taken into account appropriately" through the application of the symmetrical comparison methodologies. The explanations provided by USDOC in the three challenged determinations suffer from three fundamental flaws:

- *First*, the "explanation" provided by USDOC in the three challenged determinations provided no analysis whatsoever of the characteristics of the identified "pattern" that led USDOC to the conclusion that it could not use the symmetrical comparison methodologies.

- *Second*, the "explanation" required by the second sentence of Article 2.4.2 must include a discussion of *both* the W-W and T-T comparison methodologies. USDOC does not contest that it did not address the T-T comparison methodology.

- *Third*, USDOC's explanation, as provided in the three challenged determinations, is based on the untenable assumption that, under the W-T comparison methodology pursuant to Article 2.4.2, second sentence, the application of zeroing procedures is somehow permissible.

C. USDOC violated the treaty limits on an authority's discretion when applying the W-T comparison methodology pursuant to Article 2.4.2, second sentence

1. USDOC improperly applied the W-T comparison methodology to all export sales instead of limiting the application of W-T to those sales that comprised the relevant pricing pattern

12. An investigating authority must limit the application of the W-T comparison methodology solely to those sales that comprise the relevant pricing pattern, i.e., the targeted sales in targeted CONNUMs. Importantly, if an investigating authority identifies the existence of a pattern in relation to some models, and not others, the authority must apply the exceptional W-T comparison methodology subject to the same limitation – i.e., solely to the pattern it identifies in those particular models. Applying the W-T comparison to a broader group of export sales for which no pattern has been identified, on the other hand, is arbitrary and disproportionate. China has demonstrated in great detail that this important limitation flows from the language of Article 2.4.2, in context, and in light of the object and purpose of the *Anti-Dumping Agreement*.

13. Contrary to what USDOC did in the three challenged determinations, the application of the W-T comparison methodology to the sales comprising the "pattern" must be combined with the application of one of the standard comparison methodologies (W-W or T-T) to the remaining, non-targeted, export sales, in order to ensure that the investigating authority properly calculates a WTO-consistent dumping margin for the product as a whole.

2. The United States' reliance on the concept of mathematical equivalence is unavailing to justify its use of zeroing when applying the W-T comparison methodology in investigations

14. The fact that the Appellate Body has not specifically encountered the question whether zeroing is prohibited under Article 2.4.2, second sentence, does not mean, as the United States implies, that zeroing is permitted under that provision. The jurisprudence illuminates foundational concepts in the *Anti-Dumping Agreement* that enjoy significance well beyond the immediate context in which they were decided. Of particular note, the fact that "dumping" and a "margin of dumping" are "exporter-specific" and "product-related" concepts is fundamental to the architecture of the *Anti-Dumping Agreement*.[1] These fundamental characteristics of the concepts of dumping and margin of dumping apply across all provisions of the *Anti-Dumping Agreement*. Indeed, towards the end of these proceedings the United States has explicitly conceded that "dumping" and "margins of dumping" mean the same thing across all provisions of the *Anti-Dumping Agreement*, including Article 2.4.2, second sentence. Zeroing, by contrast, is based on a transaction-specific understanding of the concepts of "dumping" and "margins of dumping" that is inconsistent with the entire architecture of the treaty.

15. The United States is plainly wrong when it insists that, unless zeroing were permitted under Article 2.4.2, second sentence, that provision would be rendered inutile. As China has demonstrated, the use of different temporal bases for the weighted average normal value when using the W-W and W-T comparison methodologies will generally lead to mathematically *different* results. China does not argue that investigating authorities *must* use different temporal bases for normal value. What matters for the Panel's assessment is that proceeding in that manner is a WTO-consistent way by which the second sentence of Article 2.4.2 will not be rendered inutile.

16. Furthermore, the proper way for an investigating authority to "unmask targeted dumping" is not by applying WTO-inconsistent zeroing procedures, but rather by ensuring that it correctly identifies the scope of the relevant pricing pattern to which it will subsequently apply the exceptional W-T comparison methodology, provided that it can explain why use of the symmetrical comparison methodologies would not allow the pricing pattern appropriately to be taken into account. In other words, the "unmasking of targeted dumping" is achieved through the proper identification of "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The treaty, however, grants no authority to discard the fundamental

[1] See, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

principle that a margin of dumping must be determined for the product as a whole, in order to "unmask targeted dumping".

II. CHINA'S CLAIMS UNDER ARTICLE 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994 REGARDING USDOC'S APPLICATION OF ITS TARGETED DUMPING METHODOLOGY IN AN ADMINISTRATIVE REVIEW

17. The United States' defense of USDOC's use of zeroing in *PET Film* AR3 hinges on the untenable assumption that the second sentence of Article 2.4.2 somehow applies to administrative reviews as well as original investigations. The United States is wrong to assert that this is an issue of first impression for the Panel. The well-established principles governing the manner in which an investigating authority may apply the W-T comparison methodology, and the well-litigated understanding of the foundational concepts of "dumping" and "margins of dumping", apply to all types of proceedings, including original investigations and the various types of reviews.

18. China has demonstrated that the ordinary meaning to be given to the phrase "during the investigation phase" in Article 2.4.2, considered in its context, and in light of the object and purpose of the *Anti-Dumping Agreement*, allows only one conclusion − namely, that Article 2.4.2, second sentence, applies solely to original investigations and *not* to reviews. Thus, even if the use of zeroing were permitted in original investigations when applying the W-T comparison methodology under Article 2.4.2, second sentence, which is *not* the case, such permission would not extend to the duty assessment phase governed by Article 9.3.

19. According to the United States, it is "logical" for the W-T comparison methodology to operate in the same manner, whether in original investigations or in administrative reviews, whenever the conditions for recourse to the exceptional comparison methodology under Article 2.4.2, second sentence, are met. Yet, the United States errs because the application of the W-T comparison methodology in the context of Article 9.3 reviews is not subject to the preconditions of Article 2.4.2, second sentence. Thus, in Article 9.3 any reference to Article 2.4.2 − whether or not it authorizes the use of zeroing − for the purpose of illuminating the authority to use the W-T comparison methodology would be irreconcilable with the drafters' express choice in Article 2.4.2 to limit the scope of application of that provision to original investigations.

III. THE UNITED STATES' TERMS OF REFERENCE OBJECTIONS IN CONNECTION WITH CHINA'S NON-MARKET ECONOMY TREATMENT CLAIMS

A. Six administrative reviews issued after filing of China's First Written Submission fall within the Panel's terms of reference

20. The Panel should reject the United States' contention that the six reviews issued by USDOC after the filing of China's First Written Submission and submitted to the Panel during the course of the First Hearing[2] fall outside the Panel's terms of reference. Panels may have jurisdiction over measures which have been adopted subsequent to the panels' establishment if they are closely connected to those identified by name in a panel request.[3] In its Panel Request, China specified that "any closely connected, subsequent measures" to measures identified by name and falling within the same 13 anti-dumping proceedings are within the Panel's terms of reference.[4] In its First Written Submission, China put the United States on notice that it considered the relevant six reviews to be within the scope of the dispute, including by informing the Panel that they had been initiated, and by providing the Panel with the issued preliminary determinations. Each of these six reviews is closely connected to the measures identified by name in the Panel Request because they involve "the imposition, assessment and collection of duties under the same anti-dumping order".[5]

21. The United States was given adequate notice and has had ample opportunity to respond to China's claims in respect of these measures. Exclusion of any of the six reviews would further delay settlement of the dispute that China legitimately brought before the DSB in February 2014, contrary to the principle of prompt settlement enshrined in Article 3.3 of the DSU. The fact that

[2] *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR4, *Wood Flooring* AR2, *PET Film* AR5, *Furniture* AR9.

[3] See, e.g., Appellate Body Report, *EC − Chicken Cuts,* para. 156; Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, paras. 121, 125, 130.

[4] See Annexes 3-5 to China's Panel Request, WT/DS471/5.

[5] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 230 (quoting Appellate Body Report, *US − Continued Zeroing*, para. 181). See also Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 116.

there have been significant procedural delays in these proceedings has not prevented USDOC from continuing to adopt determinations in anti-dumping proceedings involving China that do not conform with the requirements of the *Anti-Dumping Agreement*. China should thus not be forced to initiate new disputes, or wait to initiate compliance proceedings. This would not only result in delay with respect to the settlement of this dispute, it would also further burden the WTO dispute settlement system as a whole.

B. All of China's arguments and evidence are within the Panel's terms of reference

22. Contrary to the United States' assertions, there is no flaw in the manner in which China's claim with regard to the Use of Adverse Facts Available was put before the Panel. China's Panel Request identifies this specific measure and clearly presents the legal basis for the complaint. The Panel Request goes further than necessary by specifying that the problem arises because of USDOC's failure "to use the best information available and special circumspection when basing its findings on information from secondary sources".[6]

23. Moreover, despite the United States' contentions, all of China's arguments with regard to the Use of Adverse Facts Available norm as well as the arguments in response to the Panel's questions are equally within the Panel's terms of reference. Arguments need not be specified in a panel request, and may be progressively developed and clarified throughout the proceedings before a panel. Development and clarification of arguments may result from responses to questions or counter-arguments raised by an opponent. Similarly, all of the evidence that China submitted in response to the Panel's questions is within the Panel's terms of reference. Although the United States objects to evidence submitted by China in response to questions from the Panel, the working procedures are clear that parties may submit evidence which is necessary to respond to the Panel's questions. The United States has had ample opportunity to respond to the evidence submitted by China.

IV. CHINA'S CLAIMS UNDER ARTICLES 6.10, 9.2 AND 9.4, SECOND SENTENCE, REGARDING THE SINGLE RATE PRESUMPTION AS SUCH AND AS APPLIED IN 38 CHALLENGED DETERMINATIONS

24. In anti-dumping proceedings involving countries considered by USDOC to be "non-market economies" (or "NMEs"), USDOC presumes that all producers/exporters from the country concerned are part of a single, government controlled entity to which USDOC assigns a single rate. In order to rebut this presumption, a producer/exporter must satisfy USDOC's Separate Rate Test by proving both *de jure* and *de facto* absence of government control. China refers to this presumption as the "Single Rate Presumption". The United States conceded in response to questions from the Panel that this presumption has been applied in every anti-dumping determination involving China issued since 1991 − including the 38 determinations challenged by China. Nonetheless, the United States contest that the Single Rate Presumption is a norm of general and prospective application. It argues that China has not substantiated the precise content of the norm and that all that China has shown is repeated past conduct.

25. The evidence before the Panel demonstrates that, contrary to the United States' position, the Single Rate Presumption is a norm of general and prospective application. Despite the United States' assertions, it is not necessary for China to show that the detailed requirements of the Separate Rate Test are part of the precise content of the challenged norm. Additionally, as to general and prospective application, the evidence of consistent application, in combination with the United States' inability to identify even a single contrary example issued since 1991, demonstrates that the norm has been *invariably* applied by USDOC for more than a decade. This invariable conduct, together with evidence including USDOC Policy Bulletin 05.01 and the Antidumping Manual (which describe the presumption in a manner indicative of general and prospective application), as well as statements in individual determinations (which show that USDOC draws guidance from its previous decisions and practice), reveal that what is at issue goes beyond past conduct. The United States' attempts to downplay the language of these categories of evidence are, in each case, unconvincing. Consideration of all of the evidence together provides an overwhelming basis upon which the Panel must find the existence of a general and prospective norm.

26. On the merits, the United States has failed to rebut China's claims under Articles 6.10, 9.2 and the second sentence of Article 9.4 against the Single Rate Presumption. The Single Rate

[6] See China's Panel Request, WT/DS471/5, para. 26.

Presumption imposes a condition upon access to individual rates for Chinese and other NME respondents, without any justification under the *Agreement*. Contrary to the United States' assertions, the Appellate Body in *EC – Fasteners* was correct to find that singularity cannot be *presumed*. Although it can be permissible to group legally distinct respondents into single entities, an investigating authority must have facts and evidence in support of a determination to do so. USDOC's Single Rate Presumption operates in the absence of facts or evidence, and, therefore, cannot justify denial of the rights that each Chinese producer/exporter enjoys under Article 6.10, 9.2, and 9.4, second sentence, of the *Agreement.*

V. CHINA'S CLAIMS UNDER ARTICLES 6.1, 6.8 AND ANNEX II(1) REGARDING USDOC'S FAILURE TO REQUEST NECESSARY INFORMATION IN 30 CHALLENGED DETERMINATIONS

27. Having presumed, in each of the 13 challenged investigations, the existence of a PRC-wide entity, USDOC proceeded to determine a single dumping rate for the PRC-wide entity, including all of the producers/exporters included within it.[7] A PRC-wide entity rate was also determined in 17 challenged reviews.[8] In the remaining 8 challenged reviews, USDOC did not determine a PRC-wide entity rate.[9]

28. China challenges each of the relevant 30 determinations in which USDOC determined a rate for the PRC-wide entity under Articles 6.1, 6.8 and Annex II(1) of the *Agreement*. In each of these determinations, USDOC failed to request the information necessary to calculate a margin of dumping for the entity but nevertheless purported to determine an individual rate for the entity. China argues that, through failing to request this necessary information, USDOC failed to give notice of the required information and thereby also failed to provide appropriate rights of defense in the sense of Article 6.1. China also argues that, in each of these 30 determinations, USDOC resorted to facts available to replace the information necessary to calculate a margin of dumping for the PRC-wide entity even though it did not have a valid basis for doing so under Article 6.8 and Annex II(1) because it had failed to specify in detail the information required to determine the PRC-wide entity rate.

29. The United States has not denied that USDOC failed to request the information necessary to calculate a margin of dumping for the respondents included within the PRC-wide entity. The United States nevertheless argues that this failure was justified on the facts of certain groups of measures. However, China has demonstrated that USDOC's failure to request information was not justified in respect of any of the groups of measures addressed by the United States.

30. *First*, USDOC's express findings of non-cooperation by the PRC-wide entity in 20[10] of the relevant 30 challenged determinations cannot justify USDOC's failure to request the information required to calculate a margin of dumping for the PRC-wide entity. Each of these express findings of non-cooperation was based on *presumption* instead of fact because USDOC extended a finding of non-cooperation by a subset of respondents included within the PRC-wide entity to the fictional entity as a whole. However, USDOC had no basis in law or fact to attribute the conduct of one respondent to the other respondents included within the PRC-wide entity. The absence of information relating to one respondent in the PRC-wide entity does not obviate the need for information from the remaining respondents included within the fictional entity. There is no justification for replacing information required from *other* respondents included within the PRC-wide entity, in the absence of any request for that information from those respondents.

31. *Second*, USDOC's failure to request the necessary information cannot be justified in relation to the remaining 10[11] of the relevant 30 challenged determinations in which USDOC resorted to facts available without expressly saying so. Contrary to the United States' assertions, the disciplines of Article 6.8 and Annex II are not limited to instances in which an investigating

[7] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *PET Film* OI, *Furniture* OI.

[8] *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

[9] *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* AR9.

[10] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, *PET Film* OI, *Furniture* OI, *Furniture* AR7.

[11] *OTR Tires* AR5, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8.

authority expressly states that it has resorted to facts available. Rather, these disciplines apply whenever an investigating authority, in substance, replaces information from an interested party with facts available. China has shown that, in all 10 relevant challenged determinations, USDOC, in substance, replaced with facts available all or some of the information necessary to calculate a margin of dumping for the PRC-wide entity, including all of the producers/exporters included within that entity. Thus, USDOC acted inconsistently with Article 6.8 and Annex II(1) by replacing, with facts available, necessary information that USDOC had failed to seek from the producers/exporters included within the PRC-wide entity.

32. Even if the Panel were to take the view that USDOC did not resort to facts available in the relevant 10 determinations, USDOC's failure to request the required information in these determinations would nevertheless be inconsistent with Article 6.1. Contrary to the United States' assertions, the "information which the authorities require" under Article 6.1, is the information that the *Agreement* dictates an investigating authority requires in order to make a particular determination. If an authority is to determine an individual margin of dumping for a respondent consistent with the *Agreement*, the information necessary to calculate such a margin of dumping is objectively required by the authority. Accordingly, by purporting to determine an individual margin for the PRC-wide entity in each of the relevant 10 challenged determinations, without giving notice of the information necessary to calculate such a margin, USDOC acted inconsistently with Article 6.1 in each of these determinations.

VI. CHINA'S CLAIMS UNDER ARTICLE 6.8 AND ANNEX II(7) AGAINST USDOC'S USE OF ADVERSE FACTS AVAILABLE IN 30 CHALLENGED DETERMINATIONS AND THE USE OF ADVERSE FACTS AVAILABLE NORM

33. Whenever USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, USDOC systematically draws an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are adverse to the interests of that entity and each of the producers/exporters included within it. China refers to this process as the "Use of Adverse Facts Available norm". The process subject to the Use of Adverse Facts Available norm causes USDOC to select rates that, by design, are adverse to the interests of the NME-wide entity and each of the producers/exporters included within the entity, whenever it is triggered.

34. The evidence before the Panel demonstrates, contrary to the United States' position, that the Use of Adverse Facts Available norm is a norm of general and prospective application. Despite the United States' arguments, there is no need for China to prove that USDOC always selects the highest rate on the record for NME-wide entities. China does not challenge a *result* such as the selection of the highest rate on the record, but rather a selection *process*, which, when triggered, is based uniformly on inferences that are adverse to the interests of the NME-wide entity, and each of the producers/exporters included within it. Moreover, China does *not* allege that this process is triggered in each anti-dumping determinations involving countries deemed to be NMEs by the United States, but only in those determinations that involve a finding of non-cooperation by the NME-wide entity.

35. Moreover, contrary to the United States' assertions, the evidence as to general and prospective application also demonstrates that what is at issue goes beyond repeated past conduct. China has demonstrated that the norm has been consistently applied in a representative sample of all the investigations and reviews issued since China's WTO accession relating to countries deemed by USDOC to be NMEs. In combination with the United States' inability to identify even a single contrary example, this evidence demonstrates that the norm has been *invariably* applied by USDOC for more than a decade. This invariable conduct, together with evidence including the Antidumping Manual and statements by US courts (which describe aspects of the norm in a manner indicative of general and prospective application), as well as statements by USDOC in individual determinations (which show that USDOC relies on its past application of the norm as a justification and motivation for taking the same approach in new determinations) demonstrates that what is at issue goes beyond past conduct. An analysis of all this evidence together reveals a norm of general and prospective application that provides administrative guidance and sets expectations on a consistent and predictable basis.

36. On the merits, China has demonstrated that the Use of Adverse Facts Available norm necessarily results in a violation of Article 6.8 and Annex II(7) in defined circumstances. In particular, the norm is WTO-inconsistent when the non-cooperation that triggers the norm is presumed and not genuine non-cooperation, and when USDOC itself has not requested necessary information. This is because the duty to exercise special circumspection requires an authority to

have careful regard to all the facts and circumstances, including the fact that respondents have not genuinely failed to cooperate, or the fact that the authority has not sought necessary information. Inferences drawn from the facts and circumstances must be reasonable inferences in light of those facts and circumstances. Thus, when USDOC draws an adverse inference and selects adverse facts available based on *presumed* non-cooperation by an NME-wide entity, it necessarily violates Article 6.8 and Annex II(7). The same is true in circumstances where USDOC has not sought the necessary information to determine a rate for an NME-wide entity.

37. Despite the United States' assertions, USDOC's corroboration efforts in some cases cannot remedy the WTO-inconsistency of the challenged norm. A corroborated rate remains, and is explicitly described by USDOC as, "adverse facts available". At best, corroboration refines the specific rates chosen as adverse facts available and the degree to which that rate is adverse. Importantly, corroboration does not take account of the cooperation by respondents included within the NME-wide entity or USDOC's failure to request necessary information from those interested parties. Consequently, corroboration cannot cure the norm's inconsistency in these defined circumstances.

38. USDOC's application of the Use of Adverse Facts Available norm and selection of adverse facts available in 28 challenged determinations is also inconsistent with Article 6.8 and Annex II(7). In each of the relevant 28 challenged determinations in which the Use of Adverse Facts Available norm was triggered, USDOC considered the NME-wide entity to be non-cooperative based on *presumption* instead of fact. Specifically, in 20[12] of these 28 challenged determinations, USDOC extended a finding of non-cooperation by a subset of respondents included within the PRC-wide entity to the entity as a whole. In the remaining 8[13] of these 28 challenged determinations, USDOC pulled forward the finding of non-cooperation from an earlier phase of the proceeding, triggering the Use of Adverse Facts Available norm by continuing to presume non-cooperation in the instant review. In the circumstances of these determinations, even assuming *arguendo* that USDOC was justified to resort to facts available to replace missing information, the duty of special circumspection means that USDOC was not justified in drawing adverse inferences and selecting adverse facts available.

39. China has also demonstrated that USDOC failed to exercise special circumspection and select reasonable replacements for the missing information in *Diamond Sawblades* AR4 and *OTR Tires* AR5. In these two challenged determinations, the Use of Adverse Facts Available norm was *not* triggered because USDOC did not consider the PRC-wide entity to be non-cooperative but rather acknowledged that the PRC-wide entity and the respondents included within it had been fully cooperative. In these cases, even assuming *arguendo* that USDOC was justified to resort to facts available to replace missing information, USDOC failed to follow a process designed to select the "best" facts available for the PRC-wide entity, including all of the respondents included within that entity. This is because USDOC partially relied on adverse facts available rates to replace the missing information despite its finding of *cooperation* by the PRC-wide entity.

40. In response to the Panel's questions, the United States did not deny that USDOC did *not* use special circumspection in the sense of Article 6.8 and Annex II(7) in *Diamond Sawblades* AR4, *OTR Tires* AR5, as well as the other 8 reviews[14] in which USDOC did not make an *express* finding of non-cooperation in the same phase of the proceeding. Instead, the United States argued that there was no occasion for USDOC to use special circumspection because USDOC did not apply facts available to the PRC-wide entity, including the producers/exporters included within that entity. However, as noted above, in substance, USDOC replaced information with facts available in each of these 10 determinations and was, therefore, subject to the disciplines of Article 6.8 and Annex II(7). USDOC failed to comply with these disciplines.

VII. CHINA'S CLAIM UNDER ARTICLE 9.4, FIRST SENTENCE, REGARDING THE RATE DETERMINED IN 30 CHALLENGED DETERMINATIONS

41. Finally, China argues that in each of the 30 challenged determinations in which USDOC determined a rate for the PRC-wide entity, USDOC acted inconsistently with Article 9.4, first sentence. Article 9.4 applies whenever a producer/exporter has "not {been} included in the

[12] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, *PET Film* OI, *Furniture* OI, *Furniture* AR7.

[13] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8.

[14] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8.

examination". The question whether Article 9.4 applies to an individual producer/exporter is one of legal characterization that must be determined by reference to the facts of each case. A *properly* determined individual margin of dumping results from "examination" of a respondent, and therefore is *not* subject to Article 9.4. However, the same is not necessarily true for an *improperly* assigned individual rate which may *not* have resulted from "individual examination" in the sense of the *Agreement.* In such a case, a Member may act inconsistently with Article 9.4 *in addition* to provisions addressing the proper process for determining an individual rate such as Articles 6.1, 6.8, and Annex II.

42. The evidence before the Panel indicates that the PRC-wide entity and most of the individual respondents included within the entity were *not* properly included in the examination in the sense of Article 9.4, first sentence. In particular, the severe flaws in USDOC's *process* for determining the PRC-wide entity rate mean that the PRC-wide entity was *not* properly subject to individual examination. Specifically, USDOC requested the information necessary to calculate a margin of dumping from few, if any, respondents included in the entity. That being the case, USDOC was obliged to arrive at the *outcome* specified under the *Agreement*; namely, application of a rate consistent with Article 9.4.

43. Nevertheless, USDOC failed to adhere to the disciplines of Article 9.4, first sentence, in each of the relevant 30 challenged determinations. In many of these 30 challenged determinations, the rate assigned to the PRC-wide entity is clearly above the permissible level, because it is higher than even the highest calculated margin in the same phase. In the remaining relevant challenged determinations, other comparators show that the rate assigned to the PRC-wide entity is *not* a neutral all others rate that is appropriate and non-discriminatory. Accordingly, China has demonstrated that USDOC acted inconsistently with Article 9.4, first sentence, in all the 30 challenged determinations in which it determined a rate for the PRC-wide entity.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. At stake in this dispute is whether Members have the ability to "unmask" dumping concealed by a pattern of export prices which differ significantly, and whether Members have the ability to provide a remedy for dumping by exporters in non-market economy countries, such as China. China proposes interpretations of the AD Agreement that are divorced from the customary rules of interpretation. The Panel should find that all of China's proposed interpretations of the AD Agreement simply are not supported by the ordinary meaning of the text of the agreement, in context, and in light of the object and purpose of the agreement. Accordingly, all of China's legal claims lack merit, and should be rejected.

II. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

2. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination." It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Accordingly, China, as the complaining party, must establish a *prima facie* case before the United States, as the defending party, has the burden of showing consistency with that provision.

III. CHINA'S CLAIMS UNDER ARTICLE 2.4.2 OF THE AD AGREEMENT

3. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." Through its "as applied" challenges in this dispute, China seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance China's efforts in this regard.

China's Claims Related to the Coated Paper, OCTG, and Steel Cylinders Investigations

4. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must 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." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically

different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

7. China "acknowledges that an investigating authority is not bound by [the] *Anti-Dumping Agreement* to structure [its] enquiry into the existence of a relevant pricing pattern in any specific manner," but nevertheless proposes a narrow interpretation of the "pattern clause" that would impose rigid, specific requirements on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. Such requirements are not supported by the text of the second sentence of Article 2.4.2 of the AD Agreement.

8. China argues that one of the "key characteristics" of a pattern is that "the observations comprising the pattern may be discerned − that is, distinguished − from that which is *not* part of the pattern." China's arguments lack any foundation in the text of the second sentence of Article 2.4.2 or in logic. On its face, the text of Article 2.4.2 contemplates *a* pattern of export prices that would transcend multiple purchasers, regions, or time periods. Furthermore, the relevant "pattern" is "a pattern of export prices *which differ significantly* among different purchasers, regions, or time periods." Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. Logically, an investigating authority might examine all of an exporter's export sales in search of "a pattern," and likely may find that "a pattern" exists which consists of all of the exporter's export sales, including lower export prices to certain purchasers, regions, or time periods and higher export prices to other purchasers, regions, or time periods.

9. In each of the challenged investigations, the USDOC applied a two-part test − the *Nails* test − to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by respondents. As reflected in the discussion in the final issues and decision memoranda, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" of Article 2.4.2.

10. China argues that the USDOC "failed properly to identify as 'significant', in a quantitative, *statistical* sense, the differences among export prices that it found to be a part of a relevant pricing pattern." The premises of China's statistical arguments are flawed. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause" of the second sentence of Article 2.4.2. Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake the particular statistical analysis discussed by China, even if the investigating authority chooses to utilize certain statistical tools. The basic logical premise of China's arguments is equally flawed. China contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis. However, the *Nails* test does not involve the type of statistical analysis discussed by China. China's statistical criticism of the *Nails* test simply is inapposite. China seeks to replace the USDOC's balanced approach with one of the extremes noted by the USDOC, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is China's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

11. China argues that there is a "[q]ualitative dimension of 'significant' price differences" and that "it is appropriate to consider whether quantitative differences in prices *reflect factors unconnected with targeted dumping*, particularly where variations in price reflect normal or regular dynamics of the relevant product market." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. That latter question is not germane to an application of the "pattern clause." Additionally, China's reasoning is unsound. Low prices of sales, if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing. In the challenged investigations, the USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 by not doing so.

12. China argues that, "in order to identify a meaningful pattern, the investigating authority must assess such a pattern by observing the prices of individual export sales transactions." However, nothing in the text of the second sentence of Article 2.4.2 prohibits the use of weighted averages in connection with an investigating authority's analysis of a "pattern" within the meaning of the "pattern clause." The text of the second sentence of Article 2.4.2 simply does not support China's proposed interpretation, and actually supports the opposite conclusion. The proper focus is not on individual export prices *per se*, or on differences between export prices to a given purchaser, region, or time period, but on differences in export prices *among different* purchasers, regions, or time periods. China is also incorrect to suggest that the use of weighted averages would lead an investigating authority to "overlook the individual prices." When the USDOC undertook analyses pursuant to the "pattern clause" in the challenged investigations, it took into account all of the export prices for U.S. sales reported by each exporter during the period of investigation.

The "Explanation Clause"

13. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize the alternative comparison methodology only "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." The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

14. In the challenged investigations, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the weighted average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The USDOC concluded that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. The USDOC provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the "explanation" that the USDOC provided in the challenged investigations is not inconsistent with Article 2.4.2.

Application of the Average-to-Transaction Comparison Methodology to All Sales

15. China claims that the USDOC acted inconsistently with Article 2.4.2 in the challenged investigations by applying the alternative, average-to-transaction comparison methodology to all sales when, in China's view, "the exceptional [average-to-transaction] comparison methodology

under Article 2.4.2 of the *Anti-Dumping Agreement* must be limited solely to sales comprising the relevant pricing pattern" and "may *not* be applied to all sales." China's claims lack merit. When the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is constrained as China proposes. The Appellate Body did not definitively declare in *US − Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.

16. China's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping." "Masked" or "targeted dumping" involves both sales below normal value, which are evidence of dumping, as well as sales above normal value, which may mask such dumping. "Targeted dumping" is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced sales, and by ensuring that the higher-priced sales do not offset dumping that properly should be evidenced by the lower-priced sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

17. China's arguments also are at odds with other prior findings of the Appellate Body. For example, given that the Appellate Body has found that dumping is an exporter-specific concept and the margin of dumping must be determined for the product under investigation as a whole, it would be an untenable interpretation of Article 2.4.2 to require an investigating authority to limit its application of the average-to-transaction comparison methodology to transactions "for which 'targeted dumping' has been found." China also departs from prior Appellate Body findings when it suggests that the alternative, average-to-transaction comparison methodology should be applied on a model-specific basis. That would appear to be directly contrary what the Appellate Body said about the so-called "targeted dumping" provision in *EC − Bed Linen*.

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

18. China's claims that the USDOC acted inconsistently with Article 2.4.2 of the AD Agreement by using zeroing in connection with the average-to-transaction comparison methodology are without merit. The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. China is incorrect when it argues that "the logic of the Appellate Body's reasoning" in prior disputes means that zeroing is impermissible when the alternative, average-to-transaction comparison methodology is used to determine "margins of dumping" under the second sentence of Article 2.4.2.

19. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes. That the average-to-transaction comparison methodology is an exception to the normal comparison methodologies, and that it can be used to "unmask targeted dumping" is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law, in particular the "principle of effectiveness."

20. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical

equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the challenged antidumping proceedings, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

21. The meaning of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement, which reflect that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked and that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

China's Claims Related to the PET Film Third Administrative Review

22. China's claims that "the United States acted inconsistently with Article 9.3 of the *Anti-Dumping* Agreement and Article VI:2 of the GATT 1994 by applying zeroing procedures in an administrative review of the anti-dumping order concerning PET Film from China" lack merit. China's claims fail because they are dependent upon the Panel finding that the use of zeroing is impermissible when applying the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. However, as we have demonstrated, zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology. Accordingly, when an antidumping duty is calculated in an administrative review pursuant to the second sentence of Article 2.4.2 − *i.e.*, using the alternative, average-to-transaction comparison methodology, with zeroing − that antidumping duty necessarily does not exceed the margin of dumping as established under Article 2 of the AD Agreement. On the contrary, it is, by definition, the margin of dumping as established under Article 2 of the AD Agreement.

23. While the Appellate Body has found previously that the use of zeroing in administrative reviews, including in connection with the use of an average-to-transaction comparison methodology, is inconsistent "as such" with the AD Agreement, the Appellate Body has never found that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. As with investigations, the permissibility of using zeroing in administrative reviews when applying the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is an issue of first impression for the Panel.

IV. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES HAS BREACHED ARTICLES 6.10 AND 9.2 ON ACCOUNT OF AN ALLEGED 'SINGLE RATE PRESUMPTION'

A. China Has Failed To Establish a Rule Or Norm Of General And Prospective Application That May Be Challenged "As Such"

24. China's "as such" claims cannot be sustained because China's evidence fails to establish that the so-called Single Rate Presumption is a "rule" or "norm of general and prospective application" that can be challenged "as such." In particular, China has not demonstrated that USDOC's treatment of Chinese companies rises to the level of a measure challengeable "as such", that is, a measure that expresses a rule or norm of general and prospective application. Even assuming that China has demonstrated the existence of such a measure, "particular rigor is required … to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document." China has not met this high evidentiary burden. Specifically, a complainant in order to discharge its high burden must demonstrate, at the very least: (1) that the rule or norm embodied in that measure is attributable to the responding Member; (2) the precise content of the rule or norm; and (3) that the rule or norm has general and prospective application.

25. The extent of China's arguments with respect to these three elements rests with its faulty claim that the proffered evidence establishes that the so-called Single Rate Presumption is a rule or norm of general and prospective application, the third element.

26. With respect to Policy Bulletin 05.1, upon which China relies as evidence of a purported rule or norm of general and prospective application, China quotes language it describes as a "statement of policy." However, the precise language China quotes is not from the section in Policy Bulletin 05.1 that it actually titled "Statement of Policy," but in the "Background" section. The referenced language is also speaking only to an "NME antidumping investigation," and thus cannot be extended to periodic review proceedings. The Antidumping Manual, upon which China similarly relies, is also not availing to China's argument. It clearly states on the very first page that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish DOC practice."

27. China also tries to establish that the alleged Single Rate Presumption has general and prospective application by attempting to import the panel's findings in *US − Shrimp II (Viet Nam)*. A prior panel's findings cannot alleviate China's own burden. Moreover, in any event, the panel's findings in that dispute concern an alleged norm which differs in material respects from the measure China has raised here.

28. China cites to prior USDOC determinations involving non-market economy cases. These documents do not help China meet its burden of establishing that the so-called "single rate presumption" is an unwritten measure. Moreover, it is critical to note that the referenced statements are taking place in the context of specific investigations rather than any document that purports to reflect a general and prospective measure. Thus, even under China's presentation, these documents only illustrate what USDOC has practiced in particular instances in the past. Legally, past practice is insufficient to establish the existence of a measure because repeated application in and of itself only proves that repeated applications occurred.

29. Moreover, USDOC is not applying the same outcome to every case without consideration of the record evidence or a party's arguments, but evaluates, in each instance where a party provides such information and argument, whether that party is under common government control. Moreover, the Government of China could request that USDOC re-examine its NME status under U.S. antidumping duty law. Given that this flexibility exists, and USDOC does not automatically reach the same outcome in each case, China has failed to demonstrate that this is anything more than a "consistent practice" that USDOC applied in a discrete number of cases.

30. Finally, China cites certain decisions from U.S. domestic courts. The quoted language from these decisions do not establish what USDOC will do in the future, but speaks to it being "within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy" and that such a presumption − because it is not required by U.S. law − is subject to change at any time. More fundamentally, these decisions − like those at issue in in *Thailand − Cigarettes (Philippines)* − are necessarily decisions evaluating particular complaints rather than authoritative statements of future policy.

B. China Has Misapplied The Legal Analysis

31. Legally, China fails to recognize that the critical issue in the provisions that it invokes is that not every legal entity is necessarily a distinct exporter or producer under the AD Agreement. To the contrary, these provisions permit investigating authorities to treat the export activity of multiple companies as the pricing behavior of a single exporter or producer. Factually (and legally), China fails to address the basis for USDOC's treatment of Chinese firms as part of a single government entity (China's Accession Protocol and Working Party Report), or USDOC's continued finding that China should be treated as an NME. Moreover, China does not address that the information solicited by the United States allows Chinese firms to demonstrate whether they should be treated as part of a common Chinese government entity or not. Because of such failings, China's various claims of breach are deficient and must fail.

32. In applying Article 6.10 of the AD Agreement, the initial question is to identify the entity, or group of entities, that constitute each known "exporter" or the known "producer." China has no

basis for asserting that related entities, simply because they may be organized as a formal matter as separate companies, must be treated as individual exporters for the purpose of Article 6.10. Similarly, Article 9.5 of the AD Agreement establishes an obligation to carry out a review to determine an "individual" margin of dumping for a new shipper "provided that the[] exporter[] or producer[] can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." This provision indicates that such an exporter that cannot demonstrate that it is not related to an exporter or producer subject to the duty would not be entitled to an "individual" margin of dumping.

33. Accordingly, depending on the facts of a given situation, an investigating authority may reasonably consider actual commercial activities and relationships of companies in deciding whether they should be treated as a single exporter or producer as opposed to simply accepting their nominal status as legally distinct companies. This textual analysis is consistent with the Appellate Body findings in *EC – Fasteners*, which in turn approvingly drew from the panel report's findings in *Korea – Certain Paper*.

34. Article 9.2 provides that "when" antidumping duties are being imposed, they shall be collected in appropriate amounts on a non-discriminatory basis from all sources, *i.e.*, imposed on imports from all sources found to be dumped and at the appropriate rate. Differences in duty rates must reflect differences in the dumping margin for the source.

35. Contrary to China's arguments, nothing in the text of Article 9.2, as with the text of Article 6.10, precludes USDOC from treating multiple companies as a single entity, including, where appropriate, a China-government entity. China's attempts to rely on *EC – Fasteners* to avoid this interpretation is misplaced because it ignores the Appellate Body's conclusion in that dispute that "if the State instructs or materially influences the behavior of several exporters in respect of prices and output, they could be effectively regarded as one exporter … and a single margin and duty could be assigned to that single exporter."

C. China's Protocol Of Accession Supports Treating Companies as Part of a Single PRC Entity in Antidumping Proceedings

36. China's Protocol of Accession supports treating companies as part of a single China-government entity in antidumping proceedings. Under the Protocol, a Member can presume that non-market economy conditions prevail in China, as the starting point for a discussion about the extent to which market economy conditions actually prevail, to decide whether market treatment for Chinese respondents is warranted. This approach preserved for Members the flexibility to adjust their antidumping policy and practice depending on the progression of China's reforms.

37. The Accession Protocol, particularly Article 15, provides important context in terms of deciding which entities in China should be considered as a single entity for purposes of Article 6.10. In particular, the Protocol supports USDOC's: (1) decision to calculate the normal value for the industry in question based on an NME methodology and its continued use of this methodology; (2) recognition that multiple companies may comprise a single exporter or producer, *i.e.*, a single China-government entity; and (3) understanding regarding export price and output that the Government of China exerts control or material influence over entities located in China and can impact such decisions.

1. Normal Value

38. Specifically, Paragraph 15 of the Accession Protocol indicates that China confirmed on accession that importing WTO Members need not calculate normal value on the basis of Chinese prices or costs for an industry subject to an antidumping investigation. Paragraph 15 further indicates, in part, that "the non-market economy provisions" of paragraph 15 shall no longer apply to a specific industry or sector in situations where China "establish[ed], pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector."

2. Treating Multiple Companies in China as Part of a China-Government Entity

39. The descriptions of its economy in the Working Party Report indicated that China planned to develop an economy where the State continued to play a predominant role. Members expressed concern about the significant level of influence of the Government of China on its economy and how such influence could affect trade remedy proceedings. Paragraph 15 of the Accession Protocol specifically reflects the concern among Members that government influence may create special difficulties in determining cost and price comparability in the context of antidumping investigations, and that a strict comparison with Chinese costs and prices might not always be appropriate.

40. Thus, underlying the Accession Protocol is evidence that non-market economy conditions prevail in China until otherwise demonstrated. The understanding that market economy conditions do not prevail and the logical consequence that this entails state control over firms, resulting in treating certain enterprises as parts of a government-controlled entity, is not inconsistent with Article 6.10. The Accession Protocol thus supports the conclusion that USDOC may consider that there exists a China-government entity to which exporters belong.

3. Pricing and Output of Exports

41. China's Accession Protocol also provides the basis by which an importing Member may presume that China controls or materially influences all entities and thereby consider all exporters or producers as part of a single China-government entity absent positive evidence to the contrary. USDOC's finding that the Government of China is legally or operationally in a position to exercise restraint or direction over entities located in China and can impact their decisions about the production, pricing, or costs of products destined for consumption in China is not subject to dispute. As a result, given that China's Accession Protocol provides importing Members the basis on which to presume that the Government of China exerts control or material influence over commercial entities with respect to the pricing and output of products destined for consumption in China, it is also reasonable to presume that that the Government of China simultaneously exerts control or material influence over these entities with respect to the pricing and output of identical or similar products destined for export.

D. The Findings From *EC-Fasteners* Are Inapposite

42. As an initial matter, the United States believes the analysis in *EC – Fasteners* to be internally inconsistent. Specifically, in *EC – Fasteners*, the Appellate Body correctly recognized that state control is a basis to treat nominally distinct entities as a single entity, yet rejected doing so on the basis of China's Accession Protocol, which memorializes precisely those types of concerns. This dispute, however, is factually different than *EC – Fasteners* as well as *US – Shrimp II*.

43. First, USDOC actually collects and evaluates information that goes directly to whether Chinese respondents should be afforded individual treatment or not. USDOC's separate rate analysis allows for an in-depth and individualized review of a company's relationship with the Chinese government. *EC – Fasteners* did not preclude such examination, but rather noted the examination in that dispute, the IT Test, was flawed because the relevant criteria denied individual treatment to producers and exporters with "little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State." Here, China makes no similar claim against USDOC's Separate Rate Test, but rather takes issue that any such test is required at all.

44. Second, USDOC has engaged in a determination that China is a non-market economy. At no time during the 13 challenged investigations and 19 challenged reviews proceedings did China, or any Chinese exporter, request that USDOC reconsider China's non-market economy status. Thus, China cannot invoke *EC – Fasteners* and *US – Shrimp II* to argue that USDOC erred by designating China a non-market economy solely on the basis of the Accession Protocol.

45. Third, the evidence China puts forward for its as-applied claims is deficient here. Principally, China relies on Table SRP, which appears to be a compilation of quotes from various antidumping proceedings. This table proves nothing because it simply provides extracted generalized quotes

rather than any evidence of concrete treatment by USDOC with respect to any of the particular participants in any of the respective proceedings. For example, nowhere in Table SRP does China present evidence to indicate whether the China-government entity was under examination for purposes of Article 6.10. Likewise, China's table fails to demonstrate as-applied breaches of Articles 6.10 and 9.2 because it is does not demonstrate that any actual exporter or producer failed to receive an individual margin or confirm whether circumstances that triggered such a denial were inconsistent with the AD Agreement.

46. In sum, USDOC's conclusion that multiple companies in China are part of the China-government entity is based on a permissible, and, indeed, eminently reasonable, interpretation of Articles 6.10 and 9.2. Therefore, the United States requests that the Panel dismiss China's claims under both these provisions, both "as such" and as applied in the 32 challenged determinations.

V. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

47. Article 9.4 applies *only* to the "anti-dumping duty applied to imports from exporters or producers not included in the examination." In other words, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. Article 9.4 is thus inapplicable either to the alleged unwritten measure "as such" or as applied because China has not established this predicate condition. China makes no attempt to demonstrate that the China-government entity was not included in the examination, and therefore, Article 9.4 is implicated. In any event, in each of the 13 challenged antidumping proceedings, the China-government entity received its own rate, and thus, Article 9.4 does not apply. Beginning with the original investigations in each of the 13 challenged proceedings the China-government entity received its own rate based on facts available consistent with Article 6.8 of the AD Agreement.

48. China argues that Article 9.4 does not allow an investigating authority to differentiate between those non-selected companies that are uncooperative, and those non-selected companies that are cooperative. Rather, according to China, the phrase "any anti-dumping duty applied" means that there can only be one rate applied to the non-selected companies. The text of Article 9.4 of the AD Agreement actually provides that *any* antidumping duty for those producers or exporters not under examination "shall not exceed" the weighted-average margin of dumping for the investigated exporters or producers, and restricts the use of zero and *de minimis* margins and margins based on facts available in calculation of that ceiling. China thus improperly seeks to create a new obligation to calculate a "single" rate.

VI. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

A. China Has Failed To Establish That USDOC's Use Of Facts Available In Assigning A Rate To The China-Government Entity As A Rule Or Norm Of General And Prospective Application That May Be Challenged "As Such"

49. China has not established that USDOC's use of facts available in assigning a rate to the China-government entity constitutes a measure which expresses a rule or norm of general and prospective application. Specifically, China fails to specify the purported norm's precise content or that it has general and prospective application.

50. China appears to allege that the content of this norm is that USDOC selects "adverse facts" when USDOC finds non-cooperation by the China-government entity. China fails though to explain what qualifies a fact as adverse. The investigating authority does not know whether the information it has selected is indeed adverse or potentially favorable because the ideal information is missing. China also makes several inconsistent statements with respect to whether a finding of non-cooperation − what China refers to as the "trigger condition" for the norm − is also part of this alleged norm, which cast further doubt on the content of this norm.

51. Furthermore, China has not demonstrated a norm of general and prospective application that may be challenged as such. The determination to apply facts available to the China-government entity, and its selection of the rate to apply to the China-government entity, continues to be a case-by-case determination that will reflect the facts of a given case. Moreover, the U.S.

statutory and regulatory framework provides USDOC with the discretion to make such a determination based on the facts and information before it.

52. The evidence China submits in support of the existence of the norm is also clearly deficient. China's sample of USDOC's NME cases over a 12-year period does not demonstrate the existence of a norm or rule of general and prospective application but rather demonstrates that the use of facts available varies in every proceeding based on the facts and circumstances at issue. Likewise, the Antidumping Manual merely describes instances in which USDOC "may" apply adverse inferences in selecting the available facts to determine the rate for the China-government entity, not any general and prospective rule. The judicial decisions cited by China are adjudications over issues decided in prior antidumping proceedings and do not constitute a pronouncement on what USDOC will do prospectively. Finally, USDOC's own statements cited by China provide no insight into the challenged determinations as these statements provide an incomplete context for the selection of facts available, as demonstrated by the analysis and actual selection in the challenged cases.

B. China Has Misapplied The Legal Analysis With Respect To Article 6.8 And Annex II Of The AD Agreement

53. China's interpretation of Article 6.8 and Annex II of the AD Agreement are flawed in key respects. First, China misinterprets the terms "any interested party" and "necessary information" in Article 6.8 to argue that USDOC must request from each company within the China-government entity information pertaining to the calculation of a dumping margin, *i.e.*, issue a dumping questionnaire to each of these companies, before it resorts to facts available. Such a reading of Article 6.8 is not supported by its text, nor shared by any previous panel or the Appellate Body. Moreover, such an interpretation would seriously undermine the ability of investigating authorities to determine appropriate dumping margins and "to proceed[] expeditiously" in reaching determinations in accordance with Article VI of the GATT 1994 and the AD Agreement. Indeed, China's strained interpretation disregards that an investigating authority requires information for determinations separate from the dumping margin determination.

54. Second, China argues that where an investigating authority collapses multiple entities into a single exporter, the investigating authority may rely on facts available only if it requested this specific information from all companies within that exporter. China is incorrect. To avoid a potential scenario in which the China-government entity shifts its exports through the producer/exporter of the China-government entity which is assigned the lowest rate, an investigating authority must apply the same antidumping duty rate to all of the China-government entity's exports. Moreover, if companies within the China-government entity do not provide requested information, the investigating authority must determine what this means for the China-government entity. Further, where a company that is part of the China-government entity has been notified of and fails to respond to an initial request for quantity and value information, the investigating authority may find that the company, and by extension, the China-government entity, has failed to respond to a request for necessary information and has significantly impeded the progress of the proceeding. Finally, China mischaracterize the present dispute because it ignores that USDOC may need to rely on facts available if it did not have the necessary information to calculate a dumping margin for the NME-government entity because of the non-cooperation of *all* or *nearly all* companies within the entity.

55. Third, China misinterprets the term "special circumspection" as stated in paragraph 7 of Annex II. China argues the term requires the investigating authority to consider whether it requested such information from each of the members of the China-government entity. Article 6.8 does not limit the type of information or the parties from whom the information was requested in the way China advocates here. Moreover, an investigating authority (such as USDOC) may find that certain companies within the NME-government entity have failed to cooperate by failing to respond to an initial request for quantity and value information or failing to provide requested information pertaining to the actual calculation of a dumping margin. In each instance, the investigating authority may also find that such a failure has significantly impeded the proceeding.

C. USDOC's Use Of Facts Available With Respect To The China-Government Entity Is Not "As Such" Inconsistent With Article 6.8 And Annex II

56. Nothing in Article 6.8 or Annex II limits the application of facts available to those facts that are *most favorable to the interests* of a party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to which facts should be selected. Rather, the permission to apply the "facts available" in making a determination pursuant to Article 6.8 means that an administering authority, when faced with a situation in which necessary facts have not been supplied, may apply those facts that are otherwise available − and will have to make inferences in deciding to how to select from the available facts. As Annex II(7) recognizes, when facts available are applied "this situation could lead to a result which is less favourable to the party than if the party did cooperate." Thus, the use of an "adverse inference" in this context does not mean the application is punitive, it simply reflects that the selection of information from the available information takes into account the party's failure or refusal to provide the necessary information, as the Appellate Body found in *US − Carbon Steel (India)*. Moreover, USDOC's use of an "adverse inference" in this context is not based upon a "speculative adverse inference" as was employed in *China-GOES*, where the investigating authority ignored *substantiated facts*.

57. Annex II of the AD Agreement establishes certain requirements when investigating authorities must resort to facts available to make their determinations. By following the safeguards established in Annex II, investigating authorities are able to select information that is considered the "best information available" consistent with the aim of Article 6.8 and Annex II to allow administering authorities to make determinations and complete their investigations.

58. Where USDOC relies on secondary information, the relevant domestic instruments direct that USDOC "shall, to the extent practicable, corroborate that information from independent sources reasonably at [its] disposal." The relevant regulation defines the term "corroborate" to mean that USDOC "will examine whether the information to be used has probative value." In doing so, USDOC considers the reliability and relevance of the information to be used as facts available. Where USDOC finds the information is unreliable or not relevant to the non-cooperating party being examined, USDOC rejects such information as "facts available", as required by law. In fact, the USDOC rejected certain information as "facts available" in many of the challenged determinations.

59. The actual determinations referenced by China also demonstrate there is no rule or norm of general or prospective application when USDOC selects facts available to be applied to the non-cooperating China-government entity, or any other non-cooperating party for that matter. USDOC is neither *prevented* from evaluating the information on the record in selecting information to be used as facts available, nor is it *prevented* from exercising special circumspection in determining whether the information selected has probative value. These determinations demonstrate that USDOC engaged in the required "comparative, evaluative assessment" of the information it may use as a proxy for the China-government entity's rate.

60. China's second and third claims concerning the purported norm are inconsistent with DSU Article 6.2 because China did not raise these claims on an "as such" basis in its panel request. These claims concern USDOC's initial decision to apply facts available, *i.e.*, its finding that the China-government entity is non-cooperative on the basis of the non-cooperation of one or more companies within the China-government entity. Accordingly, these claims must be rejected because they are outside of the Panel's terms of reference, and are not otherwise identified by China as being part of a norm of general and prospective application.

D. China Has Not Established Its As-Applied Claims

61. As an initial matter, in seven of the challenged determinations, USDOC did not make a determination based on "facts available". Rather, in these particular determinations, USDOC assessed duties at the cash deposit rate and thus, the duty rate previously established from a previous period of investigation or review continued to apply. Where USDOC did make a facts available determination in a challenged proceeding, the evidence demonstrates that USDOC notified companies within the China-government entity of the necessary information required, and appropriately determined that a failure to respond to this request for information warranted the use of facts available for the China-government entity. In these 19 determinations, USDOC

applied facts available, using one of the following, depending on the information available: (1) a rate from the domestic industry's application; (2) a rate calculated for a cooperative respondent in a previous period of review; or (3) a rate calculated from a cooperative respondent's transactional information in the current period of investigation. Each determination met the requirements under Article 6.8 and Annex II: each had a factual foundation; no substantiated fact contradicted the information selected; and nothing indicated the information selected was an unreasonable replacement for the missing information.

VII. THE PANEL SHOULD REJECT CHINA'S CLAIMS THAT USDOC ACTED INCONSISTENTLY WITH ARTICLE 6.1 OF THE AD AGREEMENT

62. Per the text itself, Article 6.1 concerns proper notice of the information required by an investigating authority, not the substantive type of information it must seek. Article 6.1 does not apply if the investigating authority does not require certain information, or is not asking for such information at that point in the proceeding. Thus, even assuming, *arguendo*, that the investigating authority is seeking the wrong information in determining a dumping margin for the NME-government entity, Article 6.1 is concerned with whether the investigating authority gave notice of the information that it has determined that it requires and is seeking from parties.

63. Article 6.1 must also be read in conjunction with Article 6.8 and Annex II of the AD Agreement. Where the investigating authority has properly determined that a party has failed to respond to a request for information or otherwise significantly impeded the proceeding, despite having notice of the request and the consequences of not cooperating, Articles 6.8 and 6.1 together do not require the investigating authority to continue to allow that party opportunities to provide information. Therefore, China's argument that an investigating authority must request the specific information necessary for the calculation of a dumping margin from all companies within the NME-government entity is unsupported by the text of Article 6.1, and also ignores the realities of an antidumping proceeding and the different circumstances of all interested parties. Moreover, in each of the 26 challenged proceedings, the evidence confirms that USDOC (1) properly notified all companies within the China-government entity of the information which USDOC required, and (2) permitted companies within the China-government entity ample opportunity to present in writing all evidence which they considered relevant.

VIII. CONCLUSION

64. For the foregoing reasons, the United States respectfully requests that the Panel reject China's claims.

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. China continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. China still has failed to establish that the United States has breached any provision of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. CHINA'S CLAIMS RELATED TO USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT ARE WITHOUT MERIT

2. China's proposed interpretations are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely. While China attacks the *Nails* test applied by the U.S. Department of Commerce ("USDOC") in the challenged antidumping investigations, China does not describe how, in its view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

A. The "Pattern Clause" Does Not Require Investigating Authorities To Utilize any Particular Type of Statistical Analysis

3. China insists that it is "not arguing that the *Anti-Dumping Agreement* compels the adoption of any particular statistical method or particular standard deviation threshold or multiple thereof." However, at every turn, the arguments China advances belie that assertion. China's arguments are all premised on the notion that a statistical probability analysis − or China's own version of such an analysis − is the standard against which the *Nails* test is to be measured. We have shown that USDOC makes *no* assumptions (whether implicit or explicit) concerning the probability distribution, let alone assume the existence of a particular type of probability distribution, and we have not suggested that the *Nails* test would meet the requirements for statistical probability analysis as understood by China or even "as generally recognized in the field of statistics." That, of course, is not the standard against which the *Nails* test is to be measured. The question before the Panel, which China appears to misunderstand, is whether USDOC's application of the *Nails* test in the challenged investigations is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. We have shown that it is.

4. China refers to the Appellate Body report in *US − Upland Cotton (Article 21.5 − Brazil)*. There are no parallels between the facts in that dispute and the facts here, and that portion of the *US − Upland Cotton (Article 21.5 − Brazil)* Appellate Body report does not contain findings that are relevant to the Panel's resolution of this dispute.

5. China asserts that, "USDOC designed the test as a statistical tool to conduct a probability analysis for purposes of assessing whether a set of observed export prices differed in a relevant way." China's assertion is wrong, and it is plainly contradicted by what USDOC said *at the time* it made its determinations.

6. China's interpretation of the "pattern clause" limits it to identifying random and aberrational outliers, or "unusually low" export prices. This interpretation, however, is incorrect. The terms of the second sentence of Article 2.4.2 do not refer to "unusually low export prices." Further, China's position is contrary to the logic of the second sentence of Article 2.4.2. Dumping may be "targeted" even in a situation where lower-priced sales are not "unusual" or "outliers." Lower prices may not be unusual and may not appear to be outliers at all.

B. The "Pattern Clause" Does Not Require Investigating Authorities To Analyze Export Sales on an Individual Basis

7. China argues that the second sentence of Article 2.4.2 of the AD Agreement establishes a "legal requirement to focus on individual export prices" and refers to the Appellate Body report in *US – Zeroing (Japan)*. To the extent that the Panel takes into account the Appellate Body's discussion in paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report, it should exercise caution in doing so. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the alternative, average-to-transaction comparison methodology. Furthermore, the Appellate Body expressly was not making findings of legal interpretation that resulted from an analysis undertaken pursuant to the customary rules of interpretation. Additionally, the Appellate Body simply was not addressing the question of whether or not it is permissible for an investigating authority to use weighted averages when examining export prices to determine if a "pattern" exists. While China quotes from the Appellate Body report, it offers no explanation for its assertion that the statements it quotes "strongly support China's interpretation."

8. China contends that its reading of the second sentence of Article 2.4.2 "ensures *parallelism* between the analysis of whether the W-T comparison methodology may be used and the substantive nature of the W-T comparison methodology, which by definition focuses on individual export prices." However, China's proposed reading lacks textual and contextual support.

9. China complains that "[i]t would be incongruous to interpret this text to permit an investigating authority to overlook the individual prices." We have explained that USDOC did not "overlook" any individual prices. Calculating weighted averages of the export prices to each of the purchasers is a way for the investigating authority to analyze the "hundreds or even thousands" of export prices and make a judgment about differences not among all of the hundreds or thousands of export prices, but among the small number of purchasers. China's argument once again reveals that China is seeking to impose statistical probability analysis as the standard against which an investigating authority's examination must be measured.

C. The "Pattern Clause" Does Not Require Investigating Authorities To Examine Why Export Prices Are Different

10. In China's view, even after the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean, including an inquiry into why they exist at all. Regardless of whether China frames its argument in terms of discerning an exporter's *intent* or identifying *reasons* for the pattern of export prices that differ significantly, nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. Certain third parties agree.

11. In China's view, any numerical difference in export prices can be explained away. The quantitative difference between the export prices, in China's view, does not matter. China's proposed interpretation is untenable, and, as we have explained, it is inconsistent with prior Appellate Body findings regarding the meaning of the term "significant."

12. While China argues that the numerically large differences in export prices that USDOC observed in the challenged investigations were, for purportedly qualitative reasons, not significant, China's arguments go toward explaining *why* the prices were different, or giving reasons for the price differences. They do not address *how*, qualitatively, the differences, which were numerically large, were not important or notable.

13. China appears to acknowledge that there was no information in the administrative records of the coated paper and OCTG antidumping investigations that would have been relevant to an analysis of the kind of "qualitative factors" China discusses, and this is because the interested parties did not raise the issue of "qualitative factors" or present evidence to USDOC about that issue. In the steel cylinders antidumping investigation, as we have explained, USDOC responded to an argument by BTIC concerning increases in steel prices and determined that the argument was "merely an unsupported assumption without the support of record evidence."

D. China Has Failed To Establish that Certain SAS Programming Errors Constitute a Breach of the AD Agreement

14. China confirms that it is "challenging" the SAS programming errors, but adds nothing that would support a finding that an inadvertent error amounts to a breach of any provision of the WTO Agreement.

15. China continues to offer the Panel no explanation of how the identified SAS programming errors could reflect a failure to provide a reasoned and adequate explanation or a failure to establish the facts properly and evaluate them in a manner that was unbiased and objective. There are no parallels between the facts in *US – Upland Cotton (Article 21.5 – Brazil)* and the facts here, and the portion of the *US – Upland Cotton (Article 21.5 – Brazil)* Appellate Body report to which China refers does not contain findings that are relevant to the Panel's resolution of this dispute.

16. China acknowledges that "correction of the two types of programming errors does *not* lead to a situation in which the Price Gap Test would no longer be passed for at least one CONNUM in *OCTG* OI and *Coated Paper* OI." So, it is clear that the finding China seeks from the Panel related to the programming errors is advisory and not necessary to secure a positive solution to the dispute.

E. USDOC's Explanations in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Are Not Inconsistent with the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

17. It is logical for an investigating authority to examine the extent to which dumping would be masked by a normal comparison methodology, in contrast to the alternative comparison methodology, as it considers whether a normal comparison methodology can "take into account appropriately" the pattern of export prices that differ significantly. In other words, logically, some manner of comparison is necessary to test whether the average-to-average comparison methodology or the average-to-transaction comparison methodology can more "appropriately" take into account a pattern of significantly differing export prices. Such a comparative exercise is precisely what USDOC undertook in the challenged antidumping investigations. It is unclear what more, beyond such a comparative exercise, would be needed to satisfy the requirements of the "explanation clause."

18. China complains that comparing the result of the average-to-transaction comparison methodology (with zeroing) and the result of the average-to-average comparison methodology (without zeroing) is insufficient because, China argues, the use of zeroing is not permitted in the application of the alternative, average-to-transaction comparison methodology. However, as demonstrated in the U.S. first written submission, and as discussed further below, zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning.

F. The "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Does Not Require an Investigating Authority to Discuss Both the Average-to-Average and Transaction-to-Transaction Comparison Methodologies in Its Explanation

19. While the Appellate Body has not previously addressed the particular legal question that is before the Panel, neither in *US – Softwood Lumber (Article 21.5 – Canada)* nor in any other dispute, the *logical extension* of the Appellate Body findings is that the exceptional, average-to-transaction comparison methodology *should* "lead to results that are systematically different" when the conditions for its use have been met. Accordingly, as the U.S. first written submission demonstrates, an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the second sentence of Article 2.4.2 of the AD Agreement.

20. China also discusses the Appellate Body report in *US – Zeroing (Japan)*. We have already commented on the passage from the *US – Zeroing (Japan)* Appellate Body report in response to

question 17. China, in an attempt to support its argument, refers to "grammatical convention" and provides to the Panel a dictionary definition of the word "either." In doing so, China appears to invite the Panel to apply a Vienna Convention analysis to the language in the *US − Zeroing (Japan)* Appellate Body report. Of course, an adopted report is not treaty language, and China's suggestion that this dispute should turn on a Vienna Convention analysis of a potentially ambiguous passage of the *US − Zeroing (Japan)* Appellate Body report only serves to highlight the weakness of China's argument.

G. USDOC's Application of the Alternative Average-to-Transaction Comparison Methodology to All Sales

21. China continues to argue that USDOC was required to apply the alternative, average-to-transaction comparison methodology on a model-specific basis, and limit its application only to certain models, because USDOC, China asserts, "decide[d] to identify the existence of a 'pattern' in a limited, model-specific, way." China appears to misunderstand USDOC's analysis and also misunderstands the Appellate Body report in *EC − Bed Linen*.

22. USDOC did not "seek[] to find 'patterns' by reference to models" in the challenged investigations. Instead, USDOC established the existence of "a pattern" − within the meaning of the second sentence of Article 2.4.2 − based on all of a respondent's sales of subject merchandise. This is evident from USDOC's discussion of its application of the *Nails* test in the challenged determinations.

23. China utterly fails to grapple with the import of the Appellate Body's findings in *EC − Bed Linen*. Despite the Appellate Body's findings in *EC − Bed Linen*, China continues to suggest that "an investigating authority may assess the existence of relevant pricing patterns on a model-specific basis," but the Appellate Body has clearly rejected this proposition and there is no support for it in the text of the second sentence of Article 2.4.2 of the AD Agreement.

H. China's Arguments Concerning the Appellate Body's Zeroing Findings Lack Merit

24. While the Appellate Body has addressed zeroing in numerous prior disputes involving different comparison methodologies, it has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. China also argues that the Appellate Body has previously "rejected" the mathematical equivalence argument. The U.S. first written submission discusses at some length the Appellate Body's prior consideration of the mathematical equivalence argument and demonstrates that the Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection.

25. China further contends that "the function of Article 2.4.2, second sentence, is found in that it allows a different *process*, as opposed to requiring a different *outcome*, in determining the margin of dumping in the presence of a relevant pricing pattern." China misses the point of the U.S. argument. The United States does not argue that the alternative, average-to-transaction comparison methodology necessarily must yield a different outcome. The outcome may or may not be different, depending on the facts.

26. China argues that the Appellate Body's findings related to the meaning of the term "margin of dumping" compel the conclusion that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology. China's reasoning is flawed, and China's argument bears no connection whatsoever to the text of Article 2.4.2 of the AD Agreement or prior Appellate Body findings.

27. It is crucial to recognize that, when the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, such as the meaning of the term "margin of dumping," those interpretations, on a basic level, are rooted in the text of the first sentence of Article 2.4.2 of the AD Agreement. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

I. China's Effort To "Avoid" Mathematical Equivalence Is Unpersuasive

28. China does not dispute that, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the challenged antidumping investigations. The dispute between the parties is not about arithmetic or algebra. It is about so-called "assumptions" related to the calculation of normal value. It is China's assumptions that are untenable and without explanation. Each of the scenarios in Exhibit CHN-497 depends on and is exclusively premised on manipulating the calculation of normal value for the application of the average-to-transaction comparison methodology while not making any similar change to the calculation of normal value for the application of the average-to-average comparison methodology. Yet, China fails to explain why changing the calculation of the *normal value* used in the application of the normal average-to-average comparison methodology and the exceptional average-to-transaction comparison methodology would in any way address a pattern of significantly differing *export prices* among different purchasers, regions, or time periods. There is no logical reason why an investigating authority would do so and China has not explained how calculating normal value differently would assist an investigating authority to, in the words of the Appellate Body, "unmask targeted dumping."

29. There also is no textual basis in Article 2.4.2 of the AD Agreement to support calculating normal value differently for the purposes of applying the average-to-average and average-to-transaction comparison methodologies set forth in the first and second sentences of Article 2.4.2, respectively. The phrase "weighted average normal value" in the first sentence of Article 2.4.2 is nearly identical to and conveys the same meaning as the phrase "normal value established on a weighted average basis" in Article 2.4.2, second sentence.

30. The United States does not argue that the investigating authority's flexibility to use monthly normal values is limited by the terms of Article 2.4.2 of the AD Agreement. China simply has failed to explain the logic of changing the basis of the calculation of the weighted-average normal value as part of the effort to "unmask" dumping concealed by a pattern of significantly differing export prices.

31. While China attempts to avoid mathematical equivalence, it expends no effort to advance an interpretation of the second sentence of Article 2.4.2 that would give that provision meaning or permit investigating authorities to use the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."

32. The scenarios presented in Table 4 of Exhibit CHN-497 support the argument made in the U.S. opening statement at the first panel meeting concerning the unpredictability of changing the basis for the calculation of normal value in the manner that China proposes. The results are unpredictable and not systematic, and they bear no relationship to the pattern of significantly differing export prices or the aim of the second sentence of Article 2.4.2 to "unmask targeted dumping."

33. China also argues that the U.S. mathematical equivalence argument "fails to grapple with the relevance of the T-T methodology," which "will generally yield results that are different from both W-W and W-T methodologies, even though zeroing is not permissible under the T-T methodology." China's observation does not support its position. The United States has never argued that the transaction-to-transaction comparison methodology should lead to the same result as either the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing). The Appellate Body has found that there is no hierarchy between the average-to-average and transaction-to-transaction comparison methodologies and they should not be interpreted in a way that would "lead to results that are systematically different." This does not mean that the outcomes of these two methodologies should be mathematically the *same*.

J. "As Applied" Claims Related to the PET Film Third Administrative Review

34. China's arguments that prior Appellate Body findings establish that zeroing is "never permissible" in administrative reviews and that recourse to the alternative, average-to-transaction comparison methodology is "only available in original investigations" are incorrect.

35. The Appellate Body has never found that the use of zeroing in an administrative review is impermissible when it is used in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. China's reading of the Appellate Body report in *US – Zeroing (EC)* is untenable. The Appellate Body did not endorse the *US – Zeroing (EC)* panel's legal reasoning concerning the term "during the investigation phase" in Article 2.4.2.

36. China's argument that "recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations" and is not available in assessing the precise amount of antidumping duty in administrative reviews is not supported by the text of Articles 2.4.2 and 9.3 of the AD Agreement or by logic. Article 9.3 of the AD Agreement provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." A margin of dumping established pursuant to the second sentence of Article 2.4.2 is a margin of dumping established under Article 2. Even if the term "during the investigation phase" is interpreted in the manner for which China argues, the implication simply would be that there is no *requirement* to apply the comparison methodologies described in Article 2.4.2 in the context of administrative reviews. It would not follow, logically, that it would be impermissible for an investigating authority to apply those comparison methodologies in administrative reviews.

III. CHINA'S CLAIMS AND ARGUMENTS CONCERNING THE ALLEGED SINGLE RATE PRESUMPTION AND THE ALLEGED USE OF ADVERSE FACTS AVAILABLE NORMS DO NOT COMPORT WITH THE DSU OR THE PANEL'S WORKING PROCEDURES

A. The Six New Determinations China Introduced During The First Substantive Meeting Are Not Within The Panel's Terms Of Reference

37. China introduced six new antidumping determinations during the course of the first substantive meeting that are in fact "new measures" that are not within the Panel's terms of reference and cannot be challenged in this dispute. These new measures are outside the scope of this dispute because China did not consult with the United States over them in accordance with Article 4.4 of the DSU or identify them in its Panel Request per Article 6.2 of the DSU.

38. China fails to recognize that under the DSU, the concept of – and need to identify – "measures" is discrete from the concept of and need to identify the requisite "legal basis of the complaint." Thus, whatever the level of precision with respect to the *legal basis* put forward by China, it is irrelevant for whether the requirement to identify *the measure* in both the Request for Consultations and the Panel Request has been fulfilled. Moreover, when China concedes that only particular arguments from China's first written submission may even be relevant for a particular determination, this only further highlights that these determinations are new measures.

B. China's Recent Arguments Are Contrary to the Panel's Working Procedures and the DSU

39. China has presented extensive arguments that properly belonged in its first written submission per paragraph 6 of the Panel's Working Procedures. Indeed, the situation here is more prejudicial than in the *EC – Fasteners* dispute (in which a previous panel has similarly been faced with a situation in which China provided evidence and arguments going to its primary case well beyond its first submission) because the substantive deficiency is qualitatively higher. Moreover, unlike *EC – Fasteners*, which concerned a single antidumping determination, the present dispute entails dozens and dozens of determinations increasing the potential prejudice upon the United States and undermining its rights to present a full defense, including by having sufficient time to prepare its submissions (DSU Article 12.4) and to receive the facts of China's case and China's arguments *before* presenting its own first submission (DSU Article 12.6 & Appendix 3, para. 4).

IV. CHINA STILL HAS NOT ESTABLISHED THE EXISTENCE OF AN ALLEGED "SINGLE RATE PRESUMPTION" NORM OR AN ALLEGED "ADVERSE FACTS AVAILABLE" NORM

40. China's challenge to both a purported "Single Rate Presumption" norm and a purported "Adverse Facts Available" norm rests on China meeting the "high threshold" that such unwritten norms exist. China has not shown the existence of anything with independent operational effect,

in the sense of doing something or requiring something to be done, which could establish the existence of such norms as measures. China does not show the existence of norms that affect USDOC's behavior generally and prospectively. Regarding the alleged Adverse Facts Available norm, China has additionally failed to articulate the content of the purported norm. Consequently, China's "as-such" challenges to these alleged measures must fail.

A. China's Evidence Still Fails to Demonstrate That The Alleged Single Rate Presumption Norm Applies Generally and Prospectively

1. The Evidence Generally

41. China's purported evidence does not show that any alleged Single Rate Presumption has any type of general and prospective application, let alone legally binding effect.

a. Policy Bulletin 05.1

42. The first piece of evidence that China relies upon is a statement taken from Policy Bulletin 05.1. That statement does not establish the existence of a rule that has independent operational effect or otherwise directs USDOC's future conduct. The cited statement is located in a section titled "Background" and, thus, does not demonstrate that the alleged Single Rate Presumption has a "normative" character. China's attempt to equate Policy Bulletin 05.1 with the Sunset Policy Bulletin at issue in *US –OCTG Sunset Reviews* is also misplaced, particularly as in that dispute, unlike in this dispute, Argentina challenged the Sunset Policy Bulletin ("SPB") itself as a measure.

43. Moreover, China's excerpted language when put next to the adjoining sentences makes clear that what, if anything, may happen in the future is a particular procedure concerning a separate rate application. Critically, China has not explained what words in the proffered excerpt will "necessarily give rise" to the alleged Single Rate Presumption. To the extent China relies on the language noting the "Department presumes", the use of the present tense confirms that, at most, the USDOC is describing conduct in the past up to the present.

b. Antidumping Manual

44. China relies on three sentences from the Antidumping Manual to assert the existence of the norm. China does not explain how or why any of the text in these sentences establishes or otherwise supports its contention that the alleged Single Rate Presumption will "necessarily give rise" with respect to particular situations in the future.

45. Instead, China asserts these statements serve "as a *justification* and a *motivation* for the decision in the instant investigation or review." Justification, however, does not speak to general and prospective application. With respect to motivation, the cited statements do not in any way evince in any respect future and general application. Moreover, the Antidumping Manual contains an explicit disclaimer and USDOC, nearly 10 years ago, had explicitly, and publicly stated in a memorandum that the manual is not meant to be relied upon by the public

c. Rulings by U.S. Courts

46. The language referenced from the various court decisions do not support the existence of a norm of general and prospective effect. These statements simply note, at most, that USDOC has done something previously, and then done something different at a subsequent time. The statements also note that it is well settled under U.S. law that USDOC may undertake such actions. The fact that a particular exercise of discretion is lawful under a Member's domestic legal framework does not mean that this is the only choice available under domestic law, nor that the agency will continue to exercise its discretion in the exact same way in the future.

d. Tabulated statements from 38 challenged determinations and Statements from other sampled determinations

47. The various tabulations, such as Table SRP, provided by China are nothing but the string of cases that the Appellate Body explicitly described as insufficient evidence – and thus do not prove

the existence of the alleged norm. Indeed, nowhere in its submissions does China actually direct the Panel as to what aspect or entry in the table proves general and prospective application.

2. The Evidence With Respect to the Separate Rate Test

48. As China implicitly concedes through its reference to a "first element," China's alleged norm is different from the unwritten norm alleged in *US – Shrimp II (Viet Nam*). Specifically, China alleges that the alleged norm includes two elements, the latter involving a Separate Rate Test. Furthermore, China has not identified in its submissions what evidence China is putting forward to establish the general and prospective nature of this second element.

B. China's Evidence Still Fails to Demonstrate The Content of The Alleged Adverse Facts Available Norm

49. China's own description of the alleged Use of Adverse Facts Available Norm ("Adverse Facts Available Norm") highlights three critical defects. First, while China recognizes at the outset that a norm must apply "whenever," its own description of the purported norm is lacking in that regard. Second, China has failed to specify what constitutes "adverse information" or "adverse facts." Third, China's reference to the "process" employed by USDOC failed to identify the discrete conduct that is required by the alleged norm.

C. China's Evidence Still Fails to Demonstrate The Existence of an Alleged Adverse Facts Available Norm with General and Prospective Application

50. The statements cited by China do not speak to the actual selection of facts. Moreover, as these statements are phrased conditionally – "in many cases" or "[o]ccasionally" – China cannot reasonably claim that they evince general and prospective application.

V. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES HAS BREACHED ARTICLES 6.10 AND 9.2 ON ACCOUNT OF A "SINGLE RATE PRESUMPTION"

A. China's Arguments Fail to Address That USDOC May Treat Nominally Distinct Respondents as a Single Entity

51. China has failed to satisfy its *prima facie* case because all of its arguments go to the first, inapposite question of treatment of individual companies. Where an entity has been properly established, there is no basis to evaluate further whether the individual companies properly within the entity have been assigned an individual margin and duty.

B. China Has Otherwise Failed To Establish Its *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With Articles 6.10 and 9.2

52. China does not explain for those cases in which the China-government entity is not under review, how the alleged Single Rate Presumption precludes individual producers/exporters who are grouped within the entity from receiving an individual margin of dumping. Additionally, China has not demonstrated through evidence that the rate assigned to the China-government entity is inconsistent with Article 9.2 in each challenged investigation. It bears emphasis that China has not addressed U.S. arguments concerning USDOC's Separate Rate Application and Separate Rate Certification. Specifically, USDOC asks a company to provide information that goes to whether the company's export activities are controlled by the Chinese Government. The questions asked by USDOC go to factors that the Appellate Body in *EC – Fasteners* found could be considered to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity."

53. China's failure to put forward the requisite evidence means that is unclear whether evidence gathered from the Separate Rate Test was relied upon, and not any presumption. Because of the particularized circumstances, it was incumbent upon China to demonstrate the exporters, producers, or suppliers were denied an individual rate in the challenged proceedings. In other words, in a particular proceeding no company may have been treated as part of the China-

government entity on account of a presumption, or a company may have been so treated on the basis of record evidence.

C. China Has Not Addressed The Importance Of China's Accession Protocol And The Working Party Report

54. As the United States has established, China's Accession Protocol and Working Party Report provide both a legal and factual predicate for USDOC's treatment of Chinese companies as part of a single China-government entity. Paragraph 15 of the Accession Protocol, placed in proper context, and relevant provisions of the Working Party Report, provide the basis for USDOC's recognition that multiple companies may comprise a single China-government entity.

55. An interpretation of Section 15 that construes it exclusively as a derogation for how normal value may be calculated for Chinese respondents would create serious problems for investigating authorities trying to address injurious dumping. Indeed, a particular irony to such an interpretation is that companies that are found not to be part of the China government entity could be disadvantaged in antidumping investigations in comparison to those under the control of the Chinese government, since the Chinese government could potentially manipulate export price by rechanneling sales though different legal entities under its control.

56. A more logical interpretation is that Section 15's silence on export price is simply a reflection that there was no need to explicitly reference the issue in order for Members to address it. At least two reasons justify such silence. First, explicit reference is not required because it is addressed by implication. Second, Members viewed existing mechanisms being used in Chinese antidumping investigations at the time of China's accession −treating Chinese companies as part of a single China-government entity absent evidence demonstrating independence − as sufficient to address concerns arising with export price.

VI. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

57. China's arguments fail because Article 9.4 applies only where the China-government entity is not under examination. Where the China-government entity receives its own rate, the facts in a proceeding will often, if not always, subject the China-government entity to examination. In several of the referenced determinations, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination.

A. China Has Failed To Establish A *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With The Second Obligation Of Article 9.4

58. There are two critical defects to China's "as such" claim. First, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. Moreover, China must demonstrate that the China-government entity is not under examination. In nearly every determination referenced by China, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination. In those few determinations referenced by China in which the China-government entity was not under review or in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

59. This leads to the second defect in China's claim. The crux of China's claim here − that the alleged Single Rate Presumption is "as such" inconsistent with the second obligation of Article 9.4 − rests on the applicability of the very particular situation described in Article 6.10.2 and the last sentence of Article 9.4. China ignores that the last sentence of Article 6.10.2 does not provide for an *automatic* right to an individual rate for those companies not included in the examination, but creates certain prerequisite conditions. China does not point to a single example where there exists such a company that has met these conditions.

B. China Has Failed To Establish That USDOC Acted Inconsistently With The First Obligation Of Article 9.4 In The 26 Challenged Determinations

60. China argues that USDOC acts inconsistently with Article 9.4's first obligation concerning the "ceiling rate for the level of duties that may be applied to non-selected exporters or producers" in 26 challenged determinations. However, in 19 of the challenged determinations, the China-government entity was under examination and received its own rate pursuant to Article 6.8. The pertinent issue is USDOC's treatment of the China-government entity *as a whole*, rather than simply the treatment of the individual companies. For those seven (7) determinations in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

VII. CHINA HAS NOT DEMONSTRATED THAT USDOC WAS REQUIRED TO SEND A DUMPING QUESTIONNAIRE TO ALL MEMBERS OF THE CHINA-GOVERNMENT ENTITY IN 26 OF THE CHALLENGED DETERMINATIONS

61. China has failed to establish that the United States has breached Articles 6.1, 6.8, and Annex II of the AD Agreement for the 26 challenged determinations. Despite the numerous requests for information made by USDOC, China's claims focus instead on the information that was not requested. Specifically, China's argument is that USDOC was required to send a dumping questionnaire to all members of the China-government entity in all instances, no matter the circumstances. Nothing in the AD Agreement requires so.

A. China's Article 6.1 Claims With Respect to the 26 Challenged Determinations Are Legally And Factually Deficient

62. China continues to put forth an interpretation of Article 6.1 of the AD Agreement which purports to govern not just an investigating authority's procedural obligations with respect to notifying parties "of the information which the authorities require", but also the content of the information required for a certain determination. The *substantive* issue of which information is required for a particular determination is addressed elsewhere in the AD Agreement.

B. China Has Not Demonstrated That USDOC Resorted To Facts Available In 7 Challenged Determinations[1]

63. The record is undisputed that USDOC did *not* make a finding of noncooperation in these 7 reviews. As found by the panel in *US – Shrimp II (Viet Nam)*, applying a rate that had previously been determined in a prior proceeding does not equate to a determination that is governed by Article 6.8. Additionally, with respect to China's "as such" claim, according to China, the alleged Use of Adverse Facts Available norm is only triggered where USDOC makes a finding of noncooperation. Because USDOC did not make such a finding with respect to these 7 reviews, the alleged norm was not triggered per China's own definition.

C. China Has Not Established That USDOC Acted Inconsistently With Article 6.8 and Annex II(1) In Tires AR5 and Diamond Sawblades AR4

64. In Tires AR5, that part of the China-government entity that USDOC found to be cooperative did not represent the entirety of the entity. In Diamond Sawblades AR4, USDOC made no findings with respect to the level of cooperation of the China-government entity. Importantly, in both of these reviews, because China has not demonstrated that USDOC resorted to facts available, it has failed to demonstrate any inconsistency with Article 6.8 and Annex II(1).

D. China Has Not Demonstrated That USDOC's Resort To Facts Available In The 19 Challenged Determinations Is Inconsistent With Article 6.8 And Annex II(1)

65. The crux of China's as applied arguments with respect to USDOC's resort to facts available is that in each determination USDOC could not resort to facts available because it did not send a

[1] These are (1) Diamond Sawblades AR1, (2) Diamond Sawblades AR2, (3) Diamond Sawblades AR3, (4) Furniture AR8, (5) Retail Bags AR3, (6) Ribbons AR1, and (7) Wood Flooring AR1.

dumping questionnaire to each and every member of the China-government entity, regardless of the circumstances. USDOC's determination to resort to facts available in assigning a margin to the China-government entity in the 19 challenged proceedings is consistent with Article 6.8 and Annex II(1) because the China-government entity was notified of a request for and failed to provide necessary information.

66. China argues that resort to facts available based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information is not a proper basis to reach a finding of noncooperation. However, if a party could pick and choose what information it submits, it would be incentivized to only selectively disclose information that benefits its interests rather than ensure the most appropriate determination.

VIII. CHINA'S CLAIMS CONTINUE TO CONFUSE USDOC'S RESORT TO FACTS AVAILABLE WITH THE SUBSEQUENT SELECTION OF FACTS AVAILABLE

67. Two of China's three "as such" claims should be found outside of the Panel's terms of reference because they are related not to the alleged Use of Adverse Facts Available norm, but rather, to USDOC's resort to facts available through a finding of noncooperation. These are: China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} a facts available rate for NME-wide entities based on the (frequently presumed) procedural circumstances of non-cooperation{,}" and China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} Adverse Facts Available in circumstances when it has not requested the necessary information{.}"

IX. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II IN SELECTING THE FACTS AVAILABLE FOR THE CHINA-GOVERNMENT ENTITY

A. In Selecting From Among The Available Facts, USDOC Performed A Comparative, Evaluative Assessment

68. USDOC considers the universe of information on the record. This included information contained in the domestic parties' application for initiating an anti-dumping investigation, information that was obtained during the course of the investigation or administrative review, such as dumping margins from cooperating parties, data on sales transactions and normal value provided by those cooperating parties, and any other information obtained by USDOC during the course of the investigation or review. USDOC considered all of this information and selected from among the facts available, taking a party's non-cooperation into account.

69. USDOC then ensured that the rate selected had probative value, meaning it was both reliable and relevant, by checking the selected rate with independent sources of information on the record. USDOC performed this comparative, evaluative assessment at least twice during each determination: at the preliminary determination or results, and again at the final determination or results. Apart from this examination, USDOC also considers whether the rate selected is aberrational or unusual, is not reflective of the missing information, and therefore should be rejected for use as facts available.

B. USDOC's Process Did Not Automatically Select The Highest Available Rate

70. If the "the highest of" language cited by China accurately reflected USDOC's determinations, then the rates selected would be the highest rates available. In the challenged determinations in which USDOC resorted to facts available, the highest rate was rejected in many cases based upon an examination of the probative value of such rates. The same point holds with respect to China's reliance on the U.S. court rulings it cites. In *Lifestyle Enterprise, Inc. v. United States*, China ignores the court's language that such rates "*must be reasonably accurate estimates of respondents' rates*" and instead focuses on the language of a "built-in increase" as a deterrent. In so doing, China fails to realize that the notion of deterring non-cooperation is no more than taking account of a party's failure to cooperate.

71. China also points to the term "sufficiently adverse" as if USDOC performs a test to ensure the rate selected is adverse enough to deter non-compliance. There is no test to determine

whether a rate is "sufficiently adverse" to induce cooperation. Rather, by taking into account the party's non-cooperation, USDOC may apply an inference that *may* be unfavorable, which may incentivize a party to cooperate.

72. In the challenged determinations, China is unable to point to any rate in which the evidence supporting that rate has greater probative value for the non-cooperating entity *as a whole*. Instead, China breaks apart the NME-entity into component parts to make its argument that the rate selected is inaccurate. In doing so, China concedes that the comparator or benchmark that it insists be used as the hallmark of accuracy – *i.e.*, the all others rate - is *not* a reasonable replacement for a party that has "genuinely" failed to cooperate.

73. China argues that the rate assigned to separate rate companies is an appropriate comparison rate in determining whether the rate assigned to the China-government entity is "adverse" or a reasonable replacement for missing facts. However, those companies that receive a separate rate have demonstrated that they are eligible for a separate rate, and, in certain proceedings, cooperated by responding to a request for Q&V information. In contrast, those companies that are within the China-government entity failed to demonstrate that they are eligible for a separate rate, and, in those proceedings at issue, the entity itself failed to cooperate.

74. China points to factors that it claims USDOC does not consider when selecting a facts available rate for the China-government entity, including the rates of cooperating respondents, the rate assigned as the all others rate, the age of the selected information, and information about the non-cooperative company's age and size. However, USDOC does consider the rates of cooperating respondents and the all others rate but, depending on the facts and circumstances of the particular case, may find that this information has less probative value because it does not correspond with a party's non-cooperation.

X. THE PANEL MAY EXERCISE JUDICIAL ECONOMY ON CLAIMS RELATING TO THE USE OF ADVERSE FACTS AVAILABLE NORM OR DISMISS THEM UNDER ARTICLE 6.2 OF THE DSU

75. If the Panel finds for China on any of its claims against the alleged Single Rate Presumption, then additional findings under Articles 6.1, 6.8, and Annex II and Article 9.4 would not contribute to a positive resolution of the dispute because such findings – and the underlying analysis – would not be relevant in resolving the dispute.

76. China asserts that relevant description in the panel request of China's facts available claims is contained only in the following, general phrase: "inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement." This phrase, however, is so lacking in specificity that all of China's claims under Article 6.8 and Annex II would fail to comply with the requirement of Article 6.2 of the DSU.

XI. CONCLUSION

77. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject China's claims.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil's participation in this dispute will focus on the conditions for the use of the second sentence of Article 2.4.2, on the operation of the W-T comparison method (or "third method") and on Article 6.8 of the Anti-Dumping Agreement.

2. Regarding the second sentence of Article 2.4.2, although there are considerable uncertainties related to when it could be invoked or how the W-T method should operate in practice, there is one aspect that is clear: this method is not expected to be routinely used. Indeed, the situation described in the second sentence of Article 2.4.2 is a very specific factual situation that exceptionally authorizes investigating authorities to use the W-T method to calculate the dumping margin. Contrary to the recourse to the W-W and T-T, which "shall normally" be used, recourse to the third method is contingent upon the fulfillment of the established requirements. This "exceptional nature" was also recognized by the Appellate Body."[1] It follows from that reasoning that particular attention must be paid to whether the specific conditions established for its use in the Agreement are met.

3. The first condition established in the Agreement is that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods". Article 2.4.2 does not convey a precise definition of what type of variation of export prices matters for the purposes of application of the "third method", neither does it require investigating authorities to rely on any particular methodology to assess the existence of such a pattern. Yet, investigating authorities are under the obligation to establish and evaluate the facts under investigation in an unbiased and objective manner (article 17.6 of the ADA). In this sense, while a mathematical model may confer objectivity to the analysis, what is before the Panel is whether the Nails test can be deemed sufficient to establish, in an unbiased and objective manner, in each and every case of its application, a pattern for the purpose of the Article 2.4.2.

4. Brazil agrees that there is nothing in the text of the Anti-Dumping Agreement suggesting that the investigating authority is compelled to assess why certain export prices were significantly lower or differ from each other or to examine the intention behind price behavior. However, the possibility that both a quantitative and qualitative dimension be taken into account, given the exceptional nature of the third method, seems to be undisputed. The respondent itself, based on the decision of the Appellate Body in *US – Large Civil Aircraft*[2], agrees that "the term "significantly" in the "pattern clause" can have both quantitative and qualitative dimensions."[3] If this is true, then it may be appropriate to consider a qualitative dimension in the analysis of the existence of a pattern relevant for the purposes of Article 2.4.2 of the Anti-dumping Agreement.

5. The finding of a "pattern" must also take into account the object and purpose of the Anti-Dumping. Brazil and the United States seem to agree that what is to be condemned is injurious dumping.[4] Accordingly, while many different patterns of export prices might be found in the total universe of export transactions, not necessarily all of them would automatically constitute "a pattern" within the meaning of the second sentence of Article 2.4.2. It is possible that even significant variations between two export prices of a given purchaser, region or time period may not be *per se* decisive. Brazil is not also convinced that there is "a pattern" within the meaning of the second sentence of Article 2.4.2 when all export prices are above normal value[5], since in such a situation there is no dumping.

6. The second condition for the use of the second sentence of Article 2.4.2 is that an explanation is provided as to why the differences in prices cannot be taken into account appropriately by the use of the W-W or T-T comparison methods. This is not a trivial obligation. The authority has to

[1] US – Zeroing (Japan) (Appellate Body Report, para. 131).
[2] US- Large Civil Aircraft (Second Complaint), AB paragraph1272
[3] US First Written Submission, paragraph 72.
[4] US. First Written Submission, para 48.
[5] U.S. First Written Submission, paras. 169 and 194.

elaborate further on the reasons why, given the operational characteristics of the W-W and the T-T methods and the factual particularities of the case under investigation, those methods were not appropriate to deal with the differences in export prices. Considering that, from a purely mathematical perspective, all investigations could, in principle, be run with one of the two symmetrical comparison methods, the particular aspects of the concrete case need to be explained in order to support a decision not to use the symmetrical methods. For example, if dumping is heavily concentrated in the first half of the year, the use of the symmetrical methods could produce a zero-margin result, when, in fact, there is high dumping in the first half of the year and no dumping in the second half. This type of factual situation should be part of the explanation to be provided together with a complementary explanation of why the pattern observed could not be tackled by adjusting the period of investigation (POI), for instance. In short, an explanation of the peculiarities of the concrete case, together with an explanation of why the regular tools already at the disposal of the investigating authority were not sufficient to enable the use of one of the symmetrical methods, is essential to justify the use of third method.

7. The "explanation" must contemplate the reasons of why *both* symmetrical methods cannot be used. Had the drafters of the Anti-Dumping Agreement intended that an explanation be limited to only one of the symmetrical methods, they would have said so explicitly at the end of the second sentence by stating, for example " by the use of *one* of the symmetrical methods". Finally, a positive or higher margin of dumping obtained with the use of third method does not seem a legitimate reason *per se* to justify its use. Ultimately, the explanation of why the third method is needed cannot be confounded with the results obtained in the dumping margin by any given methodology. In sum, for exceptional situations of targeted dumping, an exceptional level of explanation is required so as to avoid the temptation to unduly, and illegally, characterize regular dumping situations as targeted dumping.

8. Another important issue before this Panel is the operation of the third method once the conditions for its use are met. More specifically, whether "zeroing" should be used for a proper operation of this method. There seems to be more doubts than certitudes in this matter. On the one hand, whether "zeroing" is permissible in the second sentence of Article 2.4.2 "is an issue of first impression for the Panel"[6]. On the other hand, certain conclusions of the Appellate Body in past "zeroing" disputes could be of interest in the interpretative exercise that this Panel has to undertake, especially the conclusion that the concepts of "dumping" and "margin of dumping" are consistently defined in relation to a product under investigation as a whole[7]. In interpreting the relevant findings of the vast jurisprudence regarding "zeroing", the Panel will have to account for the existence of the third method and to the principle of "effet utile" of treaty interpretation. How this can be done is so far not clear. Some WTO Members have suggested that the W-W and W-T would not yield necessarily the same results if the WA normal value in these methods was different. The United States advocates that nothing in the Anti-Dumping Agreement suggests that such change could be made. The Appellate Body, on its turn, hinted with the possibility that the universe of export transactions could be limited to the export transactions within the pattern[8]. Such an interpretation raises other doubts, however. With regard to the mathematical equivalence argument, it would seem that different mathematical results would be difficult to achieve if there are no changes, both from the legal and from the practical perspective, to the way of comparing the WA normal value and the export price in a targeted dumping situation. Ultimately, the answers should be found on the basis of the text, object and purpose of the Anti-Dumping Agreement itself.

9. Brazil would also like briefly to comment on another important question raised by this dispute: if the interested Member or the interested party is non-cooperative, may dumping determinations be made on the basis of "adverse facts available"?

10. Article 6.8 of the Anti-dumping Agreement[9] requires that the provisions of Annex II be observed in its application. Together, they govern how investigating authorities are to proceed so as to apply the best available information to make sound dumping determinations.

[6] U.S. First Written Submission, para. 214.
[7] US – Softwood Lumber V, Appellate Body Report, paras. 93 and 96.
[8] US – Zeroing (Japan), Appellate Body Report, para. 135.
[9] Antidumping Agreement, Article 6.8: "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or

11. Article 6.8 is intended to ensure that the failure of an interested party to provide necessary information within a reasonable period or its action to hamper the investigation does not prevent authorities from making preliminary or final determinations. Simply put, the provision is intended to prevent any party from holding the investigating authority hostage by not providing necessary information.[10]

12. However, as emphasized by the Appellate Body, an investigating authority's discretion is not unlimited with respect to the facts it may use when faced with missing information. Rather, the facts to be employed are expected to be the "best information available". In addition, if secondary sources are used, the authority should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties.[11]

13. Furthermore, the investigating authority is not allowed to choose facts that would lead to a biased determination of dumping. As the Panel in the *Mexico - Anti-Dumping Measures on Rice* dispute exemplified, Article 6.8 is not intended to operate as a punishment for those parties that do not provide such information.[12] It is important to recall that Article 6.8 itself foresees that either "affirmative or negative [determinations] may be made on the basis of the facts available".

14. Nonetheless, Brazil believes that Article 6.8 should not be interpreted as an obligation to seek "neutral" information, as it would also mean to import into the provision an equally harmful bias, where parties could benefit from non-cooperating. Rather, Brazil understands that the best information available seems to be the most reliable one, whether positive or negative, and then it would be up to the Panel to assess whether the choice of information was actually reasonable.

15. In this connection, Brazil draws the Panel's attention to the Panel Report in "EC – Countervailing Measures on DRAM Chips".[13] While the investigating authorities are not allowed to use facts available in order to punish the non-cooperative parties, these exporters should not be somehow rewarded by non-cooperating.[14]

16. In sum, like the Panel in "*EC – DRAM Chips*", in the context of Article 12.7 of the SCM Agreement, Brazil considers there is a balance to be found in the interpretation of Article 6.8 and Annex II do Anti-dumping Agreement. While the investigating authorities are not allowed to use facts available in order to punish the non-cooperative parties, these exporters should not be somehow rewarded by non-cooperating.[15]

17. The possibility of using adverse inferences in cases of non-cooperation encompasses any situation of failure in providing necessary information required by the investigating authority, either in the form of a full dumping questionnaire or, for instance, an initial questionnaire for the purpose of exporters' selection in the context of Article 6.10. In that sense, Brazil understands that any initial questionnaire should be considered "information which the authorities require", as set forth by Article 6.8. For that reason, the failure to respond to this kind of inquiry could justify the use of facts available by the investigating authority when determining any final or preliminary anti-dumping duty. Brazil considers that the dumping determination would not be restrained by the limitation specified in Article 9.4.[16] In this regard, the panel in *EC-Salmon (Norway)* has already

---

significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

[10] *Mexico - Anti-Dumping Measures on Rice* (Panel Report, para. 7.238)

[11] *Mexico - Anti-Dumping Measures on Rice* (Appellate Body Report, para. 289)

[12] *Mexico - Anti-Dumping Measures on Rice* (Panel Report, para. 7.238)

[13] Paragraph 7.61.

[14] See also Appellate Body report, *US – Hot-Rolled Steel*, paragraph 102.

[15] See also Appellate Body report, *US – Hot-Rolled Steel*, paragraph 102.

[16] 9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined, provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins

clarified that the ceiling for the dumping margin for exporters not included in the sample would not apply to those parties that failed to provide the requested information for the purpose of sampling[17].

established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

[17] European Communities — Anti-Dumping Measure on Farmed Salmon from Norway (Panel Report, paragraph 7.431)

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. THE USDOC APPLICATION OF THE *NAILS TEST* DOES NOT ESTABLISH THE REQUISITE PATTERN OF EXPORT PRICES WHICH DIFFER SIGNIFICANTLY

1. In the challenged investigation, the USDOC applied the *Nails Test*, a two-part test composed of the standard deviation test and the gap test.

2. The Appellate Body has stated that the average-to-transaction methodology may only be used if an investigating authority finds a pattern of export prices which differ significantly among different purchasers, regions or time periods (*US – Zeroing (Japan)*). This requires findings that clearly demonstrate the existence of: (i) significant differences in export prices, and (ii) a pattern to these differences.

3. In relation to the pattern requirement, in its first written submission the United States observes that use of the average-to-transaction comparison methodology requires an investigating authority to find "a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as between different purchasers, regions, or time periods". The United States describes in detail the various stages of the *Nails test* and how the *Nails test* identifies "targeting". However, it fails to demonstrate that its methodology identifies a "pattern".

4. The text of Article 2.4.2 makes it clear that the pattern to be identified is one "of export prices". The USDOC application of the *Nails test* does not meet this requirement because the USDOC averages export prices instead of comparing them to each other. The very nature of an average is that it creates a typical value and by so doing obfuscates differences. In averaging export prices, the USDOC conceals whether or not there is a form or sequence to those prices.

5. The United States argues in its first written submission that the focus should be on differences among purchasers, regions or time periods and not individual export prices. However, this argument overlooks the requirement that there must be a pattern to these differences.

6. Article 2.4.2 requires a pattern of export prices which "differ significantly". In order for prices to "differ", there must be a point of comparison. In its first written submission, the United States rightly points out that "[a]n export price cannot 'differ significantly' on its own. Given that 'difference' is a comparative or relative concept, for something to be different, it must differ from something else". However, the USDOC distorts its gap test when it ignores lower prices among non-targeted prices, thereby eliminating non-targeted prices that may be similar to alleged targeted prices.

7. The USDOC methodology, as applied, therefore does not include a proper assessment as to whether there is a significant difference among prices and whether the variance in export prices follows any discernible sequence or "pattern".

II. THE USE OF ZEROING WHEN APPLYING AVERAGE-TO-TRANSACTION METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

8. Canada submits that, in addition to the inconsistencies described above, the USDOC's use of zeroing when applying the exceptional average-to-transaction methodology is inconsistent with Articles 2.4.2 of the Anti-Dumping Agreement.

9. When employing the average-to-transaction methodology, the USDOC calculated an intermediate result for each export transaction compared to the weighted average normal value. When aggregating these results, the USDOC did not offset the intermediate results of transactions for which the export price is lower than the normal value with intermediate results of transactions

for which the export price is found to exceed normal value. Aggregation without offsetting is commonly referred to as "zeroing".

10. The Appellate Body in *US – Zeroing (EC)* and *US – Softwood Lumber V (Article 21.5 – Canada)* has found that the practice of "zeroing" is inconsistent with the Anti-Dumping Agreement in the context of both the average-to-average and the transaction-to-transaction methodologies. It also reached the same finding in *US – Stainless Steel (Mexico)* and *US – Continued Zeroing* when considering the average-to-transaction methodology in the context of administrative reviews.

11. The principles espoused in those decisions on zeroing demonstrate that zeroing is also not permissible even when an investigating authority employs the exceptional average-to-transaction methodology set out in Article 2.4.2 in the context of initial investigations.

12. The definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. When examining the use of zeroing under the transaction-to-transaction methodology, the Appellate Body found that the concepts of "dumping" and "margins of dumping" can only be found to exist in relation to a product. Because the individual comparisons only yield intermediate results and not margins of dumping, margins of dumping cannot be found to exist under any methodology at the transaction level (*US – Zeroing (Japan)*).

13. This means that even when an investigating authority is justified in using the exceptional average-to-transaction methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

14. The United States argues in its first written submission that zeroing is permissible when applying the average-to-transaction methodology because failing to do so would lead to results that are mathematically equivalent to those obtained through the standard methodologies. We note that the Appellate Body has already rejected such reasoning (*US – Softwood Lumber V (Article 21.5 – Canada)*). Moreover, it does not follow from the fact that a given methodology may yield a mathematical difference, that this methodology is permissible under the Anti-Dumping Agreement. This simple fact does not cure the deficiencies in the U.S. methodology, including those identified in this submission.

15. Therefore, the USDOC's use of zeroing in the challenged investigations was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, in particular the GATT 1994 and the Anti-Dumping Agreement ("AD Agreement"). The European Union's comments focus on: (I) the targeted dumping methodology applied by the United States; and (II) the US' methodology for dumping determinations with regard to non-market economies (NME's). This executive summary integrates comments made by the European Union in the Third Party Hearing on 15 July 2015 and in its reply to the written questions by the Panel of 30 August 2015.

II. TARGETED DUMPING

2. The European Union considers that the purpose of the final sentence of Article 2.4.2 of the AD Agreement, as reflected in the preparatory work, is to strike a reasonable compromise between two different points of view. The first point of view is that whether or not dumping exists must be measured by taking into account the average pricing behaviour of an exporter, in both domestic and export markets, as well as average costs, irrespective, on the export side, of the purchaser, region or time period. Thus, for this purpose, the data universe includes all export transactions to all purchasers and regions and in all time periods of the investigation period, to the full value of all export transactions, whether they are less or more than the normal value. This is so whether the comparison methodology is weighted average-to-weighted average or transaction-to-transaction. The second point of view is that whether or not dumping exists may be measured by comparing each export transaction with a normal value, and, if the export price exceeds the normal value, by recording a finding of zero dumping, that is, by not allowing any off-set between positive and negative results. The compromise, as enshrined in Article 2.4.2 of the AD Agreement is that normally the first rule applies; but that exceptionally, if targeted dumping by purchaser, region or time period is demonstrated to exist, a normal value established on a weighted average basis may be compared to prices of individual export transactions.

3. What the final sentence of Article 2.4.2 of the AD Agreement does is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. Thus, in the case of regional targeted dumping, a weighted average-to-weighted average comparison might lead to a determination of no dumping. However, a closer examination of one particular regional market within the importing Member might reveal that, in fact, the relatively low priced and dumped transactions are pouring into that region and devastating the local industry, and this is being off-set by relatively high priced transactions to other regions. In such a case, what the final sentence of Article 2.4.2 of the AD Agreement does is to permit an investigating authority to respond to such a situation, by unmasking the targeted dumping. Instead of determining the existence and amount of dumping by reference to the entire territory of the importing Member, it is entitled instead to determine the existence of a pattern of export prices which differ significantly among different regions, and unmask the targeted dumping accordingly.

4. The same observations apply, *mutatis mutandis*, with respect to targeted dumping by purchaser or time period.

5. This process is not aptly described as "zeroing" as that term has been used in prior DSB reports. It is not something done when calculating a dumped amount. Rather, it is something done after a dumped amount has been lawfully calculated in accordance with the provisions of the final sentence of Article 2.4.2 of the AD Agreement.

6. The point that the European Union has been consistently making during the course of these and earlier proceedings is that the particular fact pattern and legal context with which this Panel is presented has not previously been adjudicated. That is why we disagree with China's approach of

asserting the existence of a generic concept of "zeroing" that past case law has prohibited, leading to the conclusion that it is impossible for an investigating authority to unmask targeted dumping (for example by region), because the fact of not offsetting the targeted dumped amount against a negative amount for non-targets is to be characterised as "zeroing". This is just not helpful, because the same term is being used to describe very different fact patterns and legal concepts. Therefore, if the Panel is nevertheless minded to refer to this issue as "zeroing", the European Union would strongly suggest that the Panel consider following the approach adopted in the past cases, by adopting an appropriate qualifier, such as "regional zeroing" or "purchaser zeroing" or "zeroing by time period".

7. To put the matter in these terms, the European Union does not agree with China that just because the past case law has established that "model zeroing" and "simple zeroing" are generally prohibited, it necessarily follows that "regional zeroing" is prohibited. That is because the final sentence of Article 2.4.2 expressly provides for the possibility that there is a pattern of export prices that differ significantly among different regions. Thus, even if regional zeroing would generally not be permitted, it would certainly be permitted when the exceptional circumstances set out in the final sentence of Article 2.4.2 have been demonstrated to exist. The dumped amount thus calculated would have been lawfully calculated in accordance with the provisions of the AD Agreement. It could therefore lawfully form the basis for the calculation of the margin of dumping and thus the rate of anti-dumping duty to be applied.

8. The European Union agrees with the Appellate Body in *US – Continued Zeroing* that the mathematical equivalence argument does not determine the question on the use of different methodologies in case of targeted dumping determinations, because it is most likely not to hold in the case of transaction-to-transaction comparisons, and because the data set changes.

9. Furthermore, during the Third Party Hearing Japan explained that, in order to appropriately counteract low-priced transactions to a "targeted" group, it may be most appropriate to interpret the second sentence of Article 2.4.2 as allowing an investigating authority to "focus" on the transactions for that particular targeted group, and to establish the margin of dumping on the basis of the export prices in that targeted group (e.g. in a region). The European Union understood Japan to argue that the dumped amount thereby calculated does not need to be set-off against a negative dumped amount with respect to non-targets (that is, the remainder of the data set). An anti-dumping duty may then be imposed at that rate with respect to products destined for that region. This would mean that Japan would in fact ignore the exports to non-targets in the calculation of the exporter-specific dumping margin for the investigated product. Japan would apply the same approach, *mutatis mutandis*, with respect to targeted dumping by purchaser and by time period.

10. During the oral hearing the European Union explained that it disagreed with Japan's proposition regarding the levying of the duties insofar as Japan is not taking into account the context provided by Article 4.2 of the AD Agreement. We explained that, although Article 4.2 refers to a situation in which the domestic industry has been interpreted as referring to the producers in a certain area, that is, a market as defined in paragraph 1(ii) of Article 4, nevertheless it provides relevant contextual guidance disproving Japan's proposition.[1] It expressly recognises that there may be circumstances in which the constitutional law of the importing Member does not permit the levying of anti-dumping duties only on products consigned for final consumption to a particular area. In such circumstances, it provides for the exporters to be given the opportunity to cease exporting at dumped prices or give assurances to that effect pursuant to Article 8. It also refers to the possibility of the duties being levied only on products of specific producers which supply the area in question. However, if neither of these approaches is possible, Article 4.2 expressly provides that the importing Member may levy the anti-dumping duties "**without limitation**". As we explained during the oral hearing, this certainly means at least without limitation as to the geographical area.

[1] The European Union does not consider that, for the purposes of resolving the dispute before it, the Panel needs to get into the question of the relationship between the legal concept of a "region" within the meaning of Article 2.4.2 of the AD Agreement and the legal concept of a "region" within the meaning of Article 4.2. We think that the Panel can refer to the term "without limitation" as context in support of a refutation of Japan's argument without doing that.

11. What this means is that, contrary to what Japan submits, it remains possible to impose an anti-dumping duty on the exporter in Japan's example of regional targeted dumping with respect to shipments of all products to the entire geographical area of the importing Member, that is, "without limitation" as to geographical scope. The amount of the anti-dumping duty to be imposed would be equal to the margin of dumping for that exporter. The margin of dumping for the exporter in Japan's example would not be expressed as a margin of dumping into the targeted region, that is, by dividing the dumped amount by the total value of transactions to that region. Rather, the margin of dumping for that exporter would be expressed as a margin of dumping into the entire territory of the importing Member, that is, by dividing the dumped amount by the total value of **all** transactions into the importing Member. This would mean that the investigating authority would *not* ignore the exports to non-targets in the calculation of the exporter-specific dumping margin for the investigated product. Rather, they would **all** be taken into account in the calculation of the dumping margin.

12. With respect to Japan's complaint that this would mean that an anti-dumping duty would initially be imposed on products destined for regions where no regional targeted dumping had previously occurred, we agree with what we understand the US position to be, that is, that any such issues could be addressed (to the extent that this would be necessary at all) during final assessment or refund proceedings as provided for in Article 9.3 of the AD Agreement, or through the use of a variable duty, as provided for in Article 9.4 of the AD Agreement.

13. Finally, the European Union notes that, in a normal anti-dumping calculation, that is, one that does not involve any determination of targeted dumping, an investigating authority is not required to assess the reason for which dumping is occurring. Rather, the determination of the existence and amount of dumping is based on an objective assessment of the data. If the export price is less than the normal value, then dumping exists. The European Union fails to see why the situation should be any different under the final sentence of Article 2.4.2 of the AD Agreement.

14. The reasons for which the dumping might be occurring, and specifically the reasons for the existence of the pattern and the use of the weighted average-to-transaction methodology, might be relevant to the explanation to be provided pursuant to the final sentence of Article 2.4.2 of the AD Agreement, but such reasons are not relevant to the question of whether or not a pattern of relatively low priced exports by purchaser, region or time period, has been demonstrated to exist. We think that the terms "pattern" and "significantly" can be understood quantitatively; and we agree with the United States that the term can also be understood qualitatively.

III. SINGLE ENTITY METHODOLOGIES

15. The European Union expects the Panel to follow the guidance provided by the Appellate Body in *EC – Fasteners (China)*, where a similar presumption of Single Entity in EU law was found inconsistent with Articles 6.10 and 9.2 of the AD Agreement. According to the Appellate Body, legal entities may under certain circumstances be treated as a single exporter or producer, but such singularity cannot be presumed.

16. The criteria for establishing singularity may include the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management, and control or material influence by the State in respect of pricing and output. The European Union considers the criteria referred to by the United States in line with these principles, if they are effectively applied to establish singularity (and not to rebut a presumption of singularity).

17. The European Union agrees with the United States that Article 9.4 of the AD Agreement is inapplicable to entities which have received an individual rate (which can be a Single Rate for several companies if singularity has been correctly established). Where Article 9.4 of the AD Agreement is applicable, it does not require one single "all others" rate, but allows an investigating authority to impose more than one such rate. However, any "all others rate" must not exceed the ceiling calculated according to Article 9.4 (ii). Where it cannot be calculated because there are no reference margins other than zero, *de minimis*, and facts available determinations, Members must provide methodologies which are reasonable in view of the specific circumstances of the case at hand.

18. The European Union anticipates that the Panel will take account of the Appellate Body's findings in *US – Zeroing (EC)* and in *Argentina – Import Measures* when assessing whether China has demonstrated the existence and precise content of a practice of punitive use of facts available. The European Union would like to recall that in *US – Carbon Steel (India)* the existence of such a practice was not challenged by India and hence the findings in that case are not conclusive for the present case. The EU expects that when assessing whether China has sufficiently substantiated its claim, the Panel will look closely into the characterisation of the measure by China and assess the evidence provided in the light of the specific challenge, as indicated by the Appellate Body in *Argentina – Import Measures*.

19. On information rights of individual components of the Single Entity under Article 6.1 of the AD Agreement, the EU considers that a balance must be found between the fundamental due process rights of interested parties and the interest of investigating authorities in efficient and expeditious investigations. In the European Union's view, this requires that basic information about the investigation be given, whenever possible, at the outset of the investigation, to all individual companies known by then to the investigating authorities. All companies included within the Single Entity should be informed thereof once it is established that they belong to the Single Entity, including about the composition of the Entity at that point in time, and about the fact that failure to provide complete information for the whole entity might entail the use of facts available for the Single Entity as such (see next paragraph). Subsequently, it will be for the Single Entity to channel information to its components and investigating authorities.

20. If the Single Entity has been constituted correctly, i.e. not on the basis of a presumption but establishing, for each of its companies whether the criteria set out in *EC – Fasteners (China)* are met, and if all companies included within the Single Entity have been duly informed of their inclusion and the consequences thereof, investigating authorities should be allowed to apply facts available to the extent the Single Entity has been given notice of the information specifically required and failed to provide complete information for the whole Entity. In the European Union's view, a different reading would be in contradiction with the very concept of the Single Entity.

21. Finally, the European Union also advocates a balanced approach on the question whether failure to cooperate at early stages of the investigation can justify the use of facts available at later stages of the investigation, without giving again all parties notice of the information then required. Such balanced approach could consist in giving interested parties from the outset maximum notice of the information required throughout the proceedings, but on the other hand allowing investigating authorities to cease communication with those respondents which make it clear that they do not intend to cooperate.

IV. CONCLUSION

22. The European Union considers that this case raises important questions on the interpretation of various provisions of the AD Agreement and the GATT 1994. The European Union requests the Panel to carefully review the scope of the claims in light of the observations made in its submissions.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. Due to its systemic interest, Japan will address the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") as well as the conduct of the United States Department of Commerce (the "USDOC") pertaining to Certain Methodologies and their Application to Anti-Dumping Proceedings involving China.

II. Zeroing Is Inconsistent with the Anti-Dumping Agreement When Applying the Second Sentence of Article 2.4.2

A. The Appellate Body Consistently Has Held Zeroing to Be Inconsistent with the Anti-Dumping Agreement

2. The Appellate Body has consistently held that zeroing is incompatible with the Anti-Dumping Agreement. It emphasized that dumping and margins of dumping do not pertain to individual transactions or individual models/sub-types of a product, but to a product under investigation as a whole.[1] This conclusion is not only based on the text of Article 2.4.2 but also on the definition of "dumping" set out in Article 2.1, which defines the determination of dumping in relation to "a product", as well as on Article VI:2 of the GATT 1994, which allows a Member and its authorities to levy anti-dumping duties with respect to "any [dumped] product" or "such product". The Appellate Body also clarified that the term "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper review, and periodic reviews",[2] and that the concepts of "dumping" and "margin of dumping" "should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[3] The Appellate Body emphasized that while an investigating authority may undertake multiple comparisons and/or averaging when calculating margins of dumping, the results of such individual calculations are "not 'margins of dumping' within the meaning of Article 2.4.2", and the authority "necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."[4]

3. Zeroing is also inconsistent with the fair comparison obligation under Article 2.4 of the Anti-Dumping Agreement. The Appellate Body stated that zeroing "cannot be described as impartial, even-handed, or unbiased" (i.e., "fair") in the sense of Article 2.4, because the use of zeroing "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[5] The Appellate Body found that zeroing in W-T comparisons in the context of periodic reviews and new shipper reviews is, as such, inconsistent with Article 2.4.[6]

4. While the Appellate Body has not expressly addressed the issue of zeroing with respect to the second sentence of Article 2.4.2, nothing in the Anti-Dumping Agreement allows an investigating authority to depart from the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-wide, and not transaction-specific, concepts. The second sentence

[1] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 106.
[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.
[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.
[4] Appellate Body Report, *US – Softwood Lumber V*, para. 98; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Zeroing (Japan)*, para. 121.
[5] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 169.

expressly allows an investigating authority to compare "a normal value established on a weighted average basis" ("W") with "prices of individual export transactions" ("T"), but it does not prescribe how to deal with the results of such comparisons. Japan emphasizes that the use of the W-T comparison methodology to establish the existence of margins of dumping and the use of zeroing to disregard the intermediate comparison results in establishing the margins of dumping are clearly distinguished and must not be confused. As such, the permissibility of W-T comparisons by no means allows an investigating authority to apply zeroing. With respect to administrative reviews, the Appellate Body has clarified that the application of zeroing under the W-T methodology is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[7]

B. The Use of Zeroing Is Irrelevant to the Role and Function of the Second Sentence of Article 2.4.2 Which Is to "Unmask" "Targeted Dumping"

5. The practice of zeroing cannot be justified in light of the role and function of the second sentence of Article 2.4.2 either. The Appellate Body repeatedly confirmed that the second sentence of Article 2.4.2 is an instrument to "unmask" "targeted dumping".[8]

6. As the second sentence requires differences in export prices to be found "among different purchasers, regions or time periods", targeted dumping may be found when export prices for certain purchasers, regions or time periods "differ significantly" from export prices for other purchasers, regions or time periods. As the Appellate Body clarified, there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".[9] Japan considers that in order to find targeted dumping, export prices to a targeted purchaser, region or time period must *overall* "differ significantly" from other export prices. Differences in export prices among individual transactions or among individual models/subtypes are not relevant for a finding of targeted dumping because the second sentence of Article 2.4.2 does not differentiate among individual transactions or individual models/sub-types.

7. To "unmask" something is to effectively remove a masking effect. Suppose that export prices to a particular region (or purchaser or time period) are significantly lower than the export prices for other regions. Because the first sentence of Article 2.4.2 does not differentiate among different purchasers, regions or time periods, such "targeted" or "selective" pricing could be "masked", i.e., may not be detected and appropriately counteracted with a margin of dumping established under the first sentence of Article 2.4.2 by aggregating all export prices across *all* regions.

8. Therefore, Japan considers that the role and function of the second sentence of Article 2.4.2 is to allow the authority to compare the weighted average normal price ("W") with the prices of the individual transactions ("T") to "targeted" purchasers, regions or time periods when establishing the margin of dumping and to counteract the low-priced transactions to the "targeted" groups with the margin of dumping specifically tailored for such groups. In other words, the second sentence contemplates the price comparisons that are specifically focused on the prices of the export transactions for targeted "purchasers, regions or time periods". This interpretation is consistent with the Appellate Body's understanding of the second sentence of Article 2.4.2 that the application of the W-T comparison methodology may be limited to the "pattern", which, in the Appellate Body's view, consists of export prices that differ significantly from other export prices.[10]

9. It should be noted, however, that an investigating authority may not apply the margin of dumping established for the "targeted" purchasers, regions or time periods to "non-targeted" purchasers, regions or time periods because that margin of dumping was established for the purpose of unmasking and counteracting the low-priced export transactions to the "targeted" groups. Such an application would violate the authority's obligations under various provisions of Anti-Dumping Agreement, including Articles 9.1, 9.3 and 11.1.

[7] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133.
[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.
[9] Appellate Body Report, *EC – Bed Linen*, para. 62.
[10] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

10. In light of the above, the application of zeroing is at odds with, and goes far beyond, the role and function of the second sentence of Article 2.4.2. It is obvious and logical that the "masking" effect on the "targeted dumping" for certain purchaser, region or time period will be appropriately removed by separating and distinguishing the universe of export prices for that purchaser, region or time period, from that of the other export prices. Picking up export prices that are lower than the normal value from among those for the certain targeted purchaser, region or time period is irrelevant to unmask "targeted dumping".

C. The Mathematical Equivalence Argument Does Not Warrant an Interpretation That Zeroing Is Permitted under the Second Sentence of Article 2.4.2

11. Turning to the argument of mathematical equivalence, as the United States itself admits, this argument rests on the assumption that "for both [W-W and W-T] methodologies, *all of the normal value and sales data that are fed into the calculations … are identical*".[11] This assumption has no basis in the Anti-Dumping Agreement. The Appellate Body explained the U.S. argument in a previous dispute, stating it would apply only "under the specific assumptions of the hypothetical scenario".[12]

12. The Appellate Body ruled in *US – Zeroing (Japan)* that under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, an investigating authority may unmask targeted dumping by limiting the "universe" of the dumping investigation to export transactions that constitute a "pattern" when conducting W-T comparisons under that provision.[13] Thus, the export prices compared to the weighted average normal value under the second sentence of Article 2.4.2 would be different from the export prices considered under the first sentence.

13. In addition, an investigating authority may use different pools of home market transactions when calculating the weighted average normal value for the W-W comparison and the weighted average normal value for the W-T comparison. In this regard, Japan notes that the USDOC has applied the W-T comparison methodology pursuant to the second sentence of Article 2.4.2 to administrative reviews, in which it seemingly calculates the normal values on a monthly basis, in contrast to the USDOC calculating the normal values on a yearly basis when applying the W-W comparison methodology in original investigations. Japan also emphasizes that the T-T comparison methodology under the first sentence will almost certainly never yield the same results as the W-T comparison methodology under the second sentence.

III. The Methodology Employed by the USDOC to Invoke the Second Sentence of Article 2.4.2 Is Inconsistent with its Obligations As Set Forth in that Provision

14. Japan emphasizes that the first sentence of Article 2.4.2 provides that the existence of margins of dumping "shall normally" be established in accordance with that sentence. Given that it is perfectly normal to observe certain differences in export prices of a product in a given market, such variations are expected to be addressed by the methodologies available under the first sentence, which "shall normally" be used. As such, it is critical to ensure that the requirements of the second sentence not be construed so broadly as to capture the kinds of pricing variations that are "normally" observed in the market in question.

A. The Methodology Employed by the USDOC to Find a "Pattern" Is Inconsistent with its Obligations As Set Forth in the Second Sentence of Article 2.4.2

15. A textual interpretation of the term "pattern" suggests that it is "a regular and intelligible form or sequence discernible in certain actions or situations".[14] In order to be discernible, the arrangement or order must be meaningful to the objective of the analysis. Further, the "pattern" referred to in the second sentence of Article 2.4.2 must also relate to export prices which "differ significantly". Japan agrees with China and the United States that the word "significant" is defined as "in a significant manner; *esp*. so as to convey a particular meaning expressly, meaningfully".[15]

[11] U.S. First Written Submission, para. 237. Emphasis added.
[12] Appellate Body Report, *US – Softwood Lumber V (Art. 21. 5 – Canada)*, para. 99.
[13] Appellate Body Report, *US – Zeroing (Japan),* para.135.
[14] Oxford English Dictionary Online (CHN-90).
[15] China's First Written Submission, para. 137; U.S. First Written Submission, para. 44.

As such, the term "significantly", in Japan's view, has both qualitative and quantitative aspects, and therefore the "difference" in export prices must be qualitative as well as quantitative.[16] It should be also noted that the drafters of the second sentence of Article 2.4.2 did not employ a unified, purely quantitative threshold for the determination of a "pattern", but adopted instead the phrase "differ significantly", which sets forth criteria that may be construed on a case-by-case basis. Thus, an investigating authority must qualitatively assess the differences observed among different purchasers, regions or time periods with respect to the specific facts before it. Here, one needs to take into account the characteristics of the relevant product and market, including the price variances of such a product in the market.

16. Moreover, Japan also considers that in order to properly examine whether export prices "differ significantly" by *comparing* the export prices to certain purchasers, regions or time periods with the export prices to other purchasers, regions or time periods, an investigating authority must ensure that the former prices be *comparable* with the latter prices in light of all the facts and the evidence before it. In so doing, the authority must take into account various factors that may affect the price comparability, such as conditions and terms of sale, levels of trade, transaction scales, seasonal trends, increase or decrease in costs.

17. The methodology adopted by the USDOC in its *OCTG* OI, *Coated Paper* OI and *Steel Cylinders* OI[17] in the form of the *Nails* test is inconsistent with the second sentence of Article 2.4.2, for it appears to have consistently and exclusively relied on purely quantitative and inflexible benchmarks such as one standard deviation (pattern test) and 5% (gap test) in order to find a "pattern", and there is no evidence that the USDOC examined whether these numerical criteria were appropriate for each specific case at hand. Even if an investigating authority is not prohibited from using certain numerical benchmarks or criteria for the assessment as to whether the export pricing data at hand meets the requirement under the second sentence of Article 2.4.2, it cannot *ex ante* choose a unified and inflexible threshold values that are applicable to all cases. The USDOC also failed to interpret the meaning of the results of the application of those criteria in a qualitative and holistic manner.

18. Japan considers that the problem with the USDOC's methodology could be particularly significant in situations like the *Steel Cylinders* investigation, where an investigating authority allegedly finds a "pattern" based exclusively on mathematically lower prices in certain months during the POI. Such a methodology could unreasonably lead to a finding of a "pattern" in most, if not all, situations, because it is perfectly common and usual for export prices to fluctuate over time, reflecting various factors such as increases or decreases in input costs and seasonal trends.

19. The second sentence of Article 2.4.2 requires export prices to differ significantly "among different purchasers, regions and time periods"; it does not differentiate between different *models* or *sub-types* of a product under investigation. Accordingly, in order to find targeted dumping, an investigating authority must find that the export prices to certain purchasers (or regions or time periods) differ significantly from the export prices to other purchasers (or regions or time periods), taking into account *all models*. In this regard, the *Nails* test is inconsistent with the second sentence of Article 2.4.2, because it divides export transactions for a particular purchaser (or region or time period) by different *models* and focuses only on deviations of export prices observed with respect to *certain* models in order to identify a "pattern".

B. The USDOC Acted Inconsistently with the Second Sentence of Article 2.4.2 by Failing to Provide an "Explanation"

20. Given the role of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to provide an *exception* to the W-W or T-T comparison methodologies which "shall normally" be used, the obligation to provide an explanation imposes a high standard. This is underscored by the context that allows the exception only if the W-W or T-T comparisons "cannot" be used – or if their use is "not possible" ("il n'est pas possible") as the French text of Article 2.4.2 of the Anti-Dumping Agreement puts it. As explained, export prices usually vary because each export price is determined based on various factors, and such variations are expected to be captured by the comparison methodologies available under the first sentence which "shall normally" be used. Therefore, an investigating authority is required to provide an explanation at least as to why the

[16] China's First Written Submission, para. 140.
[17] China's First Written Submission, para. 61.

observed variations in export prices are not a mere reflection of factors that normally exist in a given market, or otherwise why those variations do not allow to establish an appropriate margin of dumping under the first sentence.

21. The USDOC's interpretation of the "explanation" clause of the second sentence of Article 2.4.2 falls short of its obligations set forth in that provision. First, under the *Nails* test the USDOC considers the "explanation" clause to be satisfied as soon as it finds a "meaningful difference" to exist between the margin of dumping calculated with the use of the W-T comparison methodology (with zeroing) provided for under the second sentence of Article 2.4.2 and the margin of dumping calculated with the use of the W-W comparison methodology (without zeroing) provided for under the first sentence. However, in light of the fact that the USDOC employs zeroing in its W-T comparison methodology, while it is barred from doing so in the W-W comparison methodology, such an argument renders the "explanation" requirement of the second sentence of Article 2.4.2 practically inutile. Second, the USDOC does not provide any explanation about the inability or impossibility to take into account appropriately differences in export prices by the use of the W-W comparison methodology. Finally, the USDOC fails to provide any explanation as to why the price differences cannot be taken into account appropriately by the use of the T-T comparison methodology. Japan considers that in a situation like the *Steel Cylinders* investigation, the T-T comparison methodology could have properly taken into account increases or decreases in input costs and seasonal trends, given that under such a methodology both export transactions and domestic transactions are to be considered in close temporal proximity.

IV. The Use of Zeroing in Administrative Reviews Is Inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

22. As explained above, the Appellate Body has also found that applying zeroing in administrative reviews involving the W-T comparison methodology is, as such, inconsistent with the Anti-Dumping Agreement.[18] Therefore, zeroing in administrative review is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

V. Conclusion

23. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

[18] Appellate Body Report, *US – Zeroing (Japan)*, para. 166.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF KOREA

I. The USDOC's Methodology for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement Are Inconsistent with the Obligations Set Forth in That Provision

A. Pattern Clause

1. The term "pattern" is defined by the Oxford English Dictionary as "[a] regular and intelligible form or sequence discernible in certain actions or situations."[1] The word "pattern" or its equivalent in other languages implies certain important characteristics. First, any variation in prices may not be simply random, but rather must display a discernible, regular form or design. The variation must have some relationship to each other so that this form can be discerned (that is, they must be "intelligible"). Second, to be "intelligible" or to "serve to govern the execution of something," the pattern must be meaningful to the purpose of what is being undertaken. In the context of Article 2.4.2, the differences in prices must be meaningful for the purpose of determining whether use of the W-T comparison set forth in the second sentence of Article 2.4.2 is justified.

2. This conclusion is reinforced by the requirement in Article 2.4.2 that the prices differ not only by customer, region or time period, but also that they differ "significantly." In English, the word "significant" conveys both qualitative and quantitative aspects. Anti-Dumping Agreement uses the word "significant" or "significantly" with the intent of conveying a meaning that is qualitative as well as, or instead of, quantitative. For example, Article 3.2 refers to "significant price undercutting" and "significant price depression." As the Appellate Body has recognized, the use of the term "significant" in this context has both quantitative and qualitative aspects.[2] The same is true in Article 2.4.2.

3. Conversely, when the Anti-Dumping Agreement seeks to describe a difference in purely quantitative terms, it uses a word other than "significant" in English, "notable" in French or "significativo" in Spanish. The Agreement uses the word "large" in English, "grand" or "elevé" in French, and "grande" or "elevado" in Spanish. The clearest example of this word choice is found in Article 6.10.

4. In light of these ordinary meanings and contextual considerations, the use of the word "significantly" to describe the price differences that must be found to trigger the W-T comparison in Article 2.4.2 must mean something other than merely "large" quantitative differences. Rather, the requirement that prices differ "significantly" must mean that the price differences reflect a meaning or purpose other than random price variation or price differences that reflect normal commercial factors.

5. Prices for agricultural products often follow seasonal pricing patterns, with lower prices during the harvest season when supply is greater than in the offseason, when prices are higher. Prices for consumer goods are often discounted during key holiday seasons, by all market participants, not just exporters. Similarly, both domestic and foreign suppliers will tend to charge larger volume customers lower prices than they charge smaller volume customers. Prices for most products normally go up or down over time when the underlying costs of production change. This is most evident in the case of many basic commodities, where one or two raw materials constitute a large percentage of the cost of producing the finished product, and in the case of certain high

[1] *OxfordDictionaries.com*, Oxford University Press, accessed 7 May 2015, <http://www.oxforddictionaries.com/us/definition/american_english/pattern>. Similarly, the Oxford English Dictionary defines "pattern" as "[a]n arrangement or order discernible in objects, actions, ideas, situations, etc." The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 2, p. 2126.

[2] Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft*, para. 1272 (citing Appellate Body Report, *EC – Measures Affecting Trade in Large Civil Aircraft*, para. 1218).

technology products, where costs of production typically decline dramatically over the life-cycle of the product.

6. Contrary to the ordinary meaning of the terms "pattern" and "significantly," however, the USDOC applied its so-called "pattern test" and "gap test" as purely quantitative tests. The USDOC applied these tests mechanically, and then it analysed only the quantitative differences among those average prices; the USDOC never examined the reasons why the alleged "pattern" of "significant" price differences exists.

B. Explanation Clause

7. Under the second sentence of Article 2.4.2, an investigating authority may use the W-T comparison methodology only if it provides "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." The W-T comparison methodology is not permitted if there is any way in which the W-W or T-T comparison methodology can produce a dumping margin calculation in which the pattern of significantly differing prices to the purchaser (or region, or time period) in question can be taken into account appropriately.

8. In the *Nails* test, the USDOC made no pretence of meeting this explicit requirement of the second sentence of Article 2.4.2. After finding the existence of "targeting" through a mechanical application of its "pattern test" and "gap test," the USDOC compared the respondents' dumping margins using the W-W comparison methodology (without zeroing) and the W-T comparison methodology (with zeroing). Based on this comparison, the USDOC determined that there is a "meaningful difference," and concluded that it must apply the W-T comparison methodology to all sales. These "explanations" are facially inadequate to meet the high standard that the second sentence of Article 2.4.2 imposes. Indeed, the USDOC's statements are wholly conclusory and provide no explanation at all.

9. A mere comparison of the results from W-W (without zeroing) and W-T (with zeroing) does not adequately explain why the two symmetrical comparisons cannot take into account appropriately the significant difference. Simply, the margin increase resulting from the W-T comparison comes from the use of zeroing. This is problematic because even the result of the W-W comparison on the same sales data will be different depending on the use of zeroing. This implies that the United States cannot meet the explanation clause without using the zeroing methodology.

10. Finally, the explanation under the *Nails* test does not address at all why the T-T methodology cannot take into account appropriately the pattern of significantly differing prices it found to exist, as clearly required by the second sentence of Article 2.4.2.

C. All the transactions

11. The structure and language of Article 2.4.2 confirm that the W-T comparison methodology only apply to those transactions determined to have met the criteria for invocation of the exception, and not to all export transactions. The Appellate Body in *US – Zeroing (Japan)* stated that "The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions 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. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.[3]"

12. It necessarily follows that the "symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply" to the export transactions not falling with the "pattern of export prices which differs significantly among different purchasers, regions or time periods."

[3] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

13. The United States itself previously shared the Appellate Body's understanding of the operation of the second sentence of Article 2.4.2. As the Appellate Body noted in *United States – Softwood Lumber V (Article 21.5 - Canada),* before the panel in that proceeding the United States indicated that if the USDOC found targeted dumping to exist, "the USDOC would apply the weighted average-to-transaction comparison methodology to export transactions falling within the 'pricing pattern' and would examine the other export transactions using the weighted average-to-weighted average methodology."[4] This understanding is further reinforced by the USDOC's original targeted dumping regulation, which stated that "…the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section."[5]

14. Under the correct interpretation of Article 2.4.2, therefore, application of W-T with zeroing to all the transactions will be unnecessarily punitive, and inconsistent with the second sentence. However, once a pattern was found by the problematic *Nails* test, the USDOC applied the W-T comparison methodology with zeroing to the all the transactions.

15. Additionally, the United States suggested a new concept that is foreign to the second sentence. It argues that a pattern within the meaning of the second sentence encompasses all the transactions which are composed of lower and higher prices.[6] This new concept is just meritless, because the United States confuses a situation where the second sentence should be invoked with a situation where the first sentence should be invoked. Furthermore, the US argument is self-contradictory, because the *Nails* test was only applied to the allegedly targeted purchasers, regions, or time periods, and did not test whether the export sales to other purchasers, regions, or time periods also may have been targeted.

D. Other Problems in the *Nails* Test

16. There are two more problems entrenched in the *Nails* test. First, the USDOC calculated standard deviations based on average export prices, not the actual "export prices" themselves. This approach ignored the textual obligation to analyse "export prices," not averages, which necessarily made the standard deviations smaller. Because of this method, the benchmark price (one standard deviation below the average price) was increased, which also meant the possibility of finding a pattern was increased arbitrarily.

17. Second, it does not consider the lower priced transactions below the alleged transaction in calculating 'average price gap' under the 'gap test.' In the example the United States provided, the price of $5.75 would be omitted from the gap test.[7] The United States acknowledged this problem. However, the United States did not provide any reason why it omitted the price. One possible concern is that if a petitioner wants to protect its market by applying W-T comparison with zeroing to all the imported products, it can do so simply by cherry-picking the most possible transactions to successfully pass the *Nails* test. Here an argument can be made that the omission by the USDOC passes its role as investigating authority to the petitioners. Petitioners are private companies that are inherently prone to protect its market share from the imports.

II. The Use of Zeroing When Applying Article 2.4.2, the Second Sentence, Has No Basis under the Anti-Dumping Agreement and Prior Appellate Body Rulings

18. The Appellate Body ruled that for the purposes of Articles 2.1 and 2.4.2 of the Anti-Dumping Agreement, the terms "dumping" and a "margin of dumping" must be established for the "product as a whole."[8] Moreover, the Appellate Body has held that the concepts of "dumping" and "margin of dumping" are exporter-specific, in that they relate to the aggregated pricing behaviour of the exporter.[9] The Appellate Body further held that the definition of "dumping" as a product-wide and exporter-specific concept must be applied in a coherent and consistent manner to *all* provisions of

[4] Appellate Body Report, *United States – Softwood Lumber V (Article 21.5 - Canada)*, para. 98.
[5] Targeted Dumping Proposed Final Rule, p. 27416; 19 C.F. R. § 351.414(f) (2007).
[6] US First Written Submission, paras. 55, 202, 289.
[7] US First Written Submission, paras. 91 – 104.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93.
[9] Appellate Body Report, *US – Continued Zeroing*, para. 283; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 89-90; Appellate Body Report, *US – Zeroing (EC)*, para. 128.

the Anti-Dumping Agreement, regardless of the specific anti-dumping proceeding and of the particular comparison methodology applied by the investigating authority.

19. The Appellate Body also observed that the Anti-Dumping Agreement deals with "injurious dumping," and that the very purpose of an anti-dumping duty is to counteract injury caused by "dumped imports" to the domestic industry producing a "like product." For this reason, the concepts of "dumping," "injury," and "margin of dumping" are "interlinked and should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[10] In *US – Stainless Steel (Mexico)*, the Appellate Body summarized the above jurisprudence.[11]

20. These findings of the Appellate Body are dispositive of the interpretation advanced by the USDOC as a basis for applying zeroing under the second sentence of Article 2.4.2. The use of zeroing invariably results in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons when aggregating those results for the purposes of calculating the margin of dumping for the product as a whole and for each individual exporter or foreign producer. For this reason, it is inconsistent with the second sentence of Article 2.4.2.

21. The United States supports its position, *inter alia*, by arguing the following three points: unmasking, exception, and mathematical equivalence. However, all of these theories fail for the following reasons.

A. Unmasking

22. The United States argues that an investigating authority should use W-T with zeroing to all the transactions in order to unmask the targeted dumping. Based on this unmasking theory, the United States has been applying the zeroing methodology to all the transactions, once it had found a pattern. However, the United States' assertion based on the "unmasking" theory is simply baseless.

23. First of all, the use of the term, "unmask," does not provide the United States with justification of using zeroing. The meaning of "unmasking" as guided by the Appellate Body is to "find" or "distinguish" a pattern where prices differ significantly, not to raise the margins of dumping as a remedy for the injury caused by the targeted dumping. The use of zeroing as employed by the USDOC does not contribute to "unmask" targeted dumping. The use of zeroing simply inflates the margin of dumping, which has nothing to do with unmasking. Therefore, the "unmasking" theory is flawed.

24. Second, the problem of masking also exists in W-W and T-T comparison, because lower prices and higher prices co-exist in the symmetrical comparison as well. Nonetheless, the Appellate Body has ruled against the use of zeroing in W-W and T-T comparison. If the U.S. argument on "unmasking" should be accepted by this Panel, the United States has to provide persuasive evidence of why the use of zeroing is necessary to unmask particularly in the case of targeted dumping situation, as opposed to the clear and consistent Appellate Body rulings against the use of zeroing in W-W and T-T where the problems of masking also exist. The United States failed to do so.

B. Exception

25. The United States asserts that the second sentence of Article 2.4.2 is an exception, and therefore, a new interpretation is required, and the Appellate Body rulings do not apply to this situation. With the "exception" argument, the United States is trying to prolong the life of zeroing through the unacceptable interpretation of the second sentence.

26. The United States shares the same understanding with Korea with respect to the Appellate Body rulings on the concepts of "dumping" and "margin of dumping."[12] However, the United States

[10] Appellate Body Report, *US – Continued Zeroing*, para. 284; see also Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94; Appellate Body Report, *US – Zeroing (Japan)*, para.114.

[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[12] US First Written Submission, para. 216.

omitted the equally important Appellate Body's ruling that these concepts must apply with equal force to the entire Anti-Dumping Agreement. Obviously, Article 2.4.2, the second sentence is also a provision of the Anti-Dumping Agreement. The United States cannot avoid this Appellate Body ruling by arguing that the second sentence is an "exception."

27. Moreover, the exception argument misleads this Panel. The Appellate Body found that the second sentence may be applied in an "exceptional" situation. The Appellate Body did not even mention that the second sentence is an "exception" to the existing jurisprudence under the Anti-Dumping Agreement. Therefore, the consistent Appellate Body ruling that the concepts of "dumping" and "margins of dumping" must apply with equal force to the second sentence as well.

C. Mathematical Equivalence

28. The United States seems to acknowledge that the issue of mathematical equivalence is just a matter of assumption. Korea agrees. The issue is whether the United States' assumption is consistent with the second sentence or not. The United States adopted an assumption in favour of itself to produce mathematical equivalence. However, its logic is just vulnerable. This is true because the Appellate Body in *US – Stainless Steel (Mexico)* and *US – Zeroing (Japan)* also found that mathematical equivalence may occur under certain circumstances, (a.k.a., assumptions) and therefore, the second sentence would not be inutile.

29. The United States is trying to argue that the meanings of the terms in the first sentence and the second sentence of Article 2.4.2 are the same.[13] However, the plain reading of the first and second sentences demonstrates that the meanings of the terms could be different. In the first sentence, it is stated "a weighted average normal value," while in the second sentence it is stated, "a normal value established on a weighted average basis." If the drafters were to intend the same meaning, they should have drafted as such. However, they did not. Therefore, there is no clue in the provision that these two normal values should be the same.

30. Second, more accurate comparison would be possible if the normal value is changed, and thus allowed a W-W or T-T comparison to properly and "appropriately" take into account price differences. For example, the use of monthly normal values would allow a more precise comparison of prices that may be changing over time. Prices may change over time because of seasonality, or because costs are changing over time. By comparing the monthly average export sale in one month to the monthly average normal value for the same month, the adjusted W-W method might well appropriately take into account the price differences. Similarly, in W-T comparison, comparing a specific export sale in one month to the monthly average normal value for the same month, the adjusted W in the W-T comparison might well take into account the price differences. The key point is that the method for determining the W for normal value is not fixed, and can be adjusted to better reflect the particular circumstances of a case.

31. Korea notes that the USDOC itself uses monthly comparisons in administrative reviews, because it considers monthly normal values to be more contemporaneous and thus more accurate. This shift from annual average normal value to monthly average normal value is a routine part of the USDOC practice. The USDOC does not limit monthly normal value to some cases; it applies this more contemporaneous approach to all its administrative reviews for the market economies.

32. Once one recognizes that there are some reasons to use a different normal value, mathematical equivalence is broken. As an argument for treaty interpretation, mathematical equivalence (relying on the inutile principle) only works when it exists in *all* cases. Mathematical equivalence in some cases, or even most cases, does not establish that a treaty provision has been rendered inutile.

[13] See US First Written Submission paras. 219 – 227.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. THE USE OF ZEROING

A. Interpretation of the Anti-Dumping Agreement

1. The Appellate Body has pointed out on several occasions that it is clear from the opening phrase of Article 2.1 – "[f]or the purposes of this Agreement" – that the definition of "dumping" contained in that article applies to the entire Anti-Dumping Agreement.[1] According to the Appellate Body, "dumping" and "dumped imports" must have "the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews".[2]

2. The Appellate Body has repeatedly found that the texts of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 clearly indicate that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[3] Furthermore, the Appellate Body has concluded that the concepts of "dumping" and "margin of dumping" are exporter-specific,[4] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[5] The cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.

3. Moreover, the Appellate Body has held that Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement require aggregation of <u>all</u> results of intermediate comparisons when calculating the dumping margin.[6] In *US – Softwood Lumber V*, the Appellate Body ruled that the individual comparisons only represent "intermediate values" that the investigating authority had to aggregate in order to arrive at the margin of dumping for the product as a whole. Furthermore, the investigating authority "necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[7] Disregarding or artificially reducing to zero the results of intermediate comparisons, through the application of zeroing, is at odds with this and thus inconsistent with Article 2.4.2.

4. This interpretation has been confirmed by the Appellate Body, both in the context of the "transaction-to-transaction" methodology,[8] as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews.[9]

5. Norway cannot see anything in the wording of the second sentence of Article 2.4.2 that suggests a different interpretation. On the contrary, Norway agrees with China that although the second sentence of Article 2.4.2 provides an exception from the first sentence in terms of the

[1] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 109; Appellate Body Report, *US - Softwood Lumber V*, para. 93; *US – Zeroing (EC)*, para. 125; *US – Stainless Steel (Mexico)*, para. 84; and *US – Zeroing (Japan)*, para. 109.

[2] Appellate Body Report, *US - Zeroing (Japan),* para. 109. See also Appellate Body Report, *US - Softwood Lumber V*, para. 93.

[3] Appellate Body Report, *EC – Bed Linen,* para. 53; Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93 and 96; Appellate Body Report, *US – Zeroing (EC)*, para 126.

[4] Appellate Body Report, *US – Stainless Steel (Mexico*), para. 94; Appellate Body Report; *US – Zeroing (EC)*, paras. 128-129.

[5] Appellate Body Report, *US – Continued Zeroing*, para. 283. See also Appellate Body Report, *US – Zeroing (EC)*, para. 128; Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 89.

[6] Appellate Body Report, *EC – Bed Linen*, para, 53; and Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[7] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (emphasis original).

[8] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.

[9] Appellate Body Report, *US - Stainless Steel (Mexico),* para. 133.

comparison methodology used to compare normal value and export price in investigations, this is not an exception from the requirement to determine "margins of dumping".[10] Furthermore, the object and purpose of the provision is to address possible dumping targeted at particular purchasers, regions or time periods. These dumping situations reflect a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining higher prices for other sales. The very nature of targeted dumping thus necessitates a reference to the overall pricing behaviour of the exporter, in order to identify this type of dumping. A logical consequence of this is that dumping cannot take place at the level of each individual transaction. This was reflected in *US – Stainless Steel (Mexico)* when the Appellate Body noted that "[a] proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transaction over a period of time".[11]

B. The negotiating history of the Anti-Dumping Agreement

6. Norway notes that the United States claims that the negotiation history of the Anti-Dumping Agreement confirms that zeroing should be permissible under the second sentence of Article 2.4.2.[12] As Norway understands it, the gist of this argument seems to be that communications of two delegations and minutes of a negotiating meeting could be read as proof that the asymmetrical comparisons, that is comparisons between individual export transactions and weighted average normal value in anti-dumping investigations, and zeroing, were viewed as the same thing. Norway strongly disagrees with this assumption. In our opinion, the material only show that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is indeed very different from deducting a permission of applying zeroing when using the said comparison methodology.

7. Furthermore, we note that the United States has previously described the negotiating history of Article 2.4.2 in quite a different way. In *US – Softwood Lumber V*, the United States argued that there were two practices employed by Members to establish "margins of dumping" at the time of the Uruguay Round negotiations that were relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, while the second practice was zeroing. The United States asserted that, because the negotiators were able to agree only on the issue of "asymmetry", it would be reasonable to expect that, absent modified text in the Anti-Dumping Agreement addressing zeroing, that practice would continue to be consistent with the Anti-Dumping Agreement.[13] In that particular case, the United States clearly saw these two practices as two separate issues.[14] The Appellate Body did not agree with the United States in those proceedings. Similarly, the material at hand does not in any way prove that the negotiators intended to allow zeroing when applying the third comparison methodology.

C. The obligation to make a "fair comparison"

8. Moreover, the use of zeroing when applying this third comparison methodology is inconsistent with the obligation of Article 2.4 of the Anti-Dumping Agreement to make a "fair comparison" between the export price and the normal value. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness or lack of bias".[15] The Appellate Body has found that zeroing tends to inflate the margins calculated, and that it can, in some instances, turn a negative margin of dumping into a positive margin of dumping.[16] Thus, the Appellate Body has emphasised that there is an "inherent bias" in zeroing,[17] and that "this way of calculating cannot be described as impartial, even-handed or unbiased".[18] As with the other two comparison methodologies, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias,

[10] First Written Submission of China paras. 217-218.
[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.
[12] First Written Submission of the United States, paras. 242-250.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[14] Appellate Body Report, *US – Softwood Lumber V,* para. 108.
[15] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[16] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.

making a positive determination of dumping more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the Anti-Dumping Agreement.

II. THE MATHEMATICAL EQUIVALENCE ARGUMENT

9. The United States argues that prohibiting the use of zeroing under the weighted average-to-transaction comparison methodology would lead to results that are "mathematically equivalent" to the comparison methodologies under the first sentence of the provision. According to the United States, this would render the second sentence of Article 2.4.2 redundant. The United States draws this conclusion from findings by the Appellate Body in other disputes that the first two comparison methods should not "lead to results that are systematically different".[19] Thus, the United States asserts that the third comparison method "logically" should lead to results that *are* systematically different, and that any interpretation to the contrary would mean that Article 2.4.2 would no longer be "exceptional" and therefore inutile.[20] Norway disagrees with this reasoning.

10. The mathematical equivalence argument is based on the assumption that the investigating authority must use the same set of pricing data. This is a consequence of the United States' interpretation of the term "a weighted average normal value" in the first sentence as meaning the same as "a normal value established on a weighted average basis" in the second sentence. In Norway's view, this interpretation is incorrect, and it does not follow from the wording of Article 2.4.2 that these two normal values should be the same. On the contrary, an investigating authority may use different pools of home market transactions when calculating the two different normal values. We would also point to the fact that this argument has already been rejected by the Appellate Body.[21]

11. In any event, the "mathematical equivalence" argument is misleading. The focus of the exceptional methodology in the second sentence of Article 2.4.2 is, after having examined all transactions, to show a pattern of dumping targeted at particular purchasers, regions or time periods. What is then allowed is to address such targeted dumping with targeted measures.

[19] United States' First Written Submission, para. 229.
[20] United States' First Written Submission, paras. 229-230.
[21] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 99.

ANNEX C-7

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF TURKEY[*]

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes this opportunity to submit her views as a third party in this case. Turkey's objective is to contribute to the accurate and consistent interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "ADA").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining her systematic interest, Turkey would like to limit her third party submission to the discussion on the rights and obligations of an investigating authority under Article 2.4.2 of the ADA.

II. INTERPRETATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2

3. Turkey observes that the discussion concerning the legal interpretation of the second sentence of Article 2.4.2 of the ADA has already become a frequently addressed subject in several panel proceedings. Turkey's third part contribution in some of these proceedings aimed to bring a clear perspective to this contentious issue which is cardinal to understand the methodology on how the dumping margin will be calculated in case of "*targeted dumping*".

4. Turkey understands that the arguments presented by the parties concerning this issue focus primarily on the interpretation of the conditions that trigger the use of weighted average normal value-individual transactions comparison (hereinafter referred to as "W-T comparison" or "W-T") and whether this methodology, by definition, renders the use of zeroing inevitable and most importantly legal. Turkey will address these two issues separately.

Interpretation of the conditions concerning W-T comparison

5. In Turkey's understanding the second sentence of Article 2.4.2 of the ADA, on its face, stipulates one substantive and one procedural condition. Article 2.4.2 reads as follows:

> 2.4.2.[A] normal value established on a weighted average basis may be compared to prices of individual export transactions *if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods,* and *if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison.*(emphasis added)

6. As the substantive condition, the investigating authority has to reach a conclusion that a pattern of export prices displaying a significant difference among purchasers, regions or time periods is present. As the procedural condition, the investigating authority has to bring an explanation why these differences cannot be taken into account appropriately by the use of the usual comparison methodologies.

7. The article refrains from elaborating on the methodology on how the "pattern of significantly different export prices" will be established. In that manner, the drafters of the article have given legal leeway to the investigating authority to define the steps that lead to the conclusion that a pattern of significantly differing export prices among purchasers, regions and time periods is present. Turkey understands that investigating authority has discretion to employ any methodology that is appropriate to analyze whether the export sales display a pattern which may also include statistical data analysis. Neither in the ADA nor in the case law there is any obligation to use specific means to construct the pattern test.[1] Nevertheless, the investigating authority

[*] Turkey requested that its written submission serve as its executive summary.

[1] China's first written submission, p.154; United States' first written submission, p.116

is under the obligation to act in an even-handed and unbiased manner while defining the mechanics of the methodology to evaluate the existence of a possible pattern.

8. The United States of America (hereinafter referred to as "U.S") interprets the word "pattern" in a contextual manner and underlines that a "pattern" shows a regular and intelligible form or sequence of export prices which significantly differ among purchasers, regions and time periods[2]. Turkey considers that the assessment focusing on a group of export transactions, to understand whether a pattern exists, primarily depends on the examination whether transactions repeat themselves consistently during the investigation period and such repetition form a structure that significantly differ among purchasers, regions and time periods. As a matter of fact, such an evaluation puts weight equally on the transactions itself and the export sales as a whole to pinpoint whether the repeating lines in export sales form a grouping or differing structure.

9. As explicitly stipulated in the Article 2.4.2, such a pattern should not only differ among purchasers, regions and time periods but that difference must be significant in scale. Turkey is in the same line with the case law that "*significant*" has a meaning of "*notable, important or consequential*" [3]. We equally agree that the word "significant" may have both quantitative and qualitative aspects that necessitate a more comprehensive look to the definition[4]. Yet, Turkey considers that, in Article 2.4.2, the quantitative aspect of the word "*significant*" becomes more pronounced than its qualitative side. The negotiation history confirms such a conclusion. In Carlise I and II texts, this part has been drafted as "[w]*hen a significant portion of export sales*.". This phrase turns into "*significant degree*" in New Zealand I and II texts. In New Zealand III (Ramsauer) text "*significant degree*" is omitted altogether. The last version of this part of the sentence receives its final shape in Dunkel Draft which is formulated as " ...[d]*iffer significantly among purchasers, regions or time periods*.."[5]. In Turkey's understanding the words "*degree*" and "*portion*", as used in the previous version of the text, reveal implicitly that the drafters aimed to design the article so that the word "*significantly*" could show a level of comparison that is quantifiable and discernable.

10. Closely connected with this point, Turkey disagrees with the argument that the targeted sales of the product under consideration should be necessarily an outcome of a specific intent. According to this approach, usual commercial practices, based on seasonality or other commercially driven rationales, are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices[6]. Turkey underlines that neither the reading of Article 2.4.2 nor the examination of case law confirms the possibility that so called "*usual commercial*" practices are rendering targeted dumping plausible[7].

11. Finally, the plain reading of the Article 2.4.2 shows that the W-T comparison acts as an exception and that the investigating authority can resort to the methodology only under certain conditions[8]. As an expected result of the due process requirement, diversion from the general rule requires an explanation on why normal methodologies, stipulated in the first sentence of Article 2.4.2, cannot be used appropriately. Turkey understands that this explanation should be in such a context that it should not deprive the interested parties from using their right of presenting evidences they consider relevant.

The relevance of zeroing in W-T comparison methodology

12. At this stage of the proceedings Turkey refrains from commenting on the specifics of the U.S. methodology and on mathematical equivalence argument.

[2] United States' first written submission, para.36

[3] US – Large Civil Aircraft (Second Complaint) (AB), para. 1272 (citing US-Upland Cotton (AB), para.426)

[4] Ibid, para.1272

[5] Understanding The WTO Anti-Dumping Agreement; Negotiating History and Subsequent Interpretation; James P.Durling, Matthew R.Nicely (Cameron May International Law and Policy, 2002); p.93-95

[6] China's first written submission, para. 143

[7] United States' first written submission, para.78

[8] U.S. - Softwood Lumber VI, Article 21.5 (Panel), para.5.33

13. Nevertheless, Turkey underscores once more that the second sentence of Article 2.4.2 operates as an exception to the first sentence part of the Article and that the rules and procedures to be followed differ in terms of legal obligations and burden of explanation.

14. Turkey understands that the W-T comparison methodology was designed to address a specific case, namely targeted dumping. In this framework, it should be assessed carefully whether applying the legal discipline that was devised to mark the boundaries of the normal comparison methodologies of the first sentence of Article 2.4.2 can really fit the exceptional structure of the comparison methodology stipulated in the second half of the Article.

15. As a matter of legal interpretation, Turkey would like to share her view that the application of the legal discipline envisaged for the first two methodologies shown in Article 2.4.2 may act contrary to the legal rationale of this provision stipulated in the second half of Article 2.4.2 and erode the effectiveness of the results expected from the W-T comparison methodology which is exceptional in nature and asymmetric in terms of comparison structure.

III. CONCLUSION

16. With these comments, Turkey expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its views on this relevant debate, regarding the interpretation of the ADA.

ANNEX C-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF VIETNAM

I Introduction

1. In this third party executive summary, Viet Nam comments on two issues as follows:

(i) The United States Department of Commerce's (USDOC) application of the "targeted dumping" methodology in its determinations is inconsistent with the obligations of the United States under Article 2.4.2 of the Anti-Dumping Agreement;

(ii) The USDOC's presumption that all producers/exporters are part of a single government-controlled "NME-wide entity" and its application of an NME-wide rate to all producers/exporters from NMEs that do not successfully demonstrate that they are not subject to government control and are entitled to a separate rate is inconsistent with the requirements of Articles 6.10 and 9.2 and 9.4 of the Anti-Dumping Agreement.

II The USDOC's "targeted dumping" methodology violates Article 2.4.2 of the Anti-dumping Agreement because it does not comply with the conditions that govern recourse to W-T comparison methodology

2. The second sentence of Article 2.4.2 of the Anti-Dumping Agreement establishes an exception whereby investigating authorities are authorized to depart from the default rule mandating the use of a symmetrical comparison methodology to determine a margin of dumping. These conditions include, among other things, the existence of a "pattern" of prices that "differ significantly among different purchasers, regions or time periods", as well as a meaningful explanation why the two "normally" used comparison methodologies are insufficient to capture such differences.

3. Article 2.4.2 second sentence must be interpreted in a manner that preserves the useful effect of these conditions. These conditions must not be converted into mere formalities that are easily satisfied by an investigating authority in many cases. However, that appears to be precisely what the United States would have the panel do.

4. Under the Nails Test, the USDOC examined the existence of pricing patterns when targeted dumping was alleged by petitioners. To determine whether a pricing pattern exists, under the Nails Test approach, the United States uses one standard deviation as one of the criteria. Whatever the discretion of an investigating authority, this would appear to be far too low a threshold for the phrases "pattern" and "differ significantly". Viet Nam would urge the panel to engage in a thorough statistical and quantitative analysis of this point. Additionally, Viet Nam assumes that, in the event that the W-T methodology may be used, it may only be applied to the transactions found to "differ significantly", that is, within the pattern. Outside of the pattern, one of the two "normal" transactions shall be used.

5. Also, Viet Nam is concerned that the USDOC' practice reduces to an empty formality the requirement to provide an "explanation" as to why the two "normally" applicable methodologies cannot be used. First, the U.S. fails to provide any explanation with respect to the T-T methodology, contrary to the plain meaning of Article 2.4.2. Second, the explanation that the W-W methodology "conceals" certain price differences is merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T methodology with zeroing yields a higher margin than the W-W methodology without "zeroing" is not an explanation why price differences "cannot be taken into account appropriately" by the W-W methodology. When "zeroing" is applied, the margins of dumping will always be higher than if zeroing is not applied because of the absence of any offset for the margin by which export prices exceed normal value. Recourse to the W-T methodology cannot be driven, or justified, by the fact that the application of "zeroing" will always result in the highest possible dumping margin. Nothing in Article 2.4.2 supports such an interpretation when choosing among the possible methodologies for determining the margins of dumping.

6. Moreover, "zeroing" is as prohibited under the W-T comparison methodology as it is prohibited under the W-W and T-T methodologies under the second sentence of Article 2.4.2 of the Anti-dumping Agreement. Viet Nam disagrees with the United States' reading of the second sentence of Article 2.4.2 of Anti-dumping Agreement as permitting recourse to the "zeroing" methodology. The W-T comparison is an exception to the comparison methodologies in the first sentence of Article 2.4.2, but is not an exception to the fair comparison requirement of Article 2.4. Therefore, if "zeroing" is considered "unfair", it would be "unfair" and equally impermissible to "zero" when using the "targeted dumping" methodology.

III The USDOC's Single Rate Presumption for NME is inconsistent with the United State' obligations under Articles 6.10, 9.2 and 9.4 of the Anti-dumping Agreement

7. The Single Rate Presumption is, as such, inconsistent with the United States' obligation under Article 6.10 and 9.2 of the Anti-dumping Agreement. It is because under the Single Rate Presumption, the USDOC fails to determine an individual margin of dumping for each exporter or producer, and fails to specify duties for each supplier separately. The USDOC, by conditioning access to individual duties upon proof of absence of government control through the Separate Rate Test, the Single Rate Presumption, as such, also violates Article 9.4 of the Agreement.

1. The USDOC's "NME-Wide Entity" Rate is inconsistent with the requirements of Articles 6.10 and 9.2 of the Anti-Dumping Agreement

8. A presumption that all producers and exporters are part of a single NME-wide entity to which a single dumping rate is assigned, is inconsistent with the obligations established in (1) Article 6.10 of the Anti-Dumping Agreement to determine an individual margin of dumping for each exporter or producer; and (2) Article 9.2 of the Anti-Dumping Agreement to specify duties for each supplier separately.

a. The plain language of Articles 6.10 and 9.2 of the Anti-Dumping Agreement requires the calculation of individual anti-dumping margins and assessment of individual anti-dumping duties

9. Article 6.10 articulates an authority's obligation to determine individual anti-dumping margins for exporters under investigation. The plain language of Article 6.10 imposes a mandatory requirement, with an explicit exception. It is unambiguous: an authority must determine an individual anti-dumping margin for all known producers or exporters, subject to the limited and defined exception.

10. Article 9.2, like Article 6.10, imposes a general requirement that exporters and suppliers be individually identified. Unless the authority can demonstrate that the factual circumstances fit within the defined exception in each provision, it has failed to comply with the obligations within these articles.

b. The USDOC's practice of determining the NME-wide entity rate is, as such, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

11. The USDOC's presumption of the existence of an NME-wide entity and the application of an NME-wide entity rate does not comply with the plain language of Articles 6.10 and 9.2. These provisions require an authority to determine anti-dumping margins and impose anti-dumping duties on an individual basis. The USDOC's use of an "NME-wide entity" rate is inconsistent with this unambiguous obligation.

12. The USDOC's practice violates the requirement of Articles 6.10 and 9.2 that authorities determine individual anti-dumping margins and anti-dumping duties to exporters and producers. The NME-wide entity is not an individual exporter/producer, but rather is a collection of exporters and suppliers that the USDOC collapses into a single entity without performing the collapsing analysis required under Article 6.10.

13. The USDOC's practice does not fit within the single, limited exception to the requirements of Articles 6.10 and 9.2: that it would be impracticable to individually identify exporters and suppliers.

2. The USDOC's practice of determining the NME-wide entity rate is, as such, inconsistent with Article 9.4 of the Anti-Dumping Agreement

14. Article 9.4 provides the parameters to be followed when calculating an anti-dumping duty where the administering authority has limited individual examination to only selected exporters/producers, pursuant to Article 6.10 of the Anti-Dumping Agreement. As discussed above, Article 6.10 requires the administering authority to determine an individual margin of dumping for each known producer or exporter.[1] In exceptional circumstances, the authority may limit the number of exporters/producers individually investigated.[2] Article 9.4 governs such a situation and limits the discretion of an authority when calculating the anti-dumping margins of exporters/producers not individually investigated.

15. Article 9.4, exclusively, governs the anti-dumping duty applied to companies not selected for individual examination. The article does not provide for exceptions: where examination has been limited, the calculation of the rate for all other exporters/producers is governed by Article 9.4. Article 9.4 then explicitly instructs the authority on the maximum permissible anti-dumping rates that can be applied to the exporters not individually investigated or reviewed.

16. The USDOC's failure to assign an NME-wide entity a rate consistent with the methodology required by Article 9.4 of the Anti-Dumping Agreement for all companies not individually investigated amounts to a violation, as such, of the United States' WTO obligations.

17. The USDOC's practice requires that the NME-wide entity receive a rate that is distinct from the "separate rate" that is calculated in a manner consistent with Article 9.4. The USDOC's Manual states that "[i]n an antidumping investigation, all companies other than those that have been determined to be eligible for a separate rate are part of the NME entity and receive the NME-wide rate."[3] This follows the USDOC's discussion on how rates are to be calculated for companies that are eligible for a separate rate; namely, in a manner that is generally consistent with Article 9.4 of the Anti-Dumping Agreement.

18. Under the USDOC's practice, the NME-wide entity does not receive a rate consistent with Article 9.4, despite its non-selection as an individually investigated company. The Anti-Dumping Agreement requires that companies not selected for individual examination, per Article 6.10, are to receive rates calculated pursuant to Article 9.4. The NME-wide entity qualifies as a company not selected for individual examination. The USDOC's failure to assign the NME-wide entity an Article 9.4-consistent rate is a violation, as such, of the Anti-Dumping Agreement.

IV Conclusion

19. For the reasons explained above, Viet Nam would like to urge the Panel to rule that the USDOC' "targeted dumping" methodology as well as other aspects of its approach to the W-T methodology, are inconsistent with Article 2.4.2 of the *Anti-dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994.

20. Also, Viet Nam would like to request the Panel to find that the USDOC' Single Rate Presumption, as such, is inconsistent with Article 6.10, 9.2, and 9.4 of the *Anti-dumping Agreement.*

[1] Article 6.10 of the Anti-Dumping Agreement.
[2] Ibid.
[3] Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, p. 7.

WORLD TRADE ORGANIZATION

WT/DS471/R/Add.1

19 October 2016

(16-5650)

Original: English

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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS471/R.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

CHINA

UNITED STATES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 11 February 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

.....

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by China. If the United States chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the

floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 7 paper copies of all documents it submits to the Panel. However, Exhibits may be filed in 3 CD-ROMs or DVDs and 4 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to Gabrielle.Marceau@wto.org, Muslum.Yilmaz@wto.org and Sagnik.Sinha@wto.org. CD-ROMs or DVDs shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 16 February 2015

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by the U.S. Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping duty proceedings relevant to this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the relevant proceedings agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI, as defined above, from an entity that submitted that information in one of the relevant proceedings, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both China and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those proceedings.

3. If an entity refuses to grant the authorization letter, a party may bring the situation to the attention of the Panel. The Panel shall consider what steps to take, which may include requesting information pursuant to Article 13 of the DSU.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the proceedings relevant to this dispute.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the

Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

CHINA

UNITED STATES

ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. USDOC's Application of its Targeted Dumping Methodology in Three Original Investigations

A. USDOC failed to comply with the conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence

1. According to Article 2.4.2, second sentence, the *first* condition under which a Member may depart from the "normal" symmetrical comparison methodologies – i.e., when it may depart from using the weighted average-to-weighted average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies, and instead use the exceptional weighted-average-to-transaction ("W-T") comparison methodology – is that there must exist "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Once a relevant "pattern" has been identified, an investigating authority must satisfy the *second* condition, which is to *explain* why the pattern "cannot be taken into account appropriately" through the application of the symmetrical comparison methodologies.

2. In evaluating an investigating authority's approach to determining whether these two conditions are satisfied, a WTO panel must apply the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*. In particular, "panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts was *unbiased and objective*".[1]

3. For the below reasons, USDOC failed to comply with the two conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence, in each of the three challenged determinations.

1. USDOC's failed to comply with the condition to identify a relevant pricing pattern

a. USDOC used the statistical tools of its own choice in an arbitrary and biased manner

4. An investigating authority is not obliged under the *Anti-Dumping Agreement* to have recourse to any *specific* statistical tools in addressing the first condition under Article 2.4.2, second sentence. However, China argues that the United States failed to use the tools of its own choice in a manner that would have enabled it to establish the facts properly and to evaluate them in an unbiased and objective manner.

5. In order to assess whether the first condition for having recourse to the exceptional W-T comparison methodology was met, i.e., to assess the existence of a "pattern", USDOC applied the so-called Nails Test in the three challenged determinations.[2] However, to be potentially meaningful as an analytical tool, the Nails Test hinges on the assumption that the distribution of the examined export prices was, at the minimum, single-peaked and symmetric around the mean. Across the three challenged determinations, although in some CONNUMs the export price data came close to being normally distributed, this was not generally the case. Thus, China's claims as to USDOC's failure to demonstrate that the identified export price differences were "significant" in a quantitative sense, are not dependent on the assumption that the observed export prices were "normally distributed". Rather, it is the Nails Test, and therefore the validity of the US position, that depends on that assumption.

6. China's three main substantive criticisms of the Nails Test can be summarized as follows:

7. *First*, the threshold of a single standard deviation from the mean, USDOC's primary tool for its Pattern Test, is insufficient for reaching a reliable conclusion that an observed set of prices differ in a relevant way. Such a low threshold is insufficient to draw a conclusion that a random

[1] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56 (emphasis original).
[2] *OCTG* OI, *Coated Paper* OI, and *Steel Cylinders* OI.

price observation is significantly different from other price observations in a given distribution, or whether, by contrast, it falls within that distribution. If USDOC had instead used thresholds consistent with the established statistical conventions for determining quantitative significance, *none of the alleged-target units in any of the three challenged determinations* would have fallen below the threshold price.

8. *Second*, it was inappropriate for USDOC to attribute "significance" to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean, because this is an *inherent feature* of every peaked distribution with tails.

9. *Third*, the US approach to consider only the gap between non-targeted weighted-average export prices which are greater than the weighted-average export prices to the allegedly "targeted" group led to an inherent bias in the design of the Nails Test, unduly increasing the likelihood of a finding that a price difference was "significant", and hence of an ultimate finding of "targeted dumping".

b. USDOC's reliance, in the Nails Test, on weighted-average prices instead of individual export transactions runs afoul of the treaty text and biased the test towards finding a "pattern"

10. USDOC's use of weighted-average prices for purposes of the Nails Test was inconsistent with Article 2.4.2, second sentence, for two reasons: *first*, the US approach is inconsistent with the legal requirement to focus on individual export prices; and, *second*, USDOC's reliance on customer or time period averages ignored within-customer and within time-period price variances. As a result, USDOC systematically biased the standard deviation used in the Pattern Test, drawing it closer to the mean, which improperly qualified more sales as "targeted" than would have been the case had USDOC calculated the one-standard-deviation threshold based on individual transaction prices.

c. USDOC failed to assess whether export prices differed "significantly" in a qualitative sense

11. Both a *quantitative* and a *qualitative* dimension are inherent in the concept of "significance". Variations in prices that can be explained by reference to normal factors in the relevant market are not "prices which differ significantly", in *qualitative* terms, for purposes of Article 2.4.2. USDOC's application, in the three challenged determinations, of its Pattern and Price Gap Tests did not consider *any* qualitative factors in determining whether prices to the alleged target should be considered "low" relative to any other prices charged by the exporter under investigation. Instead of considering what price differences might be normal within an industry or over time, USDOC mechanically applied the Nails Test and did not provide any explanation as to why prices passing its various thresholds could not arise from normal market dynamics undistorted by "targeted dumping".

2. USDOC failed to comply with the condition to provide a reasoned and adequate explanation as to why the relevant pricing pattern could not appropriately be taken into account using the symmetrical comparison methodologies

12. The explanation provided by USDOC as to why the relevant pricing pattern could not appropriately be addressed using a symmetrical comparison methodology in the three challenged determinations suffer from three fundamental flaws:

13. *First*, the explanation provided by USDOC in each of the three challenged determinations was excessively brief; it consisted of a single assertion as to the reason why a symmetrical comparison methodology was inappropriate. The "explanation" provided no analysis whatsoever of the characteristics of the identified "pattern" that led USDOC to the conclusion that it could not use the symmetrical comparison methodologies.

14. *Second*, contrary to the US argument, the "explanation" required by the second sentence of Article 2.4.2 must include a discussion of *both* the W-W and T-T comparison methodologies. In order properly to interpret the "or" in the second sentence of Article 2.4.2, one must take into account the context provided by the first sentence of Article 2.4.2, which contains the general rule, which is that "normally" an authority is to use a symmetrical comparison methodology to calculate a margin of dumping. Hence, recourse to the exceptional W-T comparison methodology is only

allowed if *neither* of the symmetrical comparison methodologies can take into account appropriately the identified pricing pattern.

15. *Third*, USDOC's explanation is based on the untenable assumption that, under the W-T comparison methodology under Article 2.4.2, second sentence, the application of zeroing procedures is somehow permissible. However, the US position disregards that, for the W-T comparison methodology, the *Anti-Dumping Agreement* imposes the same prohibition against the use of zeroing as in the context of both the W-W or T-T comparison methodologies. A fundamental principle undergirding the *Agreement* is that a margin of dumping must be calculated for the product as a whole, regardless whether the calculation is under the first or second sentence of Article 2.4.2 (or in a review under Article 9.3). And zeroing impermissibly prevents the determination of a margin of dumping for the product as a whole.

B. USDOC violated the treaty limits on an authority's discretion when applying the W-T comparison methodology pursuant Article 2.4.2, second sentence

1. USDOC unduly applied the W-T comparison methodology to all export sales instead of limiting the application of W-T to those sales that comprise the relevant pricing pattern

16. An investigating authority must limit the application of the W-T comparison methodology solely to those sales that comprise the relevant pricing pattern. China's position rests on the following grounds:

17. *First*, the express textual connection in Article 2.4.2 between the concepts of the "export prices which differ significantly" and "the prices of individual export transactions" denotes a parallelism between the scope of those transactions which fall into the relevant pricing pattern and the scope of application of the W-T comparison methodology.

18. Second, Article 2.4.2 limits the scope of application of the W-T comparison methodology to the extent necessary to "take into account appropriately" a relevant pricing pattern. The second sentence allows price differences to be taken into account "appropriately", and not in a generalized or excessive manner. Again, there is parallelism between the scope of the problem (a relevant pricing pattern that cannot be taken into account "appropriately") and the exceptional remedy provided.

19. *Third*, a general principle in WTO law is that an exception takes precedence over a general rule only to the extent of the conflict between the two provisions. Like other provisions of the covered agreements, Article 2.4.2 lays down a general rule that a symmetrical methodology should "normally" be used. The exception allowing use of the W-T comparison methodology takes precedence over this general rule only to the extent necessary to "take{} into account appropriately" a relevant pricing pattern. For sales outside this pattern (for example, sales to customers, regions or time periods other than those found to be targeted, or sales of models or types of the product for which no relevant pricing pattern has been found), no conflict between the first and second sentences of Article 2.4.2 exists, and therefore, an authority must use a symmetrical comparison methodology. The results of all intermediate comparison results must then be aggregated in order to generate a margin of dumping for the product as a whole.

20. *Finally*, China notes that a "relevant pricing pattern" necessarily can exist only in a *subset* of export sales. The process of discerning a "pattern" serves to *distinguish* prices that fall *within* the pattern from those that fall *outside* the pattern. Indeed, the United States' position that the pattern must include all sales because "an export price cannot 'differ significantly' on its own"[3] is at odds with the pattern of prices actually identified by the Nails Test applied by USDOC in the three challenged determinations. A fundamental element of the Nails Test is that it seeks to find "patterns" by reference to models, as well as by time (in *OCTG* and *Steel Cylinders*) or by customer (in *Coated Paper*). In this way, USDOC identified pricing patterns in respect of some models and not others. Having isolated the pattern in this limited way, USDOC was obliged to apply the exceptional W-T comparison methodology solely to the pattern it had identified, i.e., to a subset of the observed export sales.

[3] US First Written Submission, para. 202.

21. For all these reasons, there was no basis for USDOC in the three challenged determinations to apply the W-T comparison methodology to all sales of an exporter.

2. The United States' reliance on the concept of mathematical equivalence is unavailing to justify its use of zeroing when applying the W-T comparison methodology in investigations

22. Zeroing is not permissible when applying the W-T comparison methodology in investigations, just as it is impermissible when using the W-T comparison methodology in reviews. The contrary position is inconsistent with the "exporter-specific" and "product-related" aspects[4] of the foundational concept of dumping, which, as the Appellate Body has consistently explained, is *not* a transaction-specific concept. Since "dumping" cannot be found to exist at the level of individual transactions, there is no justification for failing to take account of any transaction-specific intermediate comparison results when aggregating comparison results in order to yield a margin of "dumping".

23. The United States attempts in vain to re-litigate the "mathematical equivalence" argument, which has consistently been rejected by the Appellate Body.[5] As the Appellate Body has explained, it is possible to generate results using the W-T comparison methodology that are different from those arising from the use of the W-W comparison methodology. For instance, nothing in Article 2.4.2 prevents an investigating authority from dividing the period of investigation into several time periods for purposes of calculating weighted average normal values to compare with individual export transactions under the W-T comparison methodology. As China has demonstrated, using different temporal bases for normal value means that mathematically *different* results will generally arise.

24. Although it is true that the earlier disputes in which the Appellate Body addressed the "mathematical equivalence" argument did not involve an actual application of the W-T comparison methodology under Article 2.4.2, second sentence, the disciplines that constrain how to use the W-T comparison methodology (including the prohibition on the use of zeroing procedures) apply equally regardless of the proceedings in which that methodology is used.

II. USDOC's Application of its Targeted Dumping Methodology in an Administrative Review

A. USDOC's application of zeroing procedures in *PET Film* AR3 is inconsistent with Article 9.3 of the *Anti-Dumping Agreement*

25. Although the *Anti-Dumping Agreement* does not restrict the ability of an investigating authority to use the W-T comparison methodology in administrative reviews, the use of *zeroing* "for purposes of assessing final liability for payment of anti-dumping duties" in an administrative review is prohibited.[6] Instead, as detailed in several Appellate Body Reports, duty liability must not exceed the *margin of dumping* determined for the product as a whole.[7] Accordingly, it is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 to disregard intermediate comparison results yielding negative margins when aggregating the results of multiple comparisons of normal value and export prices. USDOC's resort to zeroing to assess liability for anti-dumping duties in *PET Film* AR3 is, therefore, inconsistent with the United States' obligations under the WTO agreements.

[4] See, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[5] See, e.g., Appellate Body Report, *US – Softwood Lumber V (Article 21.5 Canada)*, paras. 97-100; Appellate Body Report, *US – Zeroing (Japan)*, para. 146; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126; Appellate Body Report, *US – Continued Zeroing*, paras. 296-298.

[6] Appellate Body Report, *US – Continued Zeroing*, para. 285.

[7] See, e.g., Appellate Body Reports, *US – Zeroing (EC)*, paras. 132-133; *US – Zeroing (Japan)*, paras. 108-115, 166 and 174-176; *US – Stainless Steel (Mexico)*, paras. 97-139; and *US – Continued Zeroing*, paras. 276-287 and 314-316.

B. The US argument depends on the untenable assumption that the second sentence of Article 2.4.2 somehow applies not only to original investigations, but also to administrative reviews

26. As regards the third administrative review in *PET Film*, China's challenge focuses on USDOC's application of zeroing procedures in connection with applying the W-T comparison methodology. Thus, China's claim must be analyzed pursuant to Article 9.3 of the *Anti-Dumping Agreement*, which governs reviews. China considers that, while investigating authorities may apply the W-T comparison methodology in administrative reviews, there is no doubt that the WTO disciplines on *how* an investigating authority may apply the W-T comparison methodology govern the application of that methodology in all types of proceedings (reviews and investigations) equally.

27. The US defense against China's claim appears to depend on the untenable assumption that the second sentence of Article 2.4.2 somehow applies to administrative reviews and not only to original investigations. Yet, the precise terms of the treaty text ("…during the investigation phase . . .") allow only one conclusion: recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations. Thus, even if the use of zeroing were permitted in original investigations in connection with applying the W-T comparison methodology under Article 2.4.2, second sentence, which is *not* the case, such permission would not extend to the duty assessment phase governed by Article 9.3 of the *Anti-Dumping Agreement*.

III. The Single Rate Presumption for Non-Market Economies, As Such, and As Applied in 38 Challenged Determinations is Inconsistent with Articles 6.10, 9.2 and 9.4 of the *Anti-Dumping Agreement*

28. In anti-dumping proceedings involving countries considered by USDOC to be "non-market economies" (or "NMEs"), USDOC presumes that all producers/exporters from the country concerned are part of a single, government controlled entity to which USDOC assigns a single rate. In order to rebut this presumption, a producer/exporter must prove both *de jure* and *de facto* absence of government control. China shows − by reference to evidence including USDOC Policy Bulletin 05.01, USDOC's Antidumping Manual, the records of the proceedings at issue, rulings of US courts and a sample of 40 original investigations and 52 administrative reviews issued by USDOC in proceedings involving NMEs since 2001 − that this "Single Rate Presumption", including the "Separate Rate Test" through which it may be rebutted, is a norm of general and prospective application that may be challenged as such in WTO dispute settlement. This norm is materially the same as the norm proven to exist and successfully challenged by Viet Nam in *US − Shrimp II (Viet Nam)* and is closely analogous to the EC measure that was found to be WTO-inconsistent by the Appellate Body in *EC − Fasteners*.

29. Article 6.10 requires that, for "each known exporter or producer ... of the product under consideration", an authority shall "determine an individual margin of dumping" unless an exception specifically contemplated by the *Agreement* applies. The Single Rate Presumption, as such and as applied in the 38 challenged determinations,[8] violates Article 6.10 because USDOC does not determine an individual margin of dumping for each of the known producers/exporters who are grouped into the single NME-wide entity by means of the presumption. Instead, in order to qualify for an individual margin, all producers/exporters from China, or any other country deemed to be an NME by USDOC, must rebut the presumption that they are part of the single NME-wide entity by demonstrating that they satisfy USDOC's Separate Rate Test. Although it is clear that authorities may, based on facts and evidence, determine that two or more respondents in an anti-dumping proceeding have such close affiliations that they may be treated as a single exporter, USDOC's *presumption* of singularity in NME cases, and the imposition of the burden on Chinese producers/exporters to rebut it, have no basis in the covered agreements. In particular, paragraph 15 of China's *Protocol of Accession* does *not* justify the Single Rate Presumption in relation to China. The exception to the generally applicable anti-dumping rules contained in

[8] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* OI, *OTR Tires* AR5, *OTR Tires* AR3, *OCTG* OI, *OCTG* AR1, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *Bags* AR4, *PET Film* OI, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* OI, *Furniture* AR7, *Furniture* AR8, *Furniture* AR9.

paragraph 15 of that *Protocol* is limited to certain matters relating to the determination of Chinese normal values.

30. Article 9.2 requires that, when imposing anti-dumping duties, an authority must "name the supplier or suppliers of the product concerned", thereby specifying such suppliers, in order to collect duties in "the appropriate amounts" from each supplier or suppliers.[9] In other words, the authority must apply individual duties to each individually-identified producer/exporter unless an exception specifically contemplated by the *Agreement* applies. The Single Rate Presumption, as such and as applied in the 38 challenged determinations, violates Article 9.2 because USDOC does not name each of the producers/exporters that are grouped into the single NME-wide entity for purposes of imposing anti-dumping duties, and thereby fails to apply to them individual duties and duties in the appropriate amounts. Instead, in order to be named and to qualify for individual anti-dumping duties, a distinct producer/exporter must rebut the presumption that it is part of the single NME-wide entity by means of the Separate Rate Test. Again, this presumption and the requirement to rebut it have no basis in the covered agreements.

31. Article 9.4, second sentence, applies when the authority has exercised its discretion to limit the investigation under the second sentence of Article 6.10. It confers additional rights upon producers and exporters who are "not included in the examination" and who would ordinarily, therefore, be the subject of an anti-dumping duty that complies with the disciplines prescribed by the first sentence of Article 9.4. The second sentence provides, in relevant part, that such producers/exporters must receive an individual duty in cases where they "provide{} the necessary information" to allow the authority to determine an individual margin for such a respondent "as provided for in subparagraph 10.2 of Article 6". Article 6.10.2, in turn, requires the calculation of individual margins of dumping for non-selected respondents who voluntarily submit the necessary information in a timely manner, unless it would be unduly burdensome to do so.

32. The Separate Rate Test violates Article 9.4, second sentence, because − regardless of whether a fictional NME-wide *entity* is considered to be "included in the examination" − at least some of the producers/exporters *included within* the NME-wide entity are *not* included in the examination in a manner that generates an individual margin of dumping or individual duty for them. Such respondents cannot receive an individual margin of dumping or anti-dumping duty rate by submitting the "necessary information", as contemplated by Article 9.4. Instead, such respondents must *additionally* meet the Separate Rate Test. By imposing an *additional* condition for receipt of individual duties that is not contemplated by Article 9.4, the Single Rate Presumption, including the Separate Rate Test, as such and as applied in the 38 challenged determinations, violates Article 9.4, second sentence.

IV. The Methodology through which USDOC Determined the Rate for the Fictional PRC-Wide Entity in 30 Challenged Determinations was Inconsistent with Articles 6.1, 6.8, 9.4 and Annex II of the *Anti-Dumping Agreement*

33. Having presumed, in each of the 13 challenged investigations, the existence of a PRC-wide entity, USDOC proceeded to determine a single dumping rate for the PRC-wide entity, including all of the producers/exporters included within it.[10] A PRC-wide entity rate was also determined in 17 challenged reviews.[11] In the remaining 8 challenged determinations, USDOC did not determine a PRC-wide entity rate.[12]

34. Pursuant to Article 6.10, investigating authorities must, as a rule, determine an *individual margin of dumping* for each known producer/exporter of the product under investigation. China understands that, in each determination, USDOC purported to determine an individual rate for the fictional PRC-wide entity, including *all* of the distinct producers/exporters included within it. In determining such an individual margin of dumping, investigating authorities must observe the procedural requirements set forth in Article 6 of the *Anti-Dumping Agreement.* These procedural

[9] Appellate Body Report, *EC − Fasteners*, para. 339.

[10] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *Pet Film* OI, *Furniture* OI.

[11] *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

[12] *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* AR9.

protections seek to ensure that authorities make an *accurate determination* of whether, and if so, in what magnitude, there is dumping by an individual producer/exporter.

35. In pursuit of an accurate determination, the *Anti-Dumping Agreement* expresses a preference in favor of information submitted by the individual producer/exporter concerned (primary information). In order to obtain primary information from the respondent and accord the respondent due process, the first step required of an authority in connection with the evidence to be used in a determination of dumping is to give *notice of the information that it requires* from interested parties, followed by the grant of *ample opportunity* for interested parties to *present evidence* in writing (Article 6.1). China claims that, in the determinations in which it determined a PRC-wide entity rate, USDOC acted inconsistently with Article 6.1. This is because, in order to determine an individual rate for the fictional PRC-wide entity, including all of the respondents grouped into it, the information that USDOC "require{d}" included all of the information regarding the US sales and the normal value comparators for all those distinct respondents. Only by obtaining this information could USDOC calculate a margin of dumping for an entity comprised of all those distinct respondents. Yet, USDOC: (i) failed to request the detailed information necessary to calculate a margin of dumping for the PRC-wide entity, including from the distinct respondents comprising the entity, and thereby failed to give notice of the required information; and (ii) failed to give the PRC-wide entity, including the distinct respondents comprising it, ample opportunity to submit relevant evidence for that determination.

36. The *Anti-Dumping Agreement* recognizes, in its Article 6.8, that an interested party might refuse access to, or otherwise not provide, primary information that is necessary for the authority to make preliminary or final determinations, including in respect of the existence and magnitude of dumping. Article 6.8 establishes that, in such cases, the authority may resort to "facts available", including secondary source information, to replace missing information, provided that the authority observes the requirements of Annex II of the *Anti-Dumping Agreement*. Like the facts available provision of the *SCM Agreement*, Article 6.8 and Annex II allow an authority to "'*reasonably replace* the information that an interested party failed to provide', with a view to arriving at an accurate determination".[13]

37. Consistent with the objective of ensuring *accurate* determinations, Annex II provides for authorities to use the "Best Information Available in Terms of Paragraph 8 of Article 6", and lays down specific requirements that must be observed: (i) before an authority may resort to facts available at all; and, (ii) if the conditions for resorting to facts available have been met, in selecting amongst the facts available.

38. With respect to (i) − that is, the pre-conditions for resort to facts available − Paragraph 1 of Annex II echoes a requirement of Article 6.1. It conditions recourse to "facts available" in respect of an interested party upon the authority having "specif{ied} in detail the information required" from that interested party. Additionally, the authority must have informed the interested party concerned that facts available may be used if the required information is not supplied within a reasonable period of time. In other words, there is no basis for recourse to facts available, if the required information has not, first, been *requested* by the authority. Further, facts available may only be used to replace the specific information that the authority required but did not receive from an interested party. In this way, Article 6.8 and Annex II of the *Anti-Dumping Agreement* are concerned with overcoming the absence of information that is *necessary* to complete a determination. According to the Appellate Body, "{i}t is the absence of *this particular information* that the use of the 'facts available' is designed to mitigate".[14]

39. China claims that, although USDOC purported to determine an individual rate for the entire PRC-wide entity (including *all* of the respondents grouped into it), USDOC failed to "specify in detail" the information that it required to determine an individual margin of dumping for the PRC-wide entity in each of the relevant determinations, as required by Article 6.8 and Annex II(1). Accordingly, USDOC did not have a valid basis to resort to facts available in setting a rate for the fictional PRC-wide entity and the respondents it contained in the challenged determinations in which it determined a PRC-wide entity rate.

[13] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.178 (emphasis added by the Appellate Body, footnotes omitted); see also and Appellate Body Report, *US − Carbon Steel (India)*, para. 4.416.

[14] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.416 (emphasis added, footnote omitted).

40. With respect to (ii) – that is, the criteria for selecting amongst the facts available once the conditions for resorting to facts available have been met by the authority – Annex II specifies that the "facts to be employed are expected to be 'best information available'",[15] which is to say, the "most fitting or 'most appropriate' information",[16] such that "there can be no better information available to be used in the particular circumstances".[17] In this way, Article 6.8 and Annex II contemplate selection of *reasonable* replacements for missing facts, so as to allow the authority to render an *accurate* determination. The *Anti-Dumping Agreement* imposes obligations on the process followed by an investigating authority to identify the *best* available information. Specifically, paragraph 7 of Annex II requires that an authority exercise "special circumspection" in the selection of facts available where such facts are drawn from secondary sources. This requires a comparative evaluation of all the information that is available, in which "all substantiated facts on the record must be taken into account".[18] Thus, where inferences must be drawn from the facts and circumstances of the case at hand, these need to take account of *all* the facts and circumstances, including the circumstances by virtue of which information is missing. Inferences made by the investigating authority must be *reasonable*, so that they allow the authority reasonably to replace the necessary information that is missing. For this reason, the Appellate Body has emphasized that such inferences "cannot be made on the basis of procedural circumstances alone".[19] Negative inferences based solely on the procedural circumstance of non-cooperation, without considering the circumstances in which non-cooperation arose, as well as all the other facts and circumstances, cannot qualify selected information as the "best" information, as required under Article 6.8 and Annex II.

41. China claims that, when selecting the secondary source information to use as facts available to determine a rate for an NME-wide entity, USDOC applies the Use of Adverse Facts Available norm. Under this norm, whenever USDOC finds non-cooperation by the NME-wide entity, it follows a process that selects *adverse* information from amongst the available secondary source information to set the rate for the fictional entity. It does not use a process that selects reasonable replacements, using the best information available, so as to render an accurate determination. Instead, USDOC selects adverse information because it makes an *adverse* inference based solely on the finding of non-cooperation and without regard to the circumstances under which the finding of non-cooperation was made, which frequently include that USDOC *presumes* non-cooperation. USDOC selects adverse facts to set the rate for the fictional NME-wide entity, even in cases where it has not sought the information required to calculate a rate for such an entity, meaning it does so even where the conditions for resort to facts available have not been met at all.

42. China demonstrates the existence of the Use of Adverse Facts Available norm by reference to USDOC's practice in anti-dumping proceedings, the Antidumping Manual, statements by USDOC, statements by US courts, as well as a sample of 64 determinations in which USDOC determined an NME-wide entity rate. This evidence, which indicates that USDOC always selects adverse facts to determine the NME-wide entity rate whenever it deems an NME-wide entity to be non-cooperative, shows the precise content of the norm, that it is attributable to the United States, and that it has general and prospective application in anti-dumping proceedings involving countries considered by USDOC to be NMEs.

43. China claims that this norm (both as such and as applied in 28 of the 30 determinations in which it determined a rate for the PRC-wide entity)[20] is inconsistent with Article 6.8 and Annex II, because the norm establishes a process that, by design, causes USDOC rigidly to select *adverse* information, which, in turn, leads USDOC not to engage in a process to identify the *best* information through an exercise "special circumspection". Contrary to the duty of "special circumspection", the norm effectively prevents USDOC from exploring relevant facts and

[15] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[16] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[17] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[18] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419, referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.
[19] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[20] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *Pet Film* OI, *Furniture* OI, *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

circumstances other than its finding of non-cooperation when selecting the PRC-wide entity rate. USDOC thus does not select replacements for missing facts because they are *reasonable*; instead it selects facts because they yield a rate for an NME-wide entity that is *adverse* – i.e., an "adverse facts available" rate, in USDOC parlance.

44. China also shows that USDOC violated the requirements of Article 6.8 and Annex II in each of the challenged determinations in which it determined a rate for the PRC-wide entity, regardless of whether or not USDOC applied a norm of general and prospective application. Specifically, in 28 of the 30 relevant determinations, USDOC violated Article 6.8 and Annex II because it failed to use a process that selected reasonable replacements, using the best information available, so as to render an accurate determination. Instead, it selected adverse information to assign the rate for the PRC-wide entity due to an *adverse* inference based on the finding of non-cooperation, and without regard to the circumstances under which the finding of non-cooperation was made. Further, in all 30 of the determinations in which it determined a rate for the PRC-wide entity, USDOC selected information to replace missing information in determining the PRC-wide entity rate from among the available secondary sources without conducting the comparative, evaluative process required. USDOC also failed, in each relevant determination, to provide a reasoned and adequate explanation as to how the secondary source information it selected was the *best* available information, in terms of Article 6.8 and Annex II.

45. Finally, where an investigating authority relies upon Article 6.10 to sample a subset of all producers/exporters for individual examination, Article 9.4 establishes disciplines upon *any* anti-dumping duty that is applied to producers/exporters *not* included in the examination. Thus, when an authority resorts to sampling, a rate must be either an *individual rate*, complying with the procedural requirements relating to the determination of an individual margin of dumping in Article 6, or it may be an *"all others" rate* that is subject to Article 9.4.

46. USDOC used sampling in each of the challenged determinations in which it determined a PRC-wide entity rate. The rate assigned to the PRC-wide entity – including each of the distinct respondents that was grouped into the fictional entity – in each of these determinations was different from and higher than the rate assigned to the non-individually investigated separate rate respondents. The rule in Article 9.4 governs "any" anti-dumping duty applied to *non-individually investigated* producers/exporters, whenever sampling is used, and does not permit such rates to exceed the calculated ceiling level or otherwise vary in a manner inconsistent with Article 9.4. Accordingly, to the extent that the PRC-wide entity and the respondents included within it were not the subject of individual examination in any of the challenged determinations in which a PRC-wide entity rate was determined, USDOC failed to observe the requirements of Article 9.4 with respect to the rate assigned to the PRC-wide entity, including the producers/exporters within that fictional entity.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. USDOC'S APPLICATION OF ITS TARGETED DUMPING METHODOLOGY IN THREE ORIGINAL INVESTIGATIONS VIOLATES ARTICLE 2.4.2

A. The United States misunderstands the relevance of the standard of factual review under Article 17.6(i) of the *Anti-Dumping Agreement* for the Panel's assessment of USDOC's application of the Nails Test

1. China does not rely on Article 17.6(i) of the *Anti-Dumping Agreement* as an independent basis for any of its legal claims. China's claims against USDOC's application of the Nails Test in the three challenged determinations are claims of violation of Article 2.4.2 of the *Anti-Dumping Agreement*. However, contrary to the United States' view, Article 17.6(i) does more than merely establish limits for a panel's review of the factual assessment undertaken by investigating authorities in the context of domestic anti-dumping proceedings. The standard of factual review for panels necessarily also illuminates the substantive requirements incumbent upon an investigating authority when it establishes and evaluates the facts. China has demonstrated that, when applying the Nails Test in the three challenged determinations, USDOC's establishment of the facts was not proper, and its evaluation of the facts fell short of being unbiased and objective, as contemplated by Article 17.6(i). Accordingly, the Panel must conclude that USDOC failed to identify a relevant pricing pattern consistent with Article 2.4.2, second sentence.

B. USDOC failed to comply with the conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence

1. USDOC failed to comply with the condition to identify a relevant pricing pattern due to three sets of fundamental flaws

a. USDOC used its chosen statistical tools in an arbitrary and biased manner

2. Having chosen to employ particular statistical tools to assist in its analysis, USDOC failed to use those tools in a manner that permits a proper establishment of the facts, and an unbiased and objective evaluation of those facts. It therefore failed to establish the existence of a relevant pricing pattern consistently with Article 2.4.2, second sentence.

3. China's claim does not rest on the assumption that the data in any of the challenged proceedings establish a particular price distribution. Rather, it is the Nails Test, and therefore the validity of the US arguments, that depends on that assumption, despite the United States' protestations to the contrary. Depending on the actual form of the price distribution in a given case, the multiplicity of flaws affecting the Nails Test becomes manifest, as follows:

4. In all instances in which a given price distribution is *not* single-peaked and symmetrical around the mean, and hence may not necessarily have a left-hand tail, the first stage of the Nails Test (i.e., the Pattern Test) is plagued by the initial fundamental flaw identified by China. This flaw is that without a symmetrical, single-peaked distribution, the concept of a standard deviation cannot function as a meaningful threshold for determining whether or not a relevant pricing pattern exists.

5. Alternatively, even in instances involving a distribution that *is* single-peaked and symmetrical around the mean and thus has a left-hand tail, a fundamental flaw infects the second stage of the Nails Test (i.e., the Price Gap Test). This flaw exists because the Test treats as significant something that is inherent in distributions that are single-peaked and symmetric around the mean. Specifically, the Price Gap Test treats the occurrence of wider price gaps among the ATs in the left-hand tail of the distribution (after discarding equally low-priced NTs) as significant, even though wider price gaps in the tails are an inherent characteristic of distributions with tails.

6. The United States does not contest the accuracy of China's statistical arguments but asserts that they are irrelevant as USDOC did not rely on the one-standard deviation threshold as a tool to draw statistical inferences. Yet, USDOC's *subjective* characterization of the Nails Test is no substitute for the Panel's obligation to engage in an *objective* assessment of the nature of that Test. An objective evaluation reveals that the Nails Test uses both the terminology and tools of

statistical analysis, albeit in an arbitrary and inadequate fashion. Having decided to apply an approach that usurps statistical concepts to assess whether sets of observed export prices differ in a relevant way, the United States cannot avoid the legal consequences by pretending that this approach was used for some other purpose.

b. USDOC's reliance, in the Nails Test, on weighted-average prices instead of individual export transactions is inconsistent with the treaty text and biased the Nails Test towards finding the presence of a "pattern"

7. USDOC's application of the Nails Test in the three challenged determinations further failed to identify a relevant pricing pattern consistently with Article 2.4.2, second sentence, because it relied on weighted-average prices instead of individual export transactions.

8. There are two reasons why the US approach is inconsistent with Article 2.4.2. *First*, the US approach is inconsistent with the treaty requirement that an investigating authority focus on individual export prices for purposes of identifying a relevant pricing pattern. *Second*, USDOC's reliance on customer or time period averages ignored within-customer and within time-period price variances. As a consequence, USDOC systematically drew the one-standard-deviation threshold too close to the mean, which caused USDOC to improperly qualify more sales as "targeted" than would have properly been the case.

c. USDOC failed to assess whether the observed export prices differed "significantly" in a qualitative sense

9. Variations in export prices that can be explained by factors that are normal in the relevant market are not "prices which differ significantly", in *qualitative* terms, for purposes of Article 2.4.2, second sentence. Yet, in the three challenged determinations, USDOC mechanically applied the Nails Test and did not provide any explanation as to why prices passing its various thresholds could not arise from market dynamics undistorted by "targeted dumping". Contrary to the United States' insistence, there is no reason why a proper consideration of the *qualitative* dimension of "significance" would prevent an investigating authority from identifying a relevant pricing pattern in a situation in which the exporter concerned has actually engaged in targeted dumping.

10. In at least one of the three challenged determinations, *Steel Cylinders* OI, the exporter advanced a plausible explanation of the observable price fluctuations in the steel market. USDOC's summary dismissal of these arguments as an unsupported assumption was insufficient. USDOC, in its role as the investigating authority, could easily have requested the exporter to supplement the record with evidence necessary to make an informed determination regarding this critical issue. USDOC could have done so even if it were true that the exporter's initial case brief failed to cite record evidence to support the assertion that the increase in underlying steel prices had an impact on the prices of steel cylinders. At the very least, in order to demonstrate, in a WTO-consistent manner, the existence of a pattern of export prices that differ "significantly", USDOC would have had to provide a reasoned and adequate explanation as to why the dynamics in the steel market identified by the exporter could not have been the reason for the observed export price differences.

2. USDOC failed to comply with the condition to provide a reasoned and adequate explanation as to why the relevant pricing pattern could not be taken into account appropriately using the symmetrical comparison methodologies

11. Once a relevant pricing pattern has been identified, an investigating authority must satisfy the *second* condition of Article 2.4.2, second sentence, and *explain* why the pattern "cannot be taken into account appropriately" through the application of the symmetrical comparison methodologies. The explanations provided by USDOC in the three challenged determinations suffer from three fundamental flaws:

- *First*, the "explanation" provided by USDOC in the three challenged determinations provided no analysis whatsoever of the characteristics of the identified "pattern" that led USDOC to the conclusion that it could not use the symmetrical comparison methodologies.

- *Second*, the "explanation" required by the second sentence of Article 2.4.2 must include a discussion of *both* the W-W and T-T comparison methodologies. USDOC does not contest that it did not address the T-T comparison methodology.

- *Third*, USDOC's explanation, as provided in the three challenged determinations, is based on the untenable assumption that, under the W-T comparison methodology pursuant to Article 2.4.2, second sentence, the application of zeroing procedures is somehow permissible.

C. USDOC violated the treaty limits on an authority's discretion when applying the W-T comparison methodology pursuant to Article 2.4.2, second sentence

1. USDOC improperly applied the W-T comparison methodology to all export sales instead of limiting the application of W-T to those sales that comprised the relevant pricing pattern

12. An investigating authority must limit the application of the W-T comparison methodology solely to those sales that comprise the relevant pricing pattern, i.e., the targeted sales in targeted CONNUMs. Importantly, if an investigating authority identifies the existence of a pattern in relation to some models, and not others, the authority must apply the exceptional W-T comparison methodology subject to the same limitation – i.e., solely to the pattern it identifies in those particular models. Applying the W-T comparison to a broader group of export sales for which no pattern has been identified, on the other hand, is arbitrary and disproportionate. China has demonstrated in great detail that this important limitation flows from the language of Article 2.4.2, in context, and in light of the object and purpose of the *Anti-Dumping Agreement*.

13. Contrary to what USDOC did in the three challenged determinations, the application of the W-T comparison methodology to the sales comprising the "pattern" must be combined with the application of one of the standard comparison methodologies (W-W or T-T) to the remaining, non-targeted, export sales, in order to ensure that the investigating authority properly calculates a WTO-consistent dumping margin for the product as a whole.

2. The United States' reliance on the concept of mathematical equivalence is unavailing to justify its use of zeroing when applying the W-T comparison methodology in investigations

14. The fact that the Appellate Body has not specifically encountered the question whether zeroing is prohibited under Article 2.4.2, second sentence, does not mean, as the United States implies, that zeroing is permitted under that provision. The jurisprudence illuminates foundational concepts in the *Anti-Dumping Agreement* that enjoy significance well beyond the immediate context in which they were decided. Of particular note, the fact that "dumping" and a "margin of dumping" are "exporter-specific" and "product-related" concepts is fundamental to the architecture of the *Anti-Dumping Agreement*.[1] These fundamental characteristics of the concepts of dumping and margin of dumping apply across all provisions of the *Anti-Dumping Agreement*. Indeed, towards the end of these proceedings the United States has explicitly conceded that "dumping" and "margins of dumping" mean the same thing across all provisions of the *Anti-Dumping Agreement*, including Article 2.4.2, second sentence. Zeroing, by contrast, is based on a transaction-specific understanding of the concepts of "dumping" and "margins of dumping" that is inconsistent with the entire architecture of the treaty.

15. The United States is plainly wrong when it insists that, unless zeroing were permitted under Article 2.4.2, second sentence, that provision would be rendered inutile. As China has demonstrated, the use of different temporal bases for the weighted average normal value when using the W-W and W-T comparison methodologies will generally lead to mathematically *different* results. China does not argue that investigating authorities *must* use different temporal bases for normal value. What matters for the Panel's assessment is that proceeding in that manner is a WTO-consistent way by which the second sentence of Article 2.4.2 will not be rendered inutile.

16. Furthermore, the proper way for an investigating authority to "unmask targeted dumping" is not by applying WTO-inconsistent zeroing procedures, but rather by ensuring that it correctly identifies the scope of the relevant pricing pattern to which it will subsequently apply the exceptional W-T comparison methodology, provided that it can explain why use of the symmetrical comparison methodologies would not allow the pricing pattern appropriately to be taken into account. In other words, the "unmasking of targeted dumping" is achieved through the proper identification of "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The treaty, however, grants no authority to discard the fundamental

[1] See, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

principle that a margin of dumping must be determined for the product as a whole, in order to "unmask targeted dumping".

II. CHINA'S CLAIMS UNDER ARTICLE 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994 REGARDING USDOC'S APPLICATION OF ITS TARGETED DUMPING METHODOLOGY IN AN ADMINISTRATIVE REVIEW

17. The United States' defense of USDOC's use of zeroing in *PET Film* AR3 hinges on the untenable assumption that the second sentence of Article 2.4.2 somehow applies to administrative reviews as well as original investigations. The United States is wrong to assert that this is an issue of first impression for the Panel. The well-established principles governing the manner in which an investigating authority may apply the W-T comparison methodology, and the well-litigated understanding of the foundational concepts of "dumping" and "margins of dumping", apply to all types of proceedings, including original investigations and the various types of reviews.

18. China has demonstrated that the ordinary meaning to be given to the phrase "during the investigation phase" in Article 2.4.2, considered in its context, and in light of the object and purpose of the *Anti-Dumping Agreement*, allows only one conclusion − namely, that Article 2.4.2, second sentence, applies solely to original investigations and *not* to reviews. Thus, even if the use of zeroing were permitted in original investigations when applying the W-T comparison methodology under Article 2.4.2, second sentence, which is *not* the case, such permission would not extend to the duty assessment phase governed by Article 9.3.

19. According to the United States, it is "logical" for the W-T comparison methodology to operate in the same manner, whether in original investigations or in administrative reviews, whenever the conditions for recourse to the exceptional comparison methodology under Article 2.4.2, second sentence, are met. Yet, the United States errs because the application of the W-T comparison methodology in the context of Article 9.3 reviews is not subject to the preconditions of Article 2.4.2, second sentence. Thus, in Article 9.3 any reference to Article 2.4.2 − whether or not it authorizes the use of zeroing − for the purpose of illuminating the authority to use the W-T comparison methodology would be irreconcilable with the drafters' express choice in Article 2.4.2 to limit the scope of application of that provision to original investigations.

III. THE UNITED STATES' TERMS OF REFERENCE OBJECTIONS IN CONNECTION WITH CHINA'S NON-MARKET ECONOMY TREATMENT CLAIMS

A. Six administrative reviews issued after filing of China's First Written Submission fall within the Panel's terms of reference

20. The Panel should reject the United States' contention that the six reviews issued by USDOC after the filing of China's First Written Submission and submitted to the Panel during the course of the First Hearing[2] fall outside the Panel's terms of reference. Panels may have jurisdiction over measures which have been adopted subsequent to the panels' establishment if they are closely connected to those identified by name in a panel request.[3] In its Panel Request, China specified that "any closely connected, subsequent measures" to measures identified by name and falling within the same 13 anti-dumping proceedings are within the Panel's terms of reference.[4] In its First Written Submission, China put the United States on notice that it considered the relevant six reviews to be within the scope of the dispute, including by informing the Panel that they had been initiated, and by providing the Panel with the issued preliminary determinations. Each of these six reviews is closely connected to the measures identified by name in the Panel Request because they involve "the imposition, assessment and collection of duties under the same anti-dumping order".[5]

21. The United States was given adequate notice and has had ample opportunity to respond to China's claims in respect of these measures. Exclusion of any of the six reviews would further delay settlement of the dispute that China legitimately brought before the DSB in February 2014, contrary to the principle of prompt settlement enshrined in Article 3.3 of the DSU. The fact that

[2] *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR4, *Wood Flooring* AR2, *PET Film* AR5, *Furniture* AR9.

[3] See, e.g., Appellate Body Report, *EC − Chicken Cuts,* para. 156; Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, paras. 121, 125, 130.

[4] See Annexes 3-5 to China's Panel Request, WT/DS471/5.

[5] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 230 (quoting Appellate Body Report, *US − Continued Zeroing*, para. 181). See also Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 116.

there have been significant procedural delays in these proceedings has not prevented USDOC from continuing to adopt determinations in anti-dumping proceedings involving China that do not conform with the requirements of the *Anti-Dumping Agreement*. China should thus not be forced to initiate new disputes, or wait to initiate compliance proceedings. This would not only result in delay with respect to the settlement of this dispute, it would also further burden the WTO dispute settlement system as a whole.

B. All of China's arguments and evidence are within the Panel's terms of reference

22. Contrary to the United States' assertions, there is no flaw in the manner in which China's claim with regard to the Use of Adverse Facts Available was put before the Panel. China's Panel Request identifies this specific measure and clearly presents the legal basis for the complaint. The Panel Request goes further than necessary by specifying that the problem arises because of USDOC's failure "to use the best information available and special circumspection when basing its findings on information from secondary sources".[6]

23. Moreover, despite the United States' contentions, all of China's arguments with regard to the Use of Adverse Facts Available norm as well as the arguments in response to the Panel's questions are equally within the Panel's terms of reference. Arguments need not be specified in a panel request, and may be progressively developed and clarified throughout the proceedings before a panel. Development and clarification of arguments may result from responses to questions or counter-arguments raised by an opponent. Similarly, all of the evidence that China submitted in response to the Panel's questions is within the Panel's terms of reference. Although the United States objects to evidence submitted by China in response to questions from the Panel, the working procedures are clear that parties may submit evidence which is necessary to respond to the Panel's questions. The United States has had ample opportunity to respond to the evidence submitted by China.

IV. CHINA'S CLAIMS UNDER ARTICLES 6.10, 9.2 AND 9.4, SECOND SENTENCE, REGARDING THE SINGLE RATE PRESUMPTION AS SUCH AND AS APPLIED IN 38 CHALLENGED DETERMINATIONS

24. In anti-dumping proceedings involving countries considered by USDOC to be "non-market economies" (or "NMEs"), USDOC presumes that all producers/exporters from the country concerned are part of a single, government controlled entity to which USDOC assigns a single rate. In order to rebut this presumption, a producer/exporter must satisfy USDOC's Separate Rate Test by proving both *de jure* and *de facto* absence of government control. China refers to this presumption as the "Single Rate Presumption". The United States conceded in response to questions from the Panel that this presumption has been applied in every anti-dumping determination involving China issued since 1991 − including the 38 determinations challenged by China. Nonetheless, the United States contest that the Single Rate Presumption is a norm of general and prospective application. It argues that China has not substantiated the precise content of the norm and that all that China has shown is repeated past conduct.

25. The evidence before the Panel demonstrates that, contrary to the United States' position, the Single Rate Presumption is a norm of general and prospective application. Despite the United States' assertions, it is not necessary for China to show that the detailed requirements of the Separate Rate Test are part of the precise content of the challenged norm. Additionally, as to general and prospective application, the evidence of consistent application, in combination with the United States' inability to identify even a single contrary example issued since 1991, demonstrates that the norm has been *invariably* applied by USDOC for more than a decade. This invariable conduct, together with evidence including USDOC Policy Bulletin 05.01 and the Antidumping Manual (which describe the presumption in a manner indicative of general and prospective application), as well as statements in individual determinations (which show that USDOC draws guidance from its previous decisions and practice), reveal that what is at issue goes beyond past conduct. The United States' attempts to downplay the language of these categories of evidence are, in each case, unconvincing. Consideration of all of the evidence together provides an overwhelming basis upon which the Panel must find the existence of a general and prospective norm.

26. On the merits, the United States has failed to rebut China's claims under Articles 6.10, 9.2 and the second sentence of Article 9.4 against the Single Rate Presumption. The Single Rate

[6] See China's Panel Request, WT/DS471/5, para. 26.

Presumption imposes a condition upon access to individual rates for Chinese and other NME respondents, without any justification under the *Agreement*. Contrary to the United States' assertions, the Appellate Body in *EC – Fasteners* was correct to find that singularity cannot be *presumed*. Although it can be permissible to group legally distinct respondents into single entities, an investigating authority must have facts and evidence in support of a determination to do so. USDOC's Single Rate Presumption operates in the absence of facts or evidence, and, therefore, cannot justify denial of the rights that each Chinese producer/exporter enjoys under Article 6.10, 9.2, and 9.4, second sentence, of the *Agreement.*

V. CHINA'S CLAIMS UNDER ARTICLES 6.1, 6.8 AND ANNEX II(1) REGARDING USDOC'S FAILURE TO REQUEST NECESSARY INFORMATION IN 30 CHALLENGED DETERMINATIONS

27. Having presumed, in each of the 13 challenged investigations, the existence of a PRC-wide entity, USDOC proceeded to determine a single dumping rate for the PRC-wide entity, including all of the producers/exporters included within it.[7] A PRC-wide entity rate was also determined in 17 challenged reviews.[8] In the remaining 8 challenged reviews, USDOC did not determine a PRC-wide entity rate.[9]

28. China challenges each of the relevant 30 determinations in which USDOC determined a rate for the PRC-wide entity under Articles 6.1, 6.8 and Annex II(1) of the *Agreement*. In each of these determinations, USDOC failed to request the information necessary to calculate a margin of dumping for the entity but nevertheless purported to determine an individual rate for the entity. China argues that, through failing to request this necessary information, USDOC failed to give notice of the required information and thereby also failed to provide appropriate rights of defense in the sense of Article 6.1. China also argues that, in each of these 30 determinations, USDOC resorted to facts available to replace the information necessary to calculate a margin of dumping for the PRC-wide entity even though it did not have a valid basis for doing so under Article 6.8 and Annex II(1) because it had failed to specify in detail the information required to determine the PRC-wide entity rate.

29. The United States has not denied that USDOC failed to request the information necessary to calculate a margin of dumping for the respondents included within the PRC-wide entity. The United States nevertheless argues that this failure was justified on the facts of certain groups of measures. However, China has demonstrated that USDOC's failure to request information was not justified in respect of any of the groups of measures addressed by the United States.

30. *First*, USDOC's express findings of non-cooperation by the PRC-wide entity in 20[10] of the relevant 30 challenged determinations cannot justify USDOC's failure to request the information required to calculate a margin of dumping for the PRC-wide entity. Each of these express findings of non-cooperation was based on *presumption* instead of fact because USDOC extended a finding of non-cooperation by a subset of respondents included within the PRC-wide entity to the fictional entity as a whole. However, USDOC had no basis in law or fact to attribute the conduct of one respondent to the other respondents included within the PRC-wide entity. The absence of information relating to one respondent in the PRC-wide entity does not obviate the need for information from the remaining respondents included within the fictional entity. There is no justification for replacing information required from *other* respondents included within the PRC-wide entity, in the absence of any request for that information from those respondents.

31. *Second*, USDOC's failure to request the necessary information cannot be justified in relation to the remaining 10[11] of the relevant 30 challenged determinations in which USDOC resorted to facts available without expressly saying so. Contrary to the United States' assertions, the disciplines of Article 6.8 and Annex II are not limited to instances in which an investigating

[7] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *PET Film* OI, *Furniture* OI.

[8] *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

[9] *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* AR9.

[10] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, *PET Film* OI, *Furniture* OI, *Furniture* AR7.

[11] *OTR Tires* AR5, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8.

authority expressly states that it has resorted to facts available. Rather, these disciplines apply whenever an investigating authority, in substance, replaces information from an interested party with facts available. China has shown that, in all 10 relevant challenged determinations, USDOC, in substance, replaced with facts available all or some of the information necessary to calculate a margin of dumping for the PRC-wide entity, including all of the producers/exporters included within that entity. Thus, USDOC acted inconsistently with Article 6.8 and Annex II(1) by replacing, with facts available, necessary information that USDOC had failed to seek from the producers/exporters included within the PRC-wide entity.

32. Even if the Panel were to take the view that USDOC did not resort to facts available in the relevant 10 determinations, USDOC's failure to request the required information in these determinations would nevertheless be inconsistent with Article 6.1. Contrary to the United States' assertions, the "information which the authorities require" under Article 6.1, is the information that the *Agreement* dictates an investigating authority requires in order to make a particular determination. If an authority is to determine an individual margin of dumping for a respondent consistent with the *Agreement*, the information necessary to calculate such a margin of dumping is objectively required by the authority. Accordingly, by purporting to determine an individual margin for the PRC-wide entity in each of the relevant 10 challenged determinations, without giving notice of the information necessary to calculate such a margin, USDOC acted inconsistently with Article 6.1 in each of these determinations.

VI. CHINA'S CLAIMS UNDER ARTICLE 6.8 AND ANNEX II(7) AGAINST USDOC'S USE OF ADVERSE FACTS AVAILABLE IN 30 CHALLENGED DETERMINATIONS AND THE USE OF ADVERSE FACTS AVAILABLE NORM

33. Whenever USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, USDOC systematically draws an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are adverse to the interests of that entity and each of the producers/exporters included within it. China refers to this process as the "Use of Adverse Facts Available norm". The process subject to the Use of Adverse Facts Available norm causes USDOC to select rates that, by design, are adverse to the interests of the NME-wide entity and each of the producers/exporters included within the entity, whenever it is triggered.

34. The evidence before the Panel demonstrates, contrary to the United States' position, that the Use of Adverse Facts Available norm is a norm of general and prospective application. Despite the United States' arguments, there is no need for China to prove that USDOC always selects the highest rate on the record for NME-wide entities. China does not challenge a *result* such as the selection of the highest rate on the record, but rather a selection *process*, which, when triggered, is based uniformly on inferences that are adverse to the interests of the NME-wide entity, and each of the producers/exporters included within it. Moreover, China does *not* allege that this process is triggered in each anti-dumping determinations involving countries deemed to be NMEs by the United States, but only in those determinations that involve a finding of non-cooperation by the NME-wide entity.

35. Moreover, contrary to the United States' assertions, the evidence as to general and prospective application also demonstrates that what is at issue goes beyond repeated past conduct. China has demonstrated that the norm has been consistently applied in a representative sample of all the investigations and reviews issued since China's WTO accession relating to countries deemed by USDOC to be NMEs. In combination with the United States' inability to identify even a single contrary example, this evidence demonstrates that the norm has been *invariably* applied by USDOC for more than a decade. This invariable conduct, together with evidence including the Antidumping Manual and statements by US courts (which describe aspects of the norm in a manner indicative of general and prospective application), as well as statements by USDOC in individual determinations (which show that USDOC relies on its past application of the norm as a justification and motivation for taking the same approach in new determinations) demonstrates that what is at issue goes beyond past conduct. An analysis of all this evidence together reveals a norm of general and prospective application that provides administrative guidance and sets expectations on a consistent and predictable basis.

36. On the merits, China has demonstrated that the Use of Adverse Facts Available norm necessarily results in a violation of Article 6.8 and Annex II(7) in defined circumstances. In particular, the norm is WTO-inconsistent when the non-cooperation that triggers the norm is presumed and not genuine non-cooperation, and when USDOC itself has not requested necessary information. This is because the duty to exercise special circumspection requires an authority to

have careful regard to all the facts and circumstances, including the fact that respondents have not genuinely failed to cooperate, or the fact that the authority has not sought necessary information. Inferences drawn from the facts and circumstances must be reasonable inferences in light of those facts and circumstances. Thus, when USDOC draws an adverse inference and selects adverse facts available based on *presumed* non-cooperation by an NME-wide entity, it necessarily violates Article 6.8 and Annex II(7). The same is true in circumstances where USDOC has not sought the necessary information to determine a rate for an NME-wide entity.

37. Despite the United States' assertions, USDOC's corroboration efforts in some cases cannot remedy the WTO-inconsistency of the challenged norm. A corroborated rate remains, and is explicitly described by USDOC as, "adverse facts available". At best, corroboration refines the specific rates chosen as adverse facts available and the degree to which that rate is adverse. Importantly, corroboration does not take account of the cooperation by respondents included within the NME-wide entity or USDOC's failure to request necessary information from those interested parties. Consequently, corroboration cannot cure the norm's inconsistency in these defined circumstances.

38. USDOC's application of the Use of Adverse Facts Available norm and selection of adverse facts available in 28 challenged determinations is also inconsistent with Article 6.8 and Annex II(7). In each of the relevant 28 challenged determinations in which the Use of Adverse Facts Available norm was triggered, USDOC considered the NME-wide entity to be non-cooperative based on *presumption* instead of fact. Specifically, in 20[12] of these 28 challenged determinations, USDOC extended a finding of non-cooperation by a subset of respondents included within the PRC-wide entity to the entity as a whole. In the remaining 8[13] of these 28 challenged determinations, USDOC pulled forward the finding of non-cooperation from an earlier phase of the proceeding, triggering the Use of Adverse Facts Available norm by continuing to presume non-cooperation in the instant review. In the circumstances of these determinations, even assuming *arguendo* that USDOC was justified to resort to facts available to replace missing information, the duty of special circumspection means that USDOC was not justified in drawing adverse inferences and selecting adverse facts available.

39. China has also demonstrated that USDOC failed to exercise special circumspection and select reasonable replacements for the missing information in *Diamond Sawblades* AR4 and *OTR Tires* AR5. In these two challenged determinations, the Use of Adverse Facts Available norm was *not* triggered because USDOC did not consider the PRC-wide entity to be non-cooperative but rather acknowledged that the PRC-wide entity and the respondents included within it had been fully cooperative. In these cases, even assuming *arguendo* that USDOC was justified to resort to facts available to replace missing information, USDOC failed to follow a process designed to select the "best" facts available for the PRC-wide entity, including all of the respondents included within that entity. This is because USDOC partially relied on adverse facts available rates to replace the missing information despite its finding of *cooperation* by the PRC-wide entity.

40. In response to the Panel's questions, the United States did not deny that USDOC did *not* use special circumspection in the sense of Article 6.8 and Annex II(7) in *Diamond Sawblades* AR4, *OTR Tires* AR5, as well as the other 8 reviews[14] in which USDOC did not make an *express* finding of non-cooperation in the same phase of the proceeding. Instead, the United States argued that there was no occasion for USDOC to use special circumspection because USDOC did not apply facts available to the PRC-wide entity, including the producers/exporters included within that entity. However, as noted above, in substance, USDOC replaced information with facts available in each of these 10 determinations and was, therefore, subject to the disciplines of Article 6.8 and Annex II(7). USDOC failed to comply with these disciplines.

VII. CHINA'S CLAIM UNDER ARTICLE 9.4, FIRST SENTENCE, REGARDING THE RATE DETERMINED IN 30 CHALLENGED DETERMINATIONS

41. Finally, China argues that in each of the 30 challenged determinations in which USDOC determined a rate for the PRC-wide entity, USDOC acted inconsistently with Article 9.4, first sentence. Article 9.4 applies whenever a producer/exporter has "not {been} included in the

[12] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, *PET Film* OI, *Furniture* OI, *Furniture* AR7.

[13] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8.

[14] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8.

examination". The question whether Article 9.4 applies to an individual producer/exporter is one of legal characterization that must be determined by reference to the facts of each case. A *properly* determined individual margin of dumping results from "examination" of a respondent, and therefore is *not* subject to Article 9.4. However, the same is not necessarily true for an *improperly* assigned individual rate which may *not* have resulted from "individual examination" in the sense of the *Agreement.* In such a case, a Member may act inconsistently with Article 9.4 *in addition* to provisions addressing the proper process for determining an individual rate such as Articles 6.1, 6.8, and Annex II.

42. The evidence before the Panel indicates that the PRC-wide entity and most of the individual respondents included within the entity were *not* properly included in the examination in the sense of Article 9.4, first sentence. In particular, the severe flaws in USDOC's *process* for determining the PRC-wide entity rate mean that the PRC-wide entity was *not* properly subject to individual examination. Specifically, USDOC requested the information necessary to calculate a margin of dumping from few, if any, respondents included in the entity. That being the case, USDOC was obliged to arrive at the *outcome* specified under the *Agreement*; namely, application of a rate consistent with Article 9.4.

43. Nevertheless, USDOC failed to adhere to the disciplines of Article 9.4, first sentence, in each of the relevant 30 challenged determinations. In many of these 30 challenged determinations, the rate assigned to the PRC-wide entity is clearly above the permissible level, because it is higher than even the highest calculated margin in the same phase. In the remaining relevant challenged determinations, other comparators show that the rate assigned to the PRC-wide entity is *not* a neutral all others rate that is appropriate and non-discriminatory. Accordingly, China has demonstrated that USDOC acted inconsistently with Article 9.4, first sentence, in all the 30 challenged determinations in which it determined a rate for the PRC-wide entity.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. At stake in this dispute is whether Members have the ability to "unmask" dumping concealed by a pattern of export prices which differ significantly, and whether Members have the ability to provide a remedy for dumping by exporters in non-market economy countries, such as China. China proposes interpretations of the AD Agreement that are divorced from the customary rules of interpretation. The Panel should find that all of China's proposed interpretations of the AD Agreement simply are not supported by the ordinary meaning of the text of the agreement, in context, and in light of the object and purpose of the agreement. Accordingly, all of China's legal claims lack merit, and should be rejected.

II. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

2. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination." It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Accordingly, China, as the complaining party, must establish a *prima facie* case before the United States, as the defending party, has the burden of showing consistency with that provision.

III. CHINA'S CLAIMS UNDER ARTICLE 2.4.2 OF THE AD AGREEMENT

3. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." Through its "as applied" challenges in this dispute, China seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance China's efforts in this regard.

China's Claims Related to the Coated Paper, OCTG, and Steel Cylinders Investigations

4. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must 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." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically

different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

7. China "acknowledges that an investigating authority is not bound by [the] *Anti-Dumping Agreement* to structure [its] enquiry into the existence of a relevant pricing pattern in any specific manner," but nevertheless proposes a narrow interpretation of the "pattern clause" that would impose rigid, specific requirements on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. Such requirements are not supported by the text of the second sentence of Article 2.4.2 of the AD Agreement.

8. China argues that one of the "key characteristics" of a pattern is that "the observations comprising the pattern may be discerned − that is, distinguished − from that which is *not* part of the pattern." China's arguments lack any foundation in the text of the second sentence of Article 2.4.2 or in logic. On its face, the text of Article 2.4.2 contemplates *a* pattern of export prices that would transcend multiple purchasers, regions, or time periods. Furthermore, the relevant "pattern" is "a pattern of export prices *which differ significantly* among different purchasers, regions, or time periods." Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. Logically, an investigating authority might examine all of an exporter's export sales in search of "a pattern," and likely may find that "a pattern" exists which consists of all of the exporter's export sales, including lower export prices to certain purchasers, regions, or time periods and higher export prices to other purchasers, regions, or time periods.

9. In each of the challenged investigations, the USDOC applied a two-part test − the *Nails* test − to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by respondents. As reflected in the discussion in the final issues and decision memoranda, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" of Article 2.4.2.

10. China argues that the USDOC "failed properly to identify as 'significant', in a quantitative, *statistical* sense, the differences among export prices that it found to be a part of a relevant pricing pattern." The premises of China's statistical arguments are flawed. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause" of the second sentence of Article 2.4.2. Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake the particular statistical analysis discussed by China, even if the investigating authority chooses to utilize certain statistical tools. The basic logical premise of China's arguments is equally flawed. China contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis. However, the *Nails* test does not involve the type of statistical analysis discussed by China. China's statistical criticism of the *Nails* test simply is inapposite. China seeks to replace the USDOC's balanced approach with one of the extremes noted by the USDOC, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is China's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

11. China argues that there is a "[q]ualitative dimension of 'significant' price differences" and that "it is appropriate to consider whether quantitative differences in prices *reflect factors unconnected with targeted dumping*, particularly where variations in price reflect normal or regular dynamics of the relevant product market." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. That latter question is not germane to an application of the "pattern clause." Additionally, China's reasoning is unsound. Low prices of sales, if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing. In the challenged investigations, the USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 by not doing so.

12. China argues that, "in order to identify a meaningful pattern, the investigating authority must assess such a pattern by observing the prices of individual export sales transactions." However, nothing in the text of the second sentence of Article 2.4.2 prohibits the use of weighted averages in connection with an investigating authority's analysis of a "pattern" within the meaning of the "pattern clause." The text of the second sentence of Article 2.4.2 simply does not support China's proposed interpretation, and actually supports the opposite conclusion. The proper focus is not on individual export prices *per se*, or on differences between export prices to a given purchaser, region, or time period, but on differences in export prices *among different* purchasers, regions, or time periods. China is also incorrect to suggest that the use of weighted averages would lead an investigating authority to "overlook the individual prices." When the USDOC undertook analyses pursuant to the "pattern clause" in the challenged investigations, it took into account all of the export prices for U.S. sales reported by each exporter during the period of investigation.

The "Explanation Clause"

13. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize the alternative comparison methodology only "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." The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

14. In the challenged investigations, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the weighted average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The USDOC concluded that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. The USDOC provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the "explanation" that the USDOC provided in the challenged investigations is not inconsistent with Article 2.4.2.

Application of the Average-to-Transaction Comparison Methodology to All Sales

15. China claims that the USDOC acted inconsistently with Article 2.4.2 in the challenged investigations by applying the alternative, average-to-transaction comparison methodology to all sales when, in China's view, "the exceptional [average-to-transaction] comparison methodology

under Article 2.4.2 of the *Anti-Dumping Agreement* must be limited solely to sales comprising the relevant pricing pattern" and "may *not* be applied to all sales." China's claims lack merit. When the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is constrained as China proposes. The Appellate Body did not definitively declare in *US − Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.

16. China's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping." "Masked" or "targeted dumping" involves both sales below normal value, which are evidence of dumping, as well as sales above normal value, which may mask such dumping. "Targeted dumping" is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced sales, and by ensuring that the higher-priced sales do not offset dumping that properly should be evidenced by the lower-priced sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

17. China's arguments also are at odds with other prior findings of the Appellate Body. For example, given that the Appellate Body has found that dumping is an exporter-specific concept and the margin of dumping must be determined for the product under investigation as a whole, it would be an untenable interpretation of Article 2.4.2 to require an investigating authority to limit its application of the average-to-transaction comparison methodology to transactions "for which 'targeted dumping' has been found." China also departs from prior Appellate Body findings when it suggests that the alternative, average-to-transaction comparison methodology should be applied on a model-specific basis. That would appear to be directly contrary what the Appellate Body said about the so-called "targeted dumping" provision in *EC − Bed Linen*.

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

18. China's claims that the USDOC acted inconsistently with Article 2.4.2 of the AD Agreement by using zeroing in connection with the average-to-transaction comparison methodology are without merit. The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. China is incorrect when it argues that "the logic of the Appellate Body's reasoning" in prior disputes means that zeroing is impermissible when the alternative, average-to-transaction comparison methodology is used to determine "margins of dumping" under the second sentence of Article 2.4.2.

19. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes. That the average-to-transaction comparison methodology is an exception to the normal comparison methodologies, and that it can be used to "unmask targeted dumping" is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law, in particular the "principle of effectiveness."

20. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical

equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the challenged antidumping proceedings, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

21. The meaning of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement, which reflect that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked and that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

China's Claims Related to the PET Film Third Administrative Review

22. China's claims that "the United States acted inconsistently with Article 9.3 of the *Anti-Dumping* Agreement and Article VI:2 of the GATT 1994 by applying zeroing procedures in an administrative review of the anti-dumping order concerning PET Film from China" lack merit. China's claims fail because they are dependent upon the Panel finding that the use of zeroing is impermissible when applying the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. However, as we have demonstrated, zeroing is permissible − indeed, it is necessary − when applying the alternative, average-to-transaction comparison methodology. Accordingly, when an antidumping duty is calculated in an administrative review pursuant to the second sentence of Article 2.4.2 − *i.e.*, using the alternative, average-to-transaction comparison methodology, with zeroing − that antidumping duty necessarily does not exceed the margin of dumping as established under Article 2 of the AD Agreement. On the contrary, it is, by definition, the margin of dumping as established under Article 2 of the AD Agreement.

23. While the Appellate Body has found previously that the use of zeroing in administrative reviews, including in connection with the use of an average-to-transaction comparison methodology, is inconsistent "as such" with the AD Agreement, the Appellate Body has never found that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. As with investigations, the permissibility of using zeroing in administrative reviews when applying the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is an issue of first impression for the Panel.

IV. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES HAS BREACHED ARTICLES 6.10 AND 9.2 ON ACCOUNT OF AN ALLEGED 'SINGLE RATE PRESUMPTION'

A. China Has Failed To Establish a Rule Or Norm Of General And Prospective Application That May Be Challenged "As Such"

24. China's "as such" claims cannot be sustained because China's evidence fails to establish that the so-called Single Rate Presumption is a "rule" or "norm of general and prospective application" that can be challenged "as such." In particular, China has not demonstrated that USDOC's treatment of Chinese companies rises to the level of a measure challengeable "as such", that is, a measure that expresses a rule or norm of general and prospective application. Even assuming that China has demonstrated the existence of such a measure, "particular rigor is required … to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document." China has not met this high evidentiary burden. Specifically, a complainant in order to discharge its high burden must demonstrate, at the very least: (1) that the rule or norm embodied in that measure is attributable to the responding Member; (2) the precise content of the rule or norm; and (3) that the rule or norm has general and prospective application.

25. The extent of China's arguments with respect to these three elements rests with its faulty claim that the proffered evidence establishes that the so-called Single Rate Presumption is a rule or norm of general and prospective application, the third element.

26. With respect to Policy Bulletin 05.1, upon which China relies as evidence of a purported rule or norm of general and prospective application, China quotes language it describes as a "statement of policy." However, the precise language China quotes is not from the section in Policy Bulletin 05.1 that it actually titled "Statement of Policy," but in the "Background" section. The referenced language is also speaking only to an "NME antidumping investigation," and thus cannot be extended to periodic review proceedings. The Antidumping Manual, upon which China similarly relies, is also not availing to China's argument. It clearly states on the very first page that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish DOC practice."

27. China also tries to establish that the alleged Single Rate Presumption has general and prospective application by attempting to import the panel's findings in *US − Shrimp II (Viet Nam)*. A prior panel's findings cannot alleviate China's own burden. Moreover, in any event, the panel's findings in that dispute concern an alleged norm which differs in material respects from the measure China has raised here.

28. China cites to prior USDOC determinations involving non-market economy cases. These documents do not help China meet its burden of establishing that the so-called "single rate presumption" is an unwritten measure. Moreover, it is critical to note that the referenced statements are taking place in the context of specific investigations rather than any document that purports to reflect a general and prospective measure. Thus, even under China's presentation, these documents only illustrate what USDOC has practiced in particular instances in the past. Legally, past practice is insufficient to establish the existence of a measure because repeated application in and of itself only proves that repeated applications occurred.

29. Moreover, USDOC is not applying the same outcome to every case without consideration of the record evidence or a party's arguments, but evaluates, in each instance where a party provides such information and argument, whether that party is under common government control. Moreover, the Government of China could request that USDOC re-examine its NME status under U.S. antidumping duty law. Given that this flexibility exists, and USDOC does not automatically reach the same outcome in each case, China has failed to demonstrate that this is anything more than a "consistent practice" that USDOC applied in a discrete number of cases.

30. Finally, China cites certain decisions from U.S. domestic courts. The quoted language from these decisions do not establish what USDOC will do in the future, but speaks to it being "within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy" and that such a presumption − because it is not required by U.S. law − is subject to change at any time. More fundamentally, these decisions − like those at issue in in *Thailand − Cigarettes (Philippines)* − are necessarily decisions evaluating particular complaints rather than authoritative statements of future policy.

B. China Has Misapplied The Legal Analysis

31. Legally, China fails to recognize that the critical issue in the provisions that it invokes is that not every legal entity is necessarily a distinct exporter or producer under the AD Agreement. To the contrary, these provisions permit investigating authorities to treat the export activity of multiple companies as the pricing behavior of a single exporter or producer. Factually (and legally), China fails to address the basis for USDOC's treatment of Chinese firms as part of a single government entity (China's Accession Protocol and Working Party Report), or USDOC's continued finding that China should be treated as an NME. Moreover, China does not address that the information solicited by the United States allows Chinese firms to demonstrate whether they should be treated as part of a common Chinese government entity or not. Because of such failings, China's various claims of breach are deficient and must fail.

32. In applying Article 6.10 of the AD Agreement, the initial question is to identify the entity, or group of entities, that constitute each known "exporter" or the known "producer." China has no

basis for asserting that related entities, simply because they may be organized as a formal matter as separate companies, must be treated as individual exporters for the purpose of Article 6.10. Similarly, Article 9.5 of the AD Agreement establishes an obligation to carry out a review to determine an "individual" margin of dumping for a new shipper "provided that the[] exporter[] or producer[] can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." This provision indicates that such an exporter that cannot demonstrate that it is not related to an exporter or producer subject to the duty would not be entitled to an "individual" margin of dumping.

33. Accordingly, depending on the facts of a given situation, an investigating authority may reasonably consider actual commercial activities and relationships of companies in deciding whether they should be treated as a single exporter or producer as opposed to simply accepting their nominal status as legally distinct companies. This textual analysis is consistent with the Appellate Body findings in *EC – Fasteners*, which in turn approvingly drew from the panel report's findings in *Korea – Certain Paper*.

34. Article 9.2 provides that "when" antidumping duties are being imposed, they shall be collected in appropriate amounts on a non-discriminatory basis from all sources, *i.e.*, imposed on imports from all sources found to be dumped and at the appropriate rate. Differences in duty rates must reflect differences in the dumping margin for the source.

35. Contrary to China's arguments, nothing in the text of Article 9.2, as with the text of Article 6.10, precludes USDOC from treating multiple companies as a single entity, including, where appropriate, a China-government entity. China's attempts to rely on *EC – Fasteners* to avoid this interpretation is misplaced because it ignores the Appellate Body's conclusion in that dispute that "if the State instructs or materially influences the behavior of several exporters in respect of prices and output, they could be effectively regarded as one exporter … and a single margin and duty could be assigned to that single exporter."

C. China's Protocol Of Accession Supports Treating Companies as Part of a Single PRC Entity in Antidumping Proceedings

36. China's Protocol of Accession supports treating companies as part of a single China-government entity in antidumping proceedings. Under the Protocol, a Member can presume that non-market economy conditions prevail in China, as the starting point for a discussion about the extent to which market economy conditions actually prevail, to decide whether market treatment for Chinese respondents is warranted. This approach preserved for Members the flexibility to adjust their antidumping policy and practice depending on the progression of China's reforms.

37. The Accession Protocol, particularly Article 15, provides important context in terms of deciding which entities in China should be considered as a single entity for purposes of Article 6.10. In particular, the Protocol supports USDOC's: (1) decision to calculate the normal value for the industry in question based on an NME methodology and its continued use of this methodology; (2) recognition that multiple companies may comprise a single exporter or producer, *i.e.*, a single China-government entity; and (3) understanding regarding export price and output that the Government of China exerts control or material influence over entities located in China and can impact such decisions.

1. Normal Value

38. Specifically, Paragraph 15 of the Accession Protocol indicates that China confirmed on accession that importing WTO Members need not calculate normal value on the basis of Chinese prices or costs for an industry subject to an antidumping investigation. Paragraph 15 further indicates, in part, that "the non-market economy provisions" of paragraph 15 shall no longer apply to a specific industry or sector in situations where China "establish[ed], pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector."

2. Treating Multiple Companies in China as Part of a China-Government Entity

39. The descriptions of its economy in the Working Party Report indicated that China planned to develop an economy where the State continued to play a predominant role. Members expressed concern about the significant level of influence of the Government of China on its economy and how such influence could affect trade remedy proceedings. Paragraph 15 of the Accession Protocol specifically reflects the concern among Members that government influence may create special difficulties in determining cost and price comparability in the context of antidumping investigations, and that a strict comparison with Chinese costs and prices might not always be appropriate.

40. Thus, underlying the Accession Protocol is evidence that non-market economy conditions prevail in China until otherwise demonstrated. The understanding that market economy conditions do not prevail and the logical consequence that this entails state control over firms, resulting in treating certain enterprises as parts of a government-controlled entity, is not inconsistent with Article 6.10. The Accession Protocol thus supports the conclusion that USDOC may consider that there exists a China-government entity to which exporters belong.

3. Pricing and Output of Exports

41. China's Accession Protocol also provides the basis by which an importing Member may presume that China controls or materially influences all entities and thereby consider all exporters or producers as part of a single China-government entity absent positive evidence to the contrary. USDOC's finding that the Government of China is legally or operationally in a position to exercise restraint or direction over entities located in China and can impact their decisions about the production, pricing, or costs of products destined for consumption in China is not subject to dispute. As a result, given that China's Accession Protocol provides importing Members the basis on which to presume that the Government of China exerts control or material influence over commercial entities with respect to the pricing and output of products destined for consumption in China, it is also reasonable to presume that that the Government of China simultaneously exerts control or material influence over these entities with respect to the pricing and output of identical or similar products destined for export.

D. The Findings From *EC-Fasteners* Are Inapposite

42. As an initial matter, the United States believes the analysis in *EC – Fasteners* to be internally inconsistent. Specifically, in *EC – Fasteners*, the Appellate Body correctly recognized that state control is a basis to treat nominally distinct entities as a single entity, yet rejected doing so on the basis of China's Accession Protocol, which memorializes precisely those types of concerns. This dispute, however, is factually different than *EC – Fasteners* as well as *US – Shrimp II*.

43. First, USDOC actually collects and evaluates information that goes directly to whether Chinese respondents should be afforded individual treatment or not. USDOC's separate rate analysis allows for an in-depth and individualized review of a company's relationship with the Chinese government. *EC – Fasteners* did not preclude such examination, but rather noted the examination in that dispute, the IT Test, was flawed because the relevant criteria denied individual treatment to producers and exporters with "little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State." Here, China makes no similar claim against USDOC's Separate Rate Test, but rather takes issue that any such test is required at all.

44. Second, USDOC has engaged in a determination that China is a non-market economy. At no time during the 13 challenged investigations and 19 challenged reviews proceedings did China, or any Chinese exporter, request that USDOC reconsider China's non-market economy status. Thus, China cannot invoke *EC – Fasteners* and *US – Shrimp II* to argue that USDOC erred by designating China a non-market economy solely on the basis of the Accession Protocol.

45. Third, the evidence China puts forward for its as-applied claims is deficient here. Principally, China relies on Table SRP, which appears to be a compilation of quotes from various antidumping proceedings. This table proves nothing because it simply provides extracted generalized quotes

rather than any evidence of concrete treatment by USDOC with respect to any of the particular participants in any of the respective proceedings. For example, nowhere in Table SRP does China present evidence to indicate whether the China-government entity was under examination for purposes of Article 6.10. Likewise, China's table fails to demonstrate as-applied breaches of Articles 6.10 and 9.2 because it is does not demonstrate that any actual exporter or producer failed to receive an individual margin or confirm whether circumstances that triggered such a denial were inconsistent with the AD Agreement.

46. In sum, USDOC's conclusion that multiple companies in China are part of the China-government entity is based on a permissible, and, indeed, eminently reasonable, interpretation of Articles 6.10 and 9.2. Therefore, the United States requests that the Panel dismiss China's claims under both these provisions, both "as such" and as applied in the 32 challenged determinations.

V. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

47. Article 9.4 applies *only* to the "anti-dumping duty applied to imports from exporters or producers not included in the examination." In other words, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. Article 9.4 is thus inapplicable either to the alleged unwritten measure "as such" or as applied because China has not established this predicate condition. China makes no attempt to demonstrate that the China-government entity was not included in the examination, and therefore, Article 9.4 is implicated. In any event, in each of the 13 challenged antidumping proceedings, the China-government entity received its own rate, and thus, Article 9.4 does not apply. Beginning with the original investigations in each of the 13 challenged proceedings the China-government entity received its own rate based on facts available consistent with Article 6.8 of the AD Agreement.

48. China argues that Article 9.4 does not allow an investigating authority to differentiate between those non-selected companies that are uncooperative, and those non-selected companies that are cooperative. Rather, according to China, the phrase "any anti-dumping duty applied" means that there can only be one rate applied to the non-selected companies. The text of Article 9.4 of the AD Agreement actually provides that *any* antidumping duty for those producers or exporters not under examination "shall not exceed" the weighted-average margin of dumping for the investigated exporters or producers, and restricts the use of zero and *de minimis* margins and margins based on facts available in calculation of that ceiling. China thus improperly seeks to create a new obligation to calculate a "single" rate.

VI. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

A. China Has Failed To Establish That USDOC's Use Of Facts Available In Assigning A Rate To The China-Government Entity As A Rule Or Norm Of General And Prospective Application That May Be Challenged "As Such"

49. China has not established that USDOC's use of facts available in assigning a rate to the China-government entity constitutes a measure which expresses a rule or norm of general and prospective application. Specifically, China fails to specify the purported norm's precise content or that it has general and prospective application.

50. China appears to allege that the content of this norm is that USDOC selects "adverse facts" when USDOC finds non-cooperation by the China-government entity. China fails though to explain what qualifies a fact as adverse. The investigating authority does not know whether the information it has selected is indeed adverse or potentially favorable because the ideal information is missing. China also makes several inconsistent statements with respect to whether a finding of non-cooperation − what China refers to as the "trigger condition" for the norm − is also part of this alleged norm, which cast further doubt on the content of this norm.

51. Furthermore, China has not demonstrated a norm of general and prospective application that may be challenged as such. The determination to apply facts available to the China-government entity, and its selection of the rate to apply to the China-government entity, continues to be a case-by-case determination that will reflect the facts of a given case. Moreover, the U.S.

statutory and regulatory framework provides USDOC with the discretion to make such a determination based on the facts and information before it.

52. The evidence China submits in support of the existence of the norm is also clearly deficient. China's sample of USDOC's NME cases over a 12-year period does not demonstrate the existence of a norm or rule of general and prospective application but rather demonstrates that the use of facts available varies in every proceeding based on the facts and circumstances at issue. Likewise, the Antidumping Manual merely describes instances in which USDOC "may" apply adverse inferences in selecting the available facts to determine the rate for the China-government entity, not any general and prospective rule. The judicial decisions cited by China are adjudications over issues decided in prior antidumping proceedings and do not constitute a pronouncement on what USDOC will do prospectively. Finally, USDOC's own statements cited by China provide no insight into the challenged determinations as these statements provide an incomplete context for the selection of facts available, as demonstrated by the analysis and actual selection in the challenged cases.

B. China Has Misapplied The Legal Analysis With Respect To Article 6.8 And Annex II Of The AD Agreement

53. China's interpretation of Article 6.8 and Annex II of the AD Agreement are flawed in key respects. First, China misinterprets the terms "any interested party" and "necessary information" in Article 6.8 to argue that USDOC must request from each company within the China-government entity information pertaining to the calculation of a dumping margin, *i.e.*, issue a dumping questionnaire to each of these companies, before it resorts to facts available. Such a reading of Article 6.8 is not supported by its text, nor shared by any previous panel or the Appellate Body. Moreover, such an interpretation would seriously undermine the ability of investigating authorities to determine appropriate dumping margins and "to proceed[] expeditiously" in reaching determinations in accordance with Article VI of the GATT 1994 and the AD Agreement. Indeed, China's strained interpretation disregards that an investigating authority requires information for determinations separate from the dumping margin determination.

54. Second, China argues that where an investigating authority collapses multiple entities into a single exporter, the investigating authority may rely on facts available only if it requested this specific information from all companies within that exporter. China is incorrect. To avoid a potential scenario in which the China-government entity shifts its exports through the producer/exporter of the China-government entity which is assigned the lowest rate, an investigating authority must apply the same antidumping duty rate to all of the China-government entity's exports. Moreover, if companies within the China-government entity do not provide requested information, the investigating authority must determine what this means for the China-government entity. Further, where a company that is part of the China-government entity has been notified of and fails to respond to an initial request for quantity and value information, the investigating authority may find that the company, and by extension, the China-government entity, has failed to respond to a request for necessary information and has significantly impeded the progress of the proceeding. Finally, China mischaracterize the present dispute because it ignores that USDOC may need to rely on facts available if it did not have the necessary information to calculate a dumping margin for the NME-government entity because of the non-cooperation of *all* or *nearly all* companies within the entity.

55. Third, China misinterprets the term "special circumspection" as stated in paragraph 7 of Annex II. China argues the term requires the investigating authority to consider whether it requested such information from each of the members of the China-government entity. Article 6.8 does not limit the type of information or the parties from whom the information was requested in the way China advocates here. Moreover, an investigating authority (such as USDOC) may find that certain companies within the NME-government entity have failed to cooperate by failing to respond to an initial request for quantity and value information or failing to provide requested information pertaining to the actual calculation of a dumping margin. In each instance, the investigating authority may also find that such a failure has significantly impeded the proceeding.

C. USDOC's Use Of Facts Available With Respect To The China-Government Entity Is Not "As Such" Inconsistent With Article 6.8 And Annex II

56. Nothing in Article 6.8 or Annex II limits the application of facts available to those facts that are *most favorable to the interests* of a party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to which facts should be selected. Rather, the permission to apply the "facts available" in making a determination pursuant to Article 6.8 means that an administering authority, when faced with a situation in which necessary facts have not been supplied, may apply those facts that are otherwise available − and will have to make inferences in deciding to how to select from the available facts. As Annex II(7) recognizes, when facts available are applied "this situation could lead to a result which is less favourable to the party than if the party did cooperate." Thus, the use of an "adverse inference" in this context does not mean the application is punitive, it simply reflects that the selection of information from the available information takes into account the party's failure or refusal to provide the necessary information, as the Appellate Body found in *US − Carbon Steel (India)*. Moreover, USDOC's use of an "adverse inference" in this context is not based upon a "speculative adverse inference" as was employed in *China-GOES*, where the investigating authority ignored *substantiated facts*.

57. Annex II of the AD Agreement establishes certain requirements when investigating authorities must resort to facts available to make their determinations. By following the safeguards established in Annex II, investigating authorities are able to select information that is considered the "best information available" consistent with the aim of Article 6.8 and Annex II to allow administering authorities to make determinations and complete their investigations.

58. Where USDOC relies on secondary information, the relevant domestic instruments direct that USDOC "shall, to the extent practicable, corroborate that information from independent sources reasonably at [its] disposal." The relevant regulation defines the term "corroborate" to mean that USDOC "will examine whether the information to be used has probative value." In doing so, USDOC considers the reliability and relevance of the information to be used as facts available. Where USDOC finds the information is unreliable or not relevant to the non-cooperating party being examined, USDOC rejects such information as "facts available", as required by law. In fact, the USDOC rejected certain information as "facts available" in many of the challenged determinations.

59. The actual determinations referenced by China also demonstrate there is no rule or norm of general or prospective application when USDOC selects facts available to be applied to the non-cooperating China-government entity, or any other non-cooperating party for that matter. USDOC is neither *prevented* from evaluating the information on the record in selecting information to be used as facts available, nor is it *prevented* from exercising special circumspection in determining whether the information selected has probative value. These determinations demonstrate that USDOC engaged in the required "comparative, evaluative assessment" of the information it may use as a proxy for the China-government entity's rate.

60. China's second and third claims concerning the purported norm are inconsistent with DSU Article 6.2 because China did not raise these claims on an "as such" basis in its panel request. These claims concern USDOC's initial decision to apply facts available, *i.e.*, its finding that the China-government entity is non-cooperative on the basis of the non-cooperation of one or more companies within the China-government entity. Accordingly, these claims must be rejected because they are outside of the Panel's terms of reference, and are not otherwise identified by China as being part of a norm of general and prospective application.

D. China Has Not Established Its As-Applied Claims

61. As an initial matter, in seven of the challenged determinations, USDOC did not make a determination based on "facts available". Rather, in these particular determinations, USDOC assessed duties at the cash deposit rate and thus, the duty rate previously established from a previous period of investigation or review continued to apply. Where USDOC did make a facts available determination in a challenged proceeding, the evidence demonstrates that USDOC notified companies within the China-government entity of the necessary information required, and appropriately determined that a failure to respond to this request for information warranted the use of facts available for the China-government entity. In these 19 determinations, USDOC

applied facts available, using one of the following, depending on the information available: (1) a rate from the domestic industry's application; (2) a rate calculated for a cooperative respondent in a previous period of review; or (3) a rate calculated from a cooperative respondent's transactional information in the current period of investigation. Each determination met the requirements under Article 6.8 and Annex II: each had a factual foundation; no substantiated fact contradicted the information selected; and nothing indicated the information selected was an unreasonable replacement for the missing information.

VII. THE PANEL SHOULD REJECT CHINA'S CLAIMS THAT USDOC ACTED INCONSISTENTLY WITH ARTICLE 6.1 OF THE AD AGREEMENT

62. Per the text itself, Article 6.1 concerns proper notice of the information required by an investigating authority, not the substantive type of information it must seek. Article 6.1 does not apply if the investigating authority does not require certain information, or is not asking for such information at that point in the proceeding. Thus, even assuming, *arguendo*, that the investigating authority is seeking the wrong information in determining a dumping margin for the NME-government entity, Article 6.1 is concerned with whether the investigating authority gave notice of the information that it has determined that it requires and is seeking from parties.

63. Article 6.1 must also be read in conjunction with Article 6.8 and Annex II of the AD Agreement. Where the investigating authority has properly determined that a party has failed to respond to a request for information or otherwise significantly impeded the proceeding, despite having notice of the request and the consequences of not cooperating, Articles 6.8 and 6.1 together do not require the investigating authority to continue to allow that party opportunities to provide information. Therefore, China's argument that an investigating authority must request the specific information necessary for the calculation of a dumping margin from all companies within the NME-government entity is unsupported by the text of Article 6.1, and also ignores the realities of an antidumping proceeding and the different circumstances of all interested parties. Moreover, in each of the 26 challenged proceedings, the evidence confirms that USDOC (1) properly notified all companies within the China-government entity of the information which USDOC required, and (2) permitted companies within the China-government entity ample opportunity to present in writing all evidence which they considered relevant.

VIII. CONCLUSION

64. For the foregoing reasons, the United States respectfully requests that the Panel reject China's claims.

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. China continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. China still has failed to establish that the United States has breached any provision of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. CHINA'S CLAIMS RELATED TO USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT ARE WITHOUT MERIT

2. China's proposed interpretations are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely. While China attacks the *Nails* test applied by the U.S. Department of Commerce ("USDOC") in the challenged antidumping investigations, China does not describe how, in its view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

A. The "Pattern Clause" Does Not Require Investigating Authorities To Utilize any Particular Type of Statistical Analysis

3. China insists that it is "not arguing that the *Anti-Dumping Agreement* compels the adoption of any particular statistical method or particular standard deviation threshold or multiple thereof." However, at every turn, the arguments China advances belie that assertion. China's arguments are all premised on the notion that a statistical probability analysis − or China's own version of such an analysis − is the standard against which the *Nails* test is to be measured. We have shown that USDOC makes *no* assumptions (whether implicit or explicit) concerning the probability distribution, let alone assume the existence of a particular type of probability distribution, and we have not suggested that the *Nails* test would meet the requirements for statistical probability analysis as understood by China or even "as generally recognized in the field of statistics." That, of course, is not the standard against which the *Nails* test is to be measured. The question before the Panel, which China appears to misunderstand, is whether USDOC's application of the *Nails* test in the challenged investigations is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. We have shown that it is.

4. China refers to the Appellate Body report in *US − Upland Cotton (Article 21.5 − Brazil)*. There are no parallels between the facts in that dispute and the facts here, and that portion of the *US − Upland Cotton (Article 21.5 − Brazil)* Appellate Body report does not contain findings that are relevant to the Panel's resolution of this dispute.

5. China asserts that, "USDOC designed the test as a statistical tool to conduct a probability analysis for purposes of assessing whether a set of observed export prices differed in a relevant way." China's assertion is wrong, and it is plainly contradicted by what USDOC said *at the time* it made its determinations.

6. China's interpretation of the "pattern clause" limits it to identifying random and aberrational outliers, or "unusually low" export prices. This interpretation, however, is incorrect. The terms of the second sentence of Article 2.4.2 do not refer to "unusually low export prices." Further, China's position is contrary to the logic of the second sentence of Article 2.4.2. Dumping may be "targeted" even in a situation where lower-priced sales are not "unusual" or "outliers." Lower prices may not be unusual and may not appear to be outliers at all.

B. The "Pattern Clause" Does Not Require Investigating Authorities To Analyze Export Sales on an Individual Basis

7. China argues that the second sentence of Article 2.4.2 of the AD Agreement establishes a "legal requirement to focus on individual export prices" and refers to the Appellate Body report in *US – Zeroing (Japan)*. To the extent that the Panel takes into account the Appellate Body's discussion in paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report, it should exercise caution in doing so. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the alternative, average-to-transaction comparison methodology. Furthermore, the Appellate Body expressly was not making findings of legal interpretation that resulted from an analysis undertaken pursuant to the customary rules of interpretation. Additionally, the Appellate Body simply was not addressing the question of whether or not it is permissible for an investigating authority to use weighted averages when examining export prices to determine if a "pattern" exists. While China quotes from the Appellate Body report, it offers no explanation for its assertion that the statements it quotes "strongly support China's interpretation."

8. China contends that its reading of the second sentence of Article 2.4.2 "ensures *parallelism* between the analysis of whether the W-T comparison methodology may be used and the substantive nature of the W-T comparison methodology, which by definition focuses on individual export prices." However, China's proposed reading lacks textual and contextual support.

9. China complains that "[i]t would be incongruous to interpret this text to permit an investigating authority to overlook the individual prices." We have explained that USDOC did not "overlook" any individual prices. Calculating weighted averages of the export prices to each of the purchasers is a way for the investigating authority to analyze the "hundreds or even thousands" of export prices and make a judgment about differences not among all of the hundreds or thousands of export prices, but among the small number of purchasers. China's argument once again reveals that China is seeking to impose statistical probability analysis as the standard against which an investigating authority's examination must be measured.

C. The "Pattern Clause" Does Not Require Investigating Authorities To Examine Why Export Prices Are Different

10. In China's view, even after the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean, including an inquiry into why they exist at all. Regardless of whether China frames its argument in terms of discerning an exporter's *intent* or identifying *reasons* for the pattern of export prices that differ significantly, nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. Certain third parties agree.

11. In China's view, any numerical difference in export prices can be explained away. The quantitative difference between the export prices, in China's view, does not matter. China's proposed interpretation is untenable, and, as we have explained, it is inconsistent with prior Appellate Body findings regarding the meaning of the term "significant."

12. While China argues that the numerically large differences in export prices that USDOC observed in the challenged investigations were, for purportedly qualitative reasons, not significant, China's arguments go toward explaining *why* the prices were different, or giving reasons for the price differences. They do not address *how*, qualitatively, the differences, which were numerically large, were not important or notable.

13. China appears to acknowledge that there was no information in the administrative records of the coated paper and OCTG antidumping investigations that would have been relevant to an analysis of the kind of "qualitative factors" China discusses, and this is because the interested parties did not raise the issue of "qualitative factors" or present evidence to USDOC about that issue. In the steel cylinders antidumping investigation, as we have explained, USDOC responded to an argument by BTIC concerning increases in steel prices and determined that the argument was "merely an unsupported assumption without the support of record evidence."

D. China Has Failed To Establish that Certain SAS Programming Errors Constitute a Breach of the AD Agreement

14. China confirms that it is "challenging" the SAS programming errors, but adds nothing that would support a finding that an inadvertent error amounts to a breach of any provision of the WTO Agreement.

15. China continues to offer the Panel no explanation of how the identified SAS programming errors could reflect a failure to provide a reasoned and adequate explanation or a failure to establish the facts properly and evaluate them in a manner that was unbiased and objective. There are no parallels between the facts in *US – Upland Cotton (Article 21.5 – Brazil)* and the facts here, and the portion of the *US – Upland Cotton (Article 21.5 – Brazil)* Appellate Body report to which China refers does not contain findings that are relevant to the Panel's resolution of this dispute.

16. China acknowledges that "correction of the two types of programming errors does *not* lead to a situation in which the Price Gap Test would no longer be passed for at least one CONNUM in *OCTG* OI and *Coated Paper* OI." So, it is clear that the finding China seeks from the Panel related to the programming errors is advisory and not necessary to secure a positive solution to the dispute.

E. USDOC's Explanations in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Are Not Inconsistent with the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

17. It is logical for an investigating authority to examine the extent to which dumping would be masked by a normal comparison methodology, in contrast to the alternative comparison methodology, as it considers whether a normal comparison methodology can "take into account appropriately" the pattern of export prices that differ significantly. In other words, logically, some manner of comparison is necessary to test whether the average-to-average comparison methodology or the average-to-transaction comparison methodology can more "appropriately" take into account a pattern of significantly differing export prices. Such a comparative exercise is precisely what USDOC undertook in the challenged antidumping investigations. It is unclear what more, beyond such a comparative exercise, would be needed to satisfy the requirements of the "explanation clause."

18. China complains that comparing the result of the average-to-transaction comparison methodology (with zeroing) and the result of the average-to-average comparison methodology (without zeroing) is insufficient because, China argues, the use of zeroing is not permitted in the application of the alternative, average-to-transaction comparison methodology. However, as demonstrated in the U.S. first written submission, and as discussed further below, zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning.

F. The "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Does Not Require an Investigating Authority to Discuss Both the Average-to-Average and Transaction-to-Transaction Comparison Methodologies in Its Explanation

19. While the Appellate Body has not previously addressed the particular legal question that is before the Panel, neither in *US – Softwood Lumber (Article 21.5 – Canada)* nor in any other dispute, the *logical extension* of the Appellate Body findings is that the exceptional, average-to-transaction comparison methodology *should* "lead to results that are systematically different" when the conditions for its use have been met. Accordingly, as the U.S. first written submission demonstrates, an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the second sentence of Article 2.4.2 of the AD Agreement.

20. China also discusses the Appellate Body report in *US – Zeroing (Japan)*. We have already commented on the passage from the *US – Zeroing (Japan)* Appellate Body report in response to

question 17. China, in an attempt to support its argument, refers to "grammatical convention" and provides to the Panel a dictionary definition of the word "either." In doing so, China appears to invite the Panel to apply a Vienna Convention analysis to the language in the *US − Zeroing (Japan)* Appellate Body report. Of course, an adopted report is not treaty language, and China's suggestion that this dispute should turn on a Vienna Convention analysis of a potentially ambiguous passage of the *US − Zeroing (Japan)* Appellate Body report only serves to highlight the weakness of China's argument.

G. USDOC's Application of the Alternative Average-to-Transaction Comparison Methodology to All Sales

21. China continues to argue that USDOC was required to apply the alternative, average-to-transaction comparison methodology on a model-specific basis, and limit its application only to certain models, because USDOC, China asserts, "decide[d] to identify the existence of a 'pattern' in a limited, model-specific, way." China appears to misunderstand USDOC's analysis and also misunderstands the Appellate Body report in *EC − Bed Linen*.

22. USDOC did not "seek[] to find 'patterns' by reference to models" in the challenged investigations. Instead, USDOC established the existence of "a pattern" − within the meaning of the second sentence of Article 2.4.2 − based on all of a respondent's sales of subject merchandise. This is evident from USDOC's discussion of its application of the *Nails* test in the challenged determinations.

23. China utterly fails to grapple with the import of the Appellate Body's findings in *EC − Bed Linen*. Despite the Appellate Body's findings in *EC − Bed Linen*, China continues to suggest that "an investigating authority may assess the existence of relevant pricing patterns on a model-specific basis," but the Appellate Body has clearly rejected this proposition and there is no support for it in the text of the second sentence of Article 2.4.2 of the AD Agreement.

H. China's Arguments Concerning the Appellate Body's Zeroing Findings Lack Merit

24. While the Appellate Body has addressed zeroing in numerous prior disputes involving different comparison methodologies, it has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. China also argues that the Appellate Body has previously "rejected" the mathematical equivalence argument. The U.S. first written submission discusses at some length the Appellate Body's prior consideration of the mathematical equivalence argument and demonstrates that the Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection.

25. China further contends that "the function of Article 2.4.2, second sentence, is found in that it allows a different *process*, as opposed to requiring a different *outcome*, in determining the margin of dumping in the presence of a relevant pricing pattern." China misses the point of the U.S. argument. The United States does not argue that the alternative, average-to-transaction comparison methodology necessarily must yield a different outcome. The outcome may or may not be different, depending on the facts.

26. China argues that the Appellate Body's findings related to the meaning of the term "margin of dumping" compel the conclusion that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology. China's reasoning is flawed, and China's argument bears no connection whatsoever to the text of Article 2.4.2 of the AD Agreement or prior Appellate Body findings.

27. It is crucial to recognize that, when the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, such as the meaning of the term "margin of dumping," those interpretations, on a basic level, are rooted in the text of the first sentence of Article 2.4.2 of the AD Agreement. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

I. China's Effort To "Avoid" Mathematical Equivalence Is Unpersuasive

28. China does not dispute that, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the challenged antidumping investigations. The dispute between the parties is not about arithmetic or algebra. It is about so-called "assumptions" related to the calculation of normal value. It is China's assumptions that are untenable and without explanation. Each of the scenarios in Exhibit CHN-497 depends on and is exclusively premised on manipulating the calculation of normal value for the application of the average-to-transaction comparison methodology while not making any similar change to the calculation of normal value for the application of the average-to-average comparison methodology. Yet, China fails to explain why changing the calculation of the *normal value* used in the application of the normal average-to-average comparison methodology and the exceptional average-to-transaction comparison methodology would in any way address a pattern of significantly differing *export prices* among different purchasers, regions, or time periods. There is no logical reason why an investigating authority would do so and China has not explained how calculating normal value differently would assist an investigating authority to, in the words of the Appellate Body, "unmask targeted dumping."

29. There also is no textual basis in Article 2.4.2 of the AD Agreement to support calculating normal value differently for the purposes of applying the average-to-average and average-to-transaction comparison methodologies set forth in the first and second sentences of Article 2.4.2, respectively. The phrase "weighted average normal value" in the first sentence of Article 2.4.2 is nearly identical to and conveys the same meaning as the phrase "normal value established on a weighted average basis" in Article 2.4.2, second sentence.

30. The United States does not argue that the investigating authority's flexibility to use monthly normal values is limited by the terms of Article 2.4.2 of the AD Agreement. China simply has failed to explain the logic of changing the basis of the calculation of the weighted-average normal value as part of the effort to "unmask" dumping concealed by a pattern of significantly differing export prices.

31. While China attempts to avoid mathematical equivalence, it expends no effort to advance an interpretation of the second sentence of Article 2.4.2 that would give that provision meaning or permit investigating authorities to use the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."

32. The scenarios presented in Table 4 of Exhibit CHN-497 support the argument made in the U.S. opening statement at the first panel meeting concerning the unpredictability of changing the basis for the calculation of normal value in the manner that China proposes. The results are unpredictable and not systematic, and they bear no relationship to the pattern of significantly differing export prices or the aim of the second sentence of Article 2.4.2 to "unmask targeted dumping."

33. China also argues that the U.S. mathematical equivalence argument "fails to grapple with the relevance of the T-T methodology," which "will generally yield results that are different from both W-W and W-T methodologies, even though zeroing is not permissible under the T-T methodology." China's observation does not support its position. The United States has never argued that the transaction-to-transaction comparison methodology should lead to the same result as either the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing). The Appellate Body has found that there is no hierarchy between the average-to-average and transaction-to-transaction comparison methodologies and they should not be interpreted in a way that would "lead to results that are systematically different." This does not mean that the outcomes of these two methodologies should be mathematically the *same*.

J. "As Applied" Claims Related to the PET Film Third Administrative Review

34. China's arguments that prior Appellate Body findings establish that zeroing is "never permissible" in administrative reviews and that recourse to the alternative, average-to-transaction comparison methodology is "only available in original investigations" are incorrect.

35. The Appellate Body has never found that the use of zeroing in an administrative review is impermissible when it is used in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. China's reading of the Appellate Body report in *US – Zeroing (EC)* is untenable. The Appellate Body did not endorse the *US – Zeroing (EC)* panel's legal reasoning concerning the term "during the investigation phase" in Article 2.4.2.

36. China's argument that "recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations" and is not available in assessing the precise amount of antidumping duty in administrative reviews is not supported by the text of Articles 2.4.2 and 9.3 of the AD Agreement or by logic. Article 9.3 of the AD Agreement provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." A margin of dumping established pursuant to the second sentence of Article 2.4.2 is a margin of dumping established under Article 2. Even if the term "during the investigation phase" is interpreted in the manner for which China argues, the implication simply would be that there is no *requirement* to apply the comparison methodologies described in Article 2.4.2 in the context of administrative reviews. It would not follow, logically, that it would be impermissible for an investigating authority to apply those comparison methodologies in administrative reviews.

III. CHINA'S CLAIMS AND ARGUMENTS CONCERNING THE ALLEGED SINGLE RATE PRESUMPTION AND THE ALLEGED USE OF ADVERSE FACTS AVAILABLE NORMS DO NOT COMPORT WITH THE DSU OR THE PANEL'S WORKING PROCEDURES

A. The Six New Determinations China Introduced During The First Substantive Meeting Are Not Within The Panel's Terms Of Reference

37. China introduced six new antidumping determinations during the course of the first substantive meeting that are in fact "new measures" that are not within the Panel's terms of reference and cannot be challenged in this dispute. These new measures are outside the scope of this dispute because China did not consult with the United States over them in accordance with Article 4.4 of the DSU or identify them in its Panel Request per Article 6.2 of the DSU.

38. China fails to recognize that under the DSU, the concept of – and need to identify – "measures" is discrete from the concept of and need to identify the requisite "legal basis of the complaint." Thus, whatever the level of precision with respect to the *legal basis* put forward by China, it is irrelevant for whether the requirement to identify *the measure* in both the Request for Consultations and the Panel Request has been fulfilled. Moreover, when China concedes that only particular arguments from China's first written submission may even be relevant for a particular determination, this only further highlights that these determinations are new measures.

B. China's Recent Arguments Are Contrary to the Panel's Working Procedures and the DSU

39. China has presented extensive arguments that properly belonged in its first written submission per paragraph 6 of the Panel's Working Procedures. Indeed, the situation here is more prejudicial than in the *EC – Fasteners* dispute (in which a previous panel has similarly been faced with a situation in which China provided evidence and arguments going to its primary case well beyond its first submission) because the substantive deficiency is qualitatively higher. Moreover, unlike *EC – Fasteners*, which concerned a single antidumping determination, the present dispute entails dozens and dozens of determinations increasing the potential prejudice upon the United States and undermining its rights to present a full defense, including by having sufficient time to prepare its submissions (DSU Article 12.4) and to receive the facts of China's case and China's arguments *before* presenting its own first submission (DSU Article 12.6 & Appendix 3, para. 4).

IV. CHINA STILL HAS NOT ESTABLISHED THE EXISTENCE OF AN ALLEGED "SINGLE RATE PRESUMPTION" NORM OR AN ALLEGED "ADVERSE FACTS AVAILABLE" NORM

40. China's challenge to both a purported "Single Rate Presumption" norm and a purported "Adverse Facts Available" norm rests on China meeting the "high threshold" that such unwritten norms exist. China has not shown the existence of anything with independent operational effect,

in the sense of doing something or requiring something to be done, which could establish the existence of such norms as measures. China does not show the existence of norms that affect USDOC's behavior generally and prospectively. Regarding the alleged Adverse Facts Available norm, China has additionally failed to articulate the content of the purported norm. Consequently, China's "as-such" challenges to these alleged measures must fail.

A. China's Evidence Still Fails to Demonstrate That The Alleged Single Rate Presumption Norm Applies Generally and Prospectively

1. The Evidence Generally

41. China's purported evidence does not show that any alleged Single Rate Presumption has any type of general and prospective application, let alone legally binding effect.

a. Policy Bulletin 05.1

42. The first piece of evidence that China relies upon is a statement taken from Policy Bulletin 05.1. That statement does not establish the existence of a rule that has independent operational effect or otherwise directs USDOC's future conduct. The cited statement is located in a section titled "Background" and, thus, does not demonstrate that the alleged Single Rate Presumption has a "normative" character. China's attempt to equate Policy Bulletin 05.1 with the Sunset Policy Bulletin at issue in *US –OCTG Sunset Reviews* is also misplaced, particularly as in that dispute, unlike in this dispute, Argentina challenged the Sunset Policy Bulletin ("SPB") itself as a measure.

43. Moreover, China's excerpted language when put next to the adjoining sentences makes clear that what, if anything, may happen in the future is a particular procedure concerning a separate rate application. Critically, China has not explained what words in the proffered excerpt will "necessarily give rise" to the alleged Single Rate Presumption. To the extent China relies on the language noting the "Department presumes", the use of the present tense confirms that, at most, the USDOC is describing conduct in the past up to the present.

b. Antidumping Manual

44. China relies on three sentences from the Antidumping Manual to assert the existence of the norm. China does not explain how or why any of the text in these sentences establishes or otherwise supports its contention that the alleged Single Rate Presumption will "necessarily give rise" with respect to particular situations in the future.

45. Instead, China asserts these statements serve "as a *justification* and a *motivation* for the decision in the instant investigation or review." Justification, however, does not speak to general and prospective application. With respect to motivation, the cited statements do not in any way evince in any respect future and general application. Moreover, the Antidumping Manual contains an explicit disclaimer and USDOC, nearly 10 years ago, had explicitly, and publicly stated in a memorandum that the manual is not meant to be relied upon by the public

c. Rulings by U.S. Courts

46. The language referenced from the various court decisions do not support the existence of a norm of general and prospective effect. These statements simply note, at most, that USDOC has done something previously, and then done something different at a subsequent time. The statements also note that it is well settled under U.S. law that USDOC may undertake such actions. The fact that a particular exercise of discretion is lawful under a Member's domestic legal framework does not mean that this is the only choice available under domestic law, nor that the agency will continue to exercise its discretion in the exact same way in the future.

d. Tabulated statements from 38 challenged determinations and Statements from other sampled determinations

47. The various tabulations, such as Table SRP, provided by China are nothing but the string of cases that the Appellate Body explicitly described as insufficient evidence – and thus do not prove

the existence of the alleged norm. Indeed, nowhere in its submissions does China actually direct the Panel as to what aspect or entry in the table proves general and prospective application.

2. The Evidence With Respect to the Separate Rate Test

48. As China implicitly concedes through its reference to a "first element," China's alleged norm is different from the unwritten norm alleged in *US – Shrimp II (Viet Nam*). Specifically, China alleges that the alleged norm includes two elements, the latter involving a Separate Rate Test. Furthermore, China has not identified in its submissions what evidence China is putting forward to establish the general and prospective nature of this second element.

B. China's Evidence Still Fails to Demonstrate The Content of The Alleged Adverse Facts Available Norm

49. China's own description of the alleged Use of Adverse Facts Available Norm ("Adverse Facts Available Norm") highlights three critical defects. First, while China recognizes at the outset that a norm must apply "whenever," its own description of the purported norm is lacking in that regard. Second, China has failed to specify what constitutes "adverse information" or "adverse facts." Third, China's reference to the "process" employed by USDOC failed to identify the discrete conduct that is required by the alleged norm.

C. China's Evidence Still Fails to Demonstrate The Existence of an Alleged Adverse Facts Available Norm with General and Prospective Application

50. The statements cited by China do not speak to the actual selection of facts. Moreover, as these statements are phrased conditionally – "in many cases" or "[o]ccasionally" – China cannot reasonably claim that they evince general and prospective application.

V. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES HAS BREACHED ARTICLES 6.10 AND 9.2 ON ACCOUNT OF A "SINGLE RATE PRESUMPTION"

A. China's Arguments Fail to Address That USDOC May Treat Nominally Distinct Respondents as a Single Entity

51. China has failed to satisfy its *prima facie* case because all of its arguments go to the first, inapposite question of treatment of individual companies. Where an entity has been properly established, there is no basis to evaluate further whether the individual companies properly within the entity have been assigned an individual margin and duty.

B. China Has Otherwise Failed To Establish Its *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With Articles 6.10 and 9.2

52. China does not explain for those cases in which the China-government entity is not under review, how the alleged Single Rate Presumption precludes individual producers/exporters who are grouped within the entity from receiving an individual margin of dumping. Additionally, China has not demonstrated through evidence that the rate assigned to the China-government entity is inconsistent with Article 9.2 in each challenged investigation. It bears emphasis that China has not addressed U.S. arguments concerning USDOC's Separate Rate Application and Separate Rate Certification. Specifically, USDOC asks a company to provide information that goes to whether the company's export activities are controlled by the Chinese Government. The questions asked by USDOC go to factors that the Appellate Body in *EC – Fasteners* found could be considered to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity."

53. China's failure to put forward the requisite evidence means that is unclear whether evidence gathered from the Separate Rate Test was relied upon, and not any presumption. Because of the particularized circumstances, it was incumbent upon China to demonstrate the exporters, producers, or suppliers were denied an individual rate in the challenged proceedings. In other words, in a particular proceeding no company may have been treated as part of the China-

government entity on account of a presumption, or a company may have been so treated on the basis of record evidence.

C. China Has Not Addressed The Importance Of China's Accession Protocol And The Working Party Report

54. As the United States has established, China's Accession Protocol and Working Party Report provide both a legal and factual predicate for USDOC's treatment of Chinese companies as part of a single China-government entity. Paragraph 15 of the Accession Protocol, placed in proper context, and relevant provisions of the Working Party Report, provide the basis for USDOC's recognition that multiple companies may comprise a single China-government entity.

55. An interpretation of Section 15 that construes it exclusively as a derogation for how normal value may be calculated for Chinese respondents would create serious problems for investigating authorities trying to address injurious dumping. Indeed, a particular irony to such an interpretation is that companies that are found not to be part of the China government entity could be disadvantaged in antidumping investigations in comparison to those under the control of the Chinese government, since the Chinese government could potentially manipulate export price by rechanneling sales though different legal entities under its control.

56. A more logical interpretation is that Section 15's silence on export price is simply a reflection that there was no need to explicitly reference the issue in order for Members to address it. At least two reasons justify such silence. First, explicit reference is not required because it is addressed by implication. Second, Members viewed existing mechanisms being used in Chinese antidumping investigations at the time of China's accession −treating Chinese companies as part of a single China-government entity absent evidence demonstrating independence − as sufficient to address concerns arising with export price.

VI. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

57. China's arguments fail because Article 9.4 applies only where the China-government entity is not under examination. Where the China-government entity receives its own rate, the facts in a proceeding will often, if not always, subject the China-government entity to examination. In several of the referenced determinations, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination.

A. China Has Failed To Establish A *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With The Second Obligation Of Article 9.4

58. There are two critical defects to China's "as such" claim. First, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. Moreover, China must demonstrate that the China-government entity is not under examination. In nearly every determination referenced by China, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination. In those few determinations referenced by China in which the China-government entity was not under review or in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

59. This leads to the second defect in China's claim. The crux of China's claim here − that the alleged Single Rate Presumption is "as such" inconsistent with the second obligation of Article 9.4 − rests on the applicability of the very particular situation described in Article 6.10.2 and the last sentence of Article 9.4. China ignores that the last sentence of Article 6.10.2 does not provide for an *automatic* right to an individual rate for those companies not included in the examination, but creates certain prerequisite conditions. China does not point to a single example where there exists such a company that has met these conditions.

B. China Has Failed To Establish That USDOC Acted Inconsistently With The First Obligation Of Article 9.4 In The 26 Challenged Determinations

60. China argues that USDOC acts inconsistently with Article 9.4's first obligation concerning the "ceiling rate for the level of duties that may be applied to non-selected exporters or producers" in 26 challenged determinations. However, in 19 of the challenged determinations, the China-government entity was under examination and received its own rate pursuant to Article 6.8. The pertinent issue is USDOC's treatment of the China-government entity *as a whole*, rather than simply the treatment of the individual companies. For those seven (7) determinations in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

VII. CHINA HAS NOT DEMONSTRATED THAT USDOC WAS REQUIRED TO SEND A DUMPING QUESTIONNAIRE TO ALL MEMBERS OF THE CHINA-GOVERNMENT ENTITY IN 26 OF THE CHALLENGED DETERMINATIONS

61. China has failed to establish that the United States has breached Articles 6.1, 6.8, and Annex II of the AD Agreement for the 26 challenged determinations. Despite the numerous requests for information made by USDOC, China's claims focus instead on the information that was not requested. Specifically, China's argument is that USDOC was required to send a dumping questionnaire to all members of the China-government entity in all instances, no matter the circumstances. Nothing in the AD Agreement requires so.

A. China's Article 6.1 Claims With Respect to the 26 Challenged Determinations Are Legally And Factually Deficient

62. China continues to put forth an interpretation of Article 6.1 of the AD Agreement which purports to govern not just an investigating authority's procedural obligations with respect to notifying parties "of the information which the authorities require", but also the content of the information required for a certain determination. The *substantive* issue of which information is required for a particular determination is addressed elsewhere in the AD Agreement.

B. China Has Not Demonstrated That USDOC Resorted To Facts Available In 7 Challenged Determinations[1]

63. The record is undisputed that USDOC did *not* make a finding of noncooperation in these 7 reviews. As found by the panel in *US – Shrimp II (Viet Nam)*, applying a rate that had previously been determined in a prior proceeding does not equate to a determination that is governed by Article 6.8. Additionally, with respect to China's "as such" claim, according to China, the alleged Use of Adverse Facts Available norm is only triggered where USDOC makes a finding of noncooperation. Because USDOC did not make such a finding with respect to these 7 reviews, the alleged norm was not triggered per China's own definition.

C. China Has Not Established That USDOC Acted Inconsistently With Article 6.8 and Annex II(1) In Tires AR5 and Diamond Sawblades AR4

64. In Tires AR5, that part of the China-government entity that USDOC found to be cooperative did not represent the entirety of the entity. In Diamond Sawblades AR4, USDOC made no findings with respect to the level of cooperation of the China-government entity. Importantly, in both of these reviews, because China has not demonstrated that USDOC resorted to facts available, it has failed to demonstrate any inconsistency with Article 6.8 and Annex II(1).

D. China Has Not Demonstrated That USDOC's Resort To Facts Available In The 19 Challenged Determinations Is Inconsistent With Article 6.8 And Annex II(1)

65. The crux of China's as applied arguments with respect to USDOC's resort to facts available is that in each determination USDOC could not resort to facts available because it did not send a

[1] These are (1) Diamond Sawblades AR1, (2) Diamond Sawblades AR2, (3) Diamond Sawblades AR3, (4) Furniture AR8, (5) Retail Bags AR3, (6) Ribbons AR1, and (7) Wood Flooring AR1.

dumping questionnaire to each and every member of the China-government entity, regardless of the circumstances. USDOC's determination to resort to facts available in assigning a margin to the China-government entity in the 19 challenged proceedings is consistent with Article 6.8 and Annex II(1) because the China-government entity was notified of a request for and failed to provide necessary information.

66. China argues that resort to facts available based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information is not a proper basis to reach a finding of noncooperation. However, if a party could pick and choose what information it submits, it would be incentivized to only selectively disclose information that benefits its interests rather than ensure the most appropriate determination.

VIII. CHINA'S CLAIMS CONTINUE TO CONFUSE USDOC'S RESORT TO FACTS AVAILABLE WITH THE SUBSEQUENT SELECTION OF FACTS AVAILABLE

67. Two of China's three "as such" claims should be found outside of the Panel's terms of reference because they are related not to the alleged Use of Adverse Facts Available norm, but rather, to USDOC's resort to facts available through a finding of noncooperation. These are: China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} a facts available rate for NME-wide entities based on the (frequently presumed) procedural circumstances of non-cooperation{,}" and China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} Adverse Facts Available in circumstances when it has not requested the necessary information{.}"

IX. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II IN SELECTING THE FACTS AVAILABLE FOR THE CHINA-GOVERNMENT ENTITY

A. In Selecting From Among The Available Facts, USDOC Performed A Comparative, Evaluative Assessment

68. USDOC considers the universe of information on the record. This included information contained in the domestic parties' application for initiating an anti-dumping investigation, information that was obtained during the course of the investigation or administrative review, such as dumping margins from cooperating parties, data on sales transactions and normal value provided by those cooperating parties, and any other information obtained by USDOC during the course of the investigation or review. USDOC considered all of this information and selected from among the facts available, taking a party's non-cooperation into account.

69. USDOC then ensured that the rate selected had probative value, meaning it was both reliable and relevant, by checking the selected rate with independent sources of information on the record. USDOC performed this comparative, evaluative assessment at least twice during each determination: at the preliminary determination or results, and again at the final determination or results. Apart from this examination, USDOC also considers whether the rate selected is aberrational or unusual, is not reflective of the missing information, and therefore should be rejected for use as facts available.

B. USDOC's Process Did Not Automatically Select The Highest Available Rate

70. If the "the highest of" language cited by China accurately reflected USDOC's determinations, then the rates selected would be the highest rates available. In the challenged determinations in which USDOC resorted to facts available, the highest rate was rejected in many cases based upon an examination of the probative value of such rates. The same point holds with respect to China's reliance on the U.S. court rulings it cites. In *Lifestyle Enterprise, Inc. v. United States*, China ignores the court's language that such rates "*must be reasonably accurate estimates of respondents' rates*" and instead focuses on the language of a "built-in increase" as a deterrent. In so doing, China fails to realize that the notion of deterring non-cooperation is no more than taking account of a party's failure to cooperate.

71. China also points to the term "sufficiently adverse" as if USDOC performs a test to ensure the rate selected is adverse enough to deter non-compliance. There is no test to determine

whether a rate is "sufficiently adverse" to induce cooperation. Rather, by taking into account the party's non-cooperation, USDOC may apply an inference that *may* be unfavorable, which may incentivize a party to cooperate.

72. In the challenged determinations, China is unable to point to any rate in which the evidence supporting that rate has greater probative value for the non-cooperating entity *as a whole*. Instead, China breaks apart the NME-entity into component parts to make its argument that the rate selected is inaccurate. In doing so, China concedes that the comparator or benchmark that it insists be used as the hallmark of accuracy – *i.e.*, the all others rate - is *not* a reasonable replacement for a party that has "genuinely" failed to cooperate.

73. China argues that the rate assigned to separate rate companies is an appropriate comparison rate in determining whether the rate assigned to the China-government entity is "adverse" or a reasonable replacement for missing facts. However, those companies that receive a separate rate have demonstrated that they are eligible for a separate rate, and, in certain proceedings, cooperated by responding to a request for Q&V information. In contrast, those companies that are within the China-government entity failed to demonstrate that they are eligible for a separate rate, and, in those proceedings at issue, the entity itself failed to cooperate.

74. China points to factors that it claims USDOC does not consider when selecting a facts available rate for the China-government entity, including the rates of cooperating respondents, the rate assigned as the all others rate, the age of the selected information, and information about the non-cooperative company's age and size. However, USDOC does consider the rates of cooperating respondents and the all others rate but, depending on the facts and circumstances of the particular case, may find that this information has less probative value because it does not correspond with a party's non-cooperation.

X. THE PANEL MAY EXERCISE JUDICIAL ECONOMY ON CLAIMS RELATING TO THE USE OF ADVERSE FACTS AVAILABLE NORM OR DISMISS THEM UNDER ARTICLE 6.2 OF THE DSU

75. If the Panel finds for China on any of its claims against the alleged Single Rate Presumption, then additional findings under Articles 6.1, 6.8, and Annex II and Article 9.4 would not contribute to a positive resolution of the dispute because such findings – and the underlying analysis – would not be relevant in resolving the dispute.

76. China asserts that relevant description in the panel request of China's facts available claims is contained only in the following, general phrase: "inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement." This phrase, however, is so lacking in specificity that all of China's claims under Article 6.8 and Annex II would fail to comply with the requirement of Article 6.2 of the DSU.

XI. CONCLUSION

77. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject China's claims.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil's participation in this dispute will focus on the conditions for the use of the second sentence of Article 2.4.2, on the operation of the W-T comparison method (or "third method") and on Article 6.8 of the Anti-Dumping Agreement.

2. Regarding the second sentence of Article 2.4.2, although there are considerable uncertainties related to when it could be invoked or how the W-T method should operate in practice, there is one aspect that is clear: this method is not expected to be routinely used. Indeed, the situation described in the second sentence of Article 2.4.2 is a very specific factual situation that exceptionally authorizes investigating authorities to use the W-T method to calculate the dumping margin. Contrary to the recourse to the W-W and T-T, which "shall normally" be used, recourse to the third method is contingent upon the fulfillment of the established requirements. This "exceptional nature" was also recognized by the Appellate Body."[1] It follows from that reasoning that particular attention must be paid to whether the specific conditions established for its use in the Agreement are met.

3. The first condition established in the Agreement is that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods". Article 2.4.2 does not convey a precise definition of what type of variation of export prices matters for the purposes of application of the "third method", neither does it require investigating authorities to rely on any particular methodology to assess the existence of such a pattern. Yet, investigating authorities are under the obligation to establish and evaluate the facts under investigation in an unbiased and objective manner (article 17.6 of the ADA). In this sense, while a mathematical model may confer objectivity to the analysis, what is before the Panel is whether the Nails test can be deemed sufficient to establish, in an unbiased and objective manner, in each and every case of its application, a pattern for the purpose of the Article 2.4.2.

4. Brazil agrees that there is nothing in the text of the Anti-Dumping Agreement suggesting that the investigating authority is compelled to assess why certain export prices were significantly lower or differ from each other or to examine the intention behind price behavior. However, the possibility that both a quantitative and qualitative dimension be taken into account, given the exceptional nature of the third method, seems to be undisputed. The respondent itself, based on the decision of the Appellate Body in *US – Large Civil Aircraft*[2], agrees that "the term "significantly" in the "pattern clause" can have both quantitative and qualitative dimensions."[3] If this is true, then it may be appropriate to consider a qualitative dimension in the analysis of the existence of a pattern relevant for the purposes of Article 2.4.2 of the Anti-dumping Agreement.

5. The finding of a "pattern" must also take into account the object and purpose of the Anti-Dumping. Brazil and the United States seem to agree that what is to be condemned is injurious dumping.[4] Accordingly, while many different patterns of export prices might be found in the total universe of export transactions, not necessarily all of them would automatically constitute "a pattern" within the meaning of the second sentence of Article 2.4.2. It is possible that even significant variations between two export prices of a given purchaser, region or time period may not be *per se* decisive. Brazil is not also convinced that there is "a pattern" within the meaning of the second sentence of Article 2.4.2 when all export prices are above normal value[5], since in such a situation there is no dumping.

6. The second condition for the use of the second sentence of Article 2.4.2 is that an explanation is provided as to why the differences in prices cannot be taken into account appropriately by the use of the W-W or T-T comparison methods. This is not a trivial obligation. The authority has to

[1] US – Zeroing (Japan) (Appellate Body Report, para. 131).
[2] US- Large Civil Aircraft (Second Complaint), AB paragraph1272
[3] US First Written Submission, paragraph 72.
[4] US. First Written Submission, para 48.
[5] U.S. First Written Submission, paras. 169 and 194.

elaborate further on the reasons why, given the operational characteristics of the W-W and the T-T methods and the factual particularities of the case under investigation, those methods were not appropriate to deal with the differences in export prices. Considering that, from a purely mathematical perspective, all investigations could, in principle, be run with one of the two symmetrical comparison methods, the particular aspects of the concrete case need to be explained in order to support a decision not to use the symmetrical methods. For example, if dumping is heavily concentrated in the first half of the year, the use of the symmetrical methods could produce a zero-margin result, when, in fact, there is high dumping in the first half of the year and no dumping in the second half. This type of factual situation should be part of the explanation to be provided together with a complementary explanation of why the pattern observed could not be tackled by adjusting the period of investigation (POI), for instance. In short, an explanation of the peculiarities of the concrete case, together with an explanation of why the regular tools already at the disposal of the investigating authority were not sufficient to enable the use of one of the symmetrical methods, is essential to justify the use of third method.

7. The "explanation" must contemplate the reasons of why *both* symmetrical methods cannot be used. Had the drafters of the Anti-Dumping Agreement intended that an explanation be limited to only one of the symmetrical methods, they would have said so explicitly at the end of the second sentence by stating, for example " by the use of *one* of the symmetrical methods". Finally, a positive or higher margin of dumping obtained with the use of third method does not seem a legitimate reason *per se* to justify its use. Ultimately, the explanation of why the third method is needed cannot be confounded with the results obtained in the dumping margin by any given methodology. In sum, for exceptional situations of targeted dumping, an exceptional level of explanation is required so as to avoid the temptation to unduly, and illegally, characterize regular dumping situations as targeted dumping.

8. Another important issue before this Panel is the operation of the third method once the conditions for its use are met. More specifically, whether "zeroing" should be used for a proper operation of this method. There seems to be more doubts than certitudes in this matter. On the one hand, whether "zeroing" is permissible in the second sentence of Article 2.4.2 "is an issue of first impression for the Panel"[6]. On the other hand, certain conclusions of the Appellate Body in past "zeroing" disputes could be of interest in the interpretative exercise that this Panel has to undertake, especially the conclusion that the concepts of "dumping" and "margin of dumping" are consistently defined in relation to a product under investigation as a whole[7]. In interpreting the relevant findings of the vast jurisprudence regarding "zeroing", the Panel will have to account for the existence of the third method and to the principle of "effet utile" of treaty interpretation. How this can be done is so far not clear. Some WTO Members have suggested that the W-W and W-T would not yield necessarily the same results if the WA normal value in these methods was different. The United States advocates that nothing in the Anti-Dumping Agreement suggests that such change could be made. The Appellate Body, on its turn, hinted with the possibility that the universe of export transactions could be limited to the export transactions within the pattern[8]. Such an interpretation raises other doubts, however. With regard to the mathematical equivalence argument, it would seem that different mathematical results would be difficult to achieve if there are no changes, both from the legal and from the practical perspective, to the way of comparing the WA normal value and the export price in a targeted dumping situation. Ultimately, the answers should be found on the basis of the text, object and purpose of the Anti-Dumping Agreement itself.

9. Brazil would also like briefly to comment on another important question raised by this dispute: if the interested Member or the interested party is non-cooperative, may dumping determinations be made on the basis of "adverse facts available"?

10. Article 6.8 of the Anti-dumping Agreement[9] requires that the provisions of Annex II be observed in its application. Together, they govern how investigating authorities are to proceed so as to apply the best available information to make sound dumping determinations.

[6] U.S. First Written Submission, para. 214.
[7] US – Softwood Lumber V, Appellate Body Report, paras. 93 and 96.
[8] US – Zeroing (Japan), Appellate Body Report, para. 135.
[9] Antidumping Agreement, Article 6.8: "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or

11. Article 6.8 is intended to ensure that the failure of an interested party to provide necessary information within a reasonable period or its action to hamper the investigation does not prevent authorities from making preliminary or final determinations. Simply put, the provision is intended to prevent any party from holding the investigating authority hostage by not providing necessary information.[10]

12. However, as emphasized by the Appellate Body, an investigating authority's discretion is not unlimited with respect to the facts it may use when faced with missing information. Rather, the facts to be employed are expected to be the "best information available". In addition, if secondary sources are used, the authority should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties.[11]

13. Furthermore, the investigating authority is not allowed to choose facts that would lead to a biased determination of dumping. As the Panel in the *Mexico - Anti-Dumping Measures on Rice* dispute exemplified, Article 6.8 is not intended to operate as a punishment for those parties that do not provide such information.[12] It is important to recall that Article 6.8 itself foresees that either "affirmative or negative [determinations] may be made on the basis of the facts available".

14. Nonetheless, Brazil believes that Article 6.8 should not be interpreted as an obligation to seek "neutral" information, as it would also mean to import into the provision an equally harmful bias, where parties could benefit from non-cooperating. Rather, Brazil understands that the best information available seems to be the most reliable one, whether positive or negative, and then it would be up to the Panel to assess whether the choice of information was actually reasonable.

15. In this connection, Brazil draws the Panel's attention to the Panel Report in "EC – Countervailing Measures on DRAM Chips".[13] While the investigating authorities are not allowed to use facts available in order to punish the non-cooperative parties, these exporters should not be somehow rewarded by non-cooperating.[14]

16. In sum, like the Panel in "*EC – DRAM Chips*", in the context of Article 12.7 of the SCM Agreement, Brazil considers there is a balance to be found in the interpretation of Article 6.8 and Annex II do Anti-dumping Agreement. While the investigating authorities are not allowed to use facts available in order to punish the non-cooperative parties, these exporters should not be somehow rewarded by non-cooperating.[15]

17. The possibility of using adverse inferences in cases of non-cooperation encompasses any situation of failure in providing necessary information required by the investigating authority, either in the form of a full dumping questionnaire or, for instance, an initial questionnaire for the purpose of exporters' selection in the context of Article 6.10. In that sense, Brazil understands that any initial questionnaire should be considered "information which the authorities require", as set forth by Article 6.8. For that reason, the failure to respond to this kind of inquiry could justify the use of facts available by the investigating authority when determining any final or preliminary anti-dumping duty. Brazil considers that the dumping determination would not be restrained by the limitation specified in Article 9.4.[16] In this regard, the panel in *EC-Salmon (Norway)* has already

---

significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

[10] *Mexico - Anti-Dumping Measures on Rice* (Panel Report, para. 7.238)

[11] *Mexico - Anti-Dumping Measures on Rice* (Appellate Body Report, para. 289)

[12] *Mexico - Anti-Dumping Measures on Rice* (Panel Report, para. 7.238)

[13] Paragraph 7.61.

[14] See also Appellate Body report, *US – Hot-Rolled Steel*, paragraph 102.

[15] See also Appellate Body report, *US – Hot-Rolled Steel*, paragraph 102.

[16] 9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined, provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins

clarified that the ceiling for the dumping margin for exporters not included in the sample would not apply to those parties that failed to provide the requested information for the purpose of sampling[17].

established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

[17] European Communities — Anti-Dumping Measure on Farmed Salmon from Norway (Panel Report, paragraph 7.431)

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. THE USDOC APPLICATION OF THE *NAILS TEST* DOES NOT ESTABLISH THE REQUISITE PATTERN OF EXPORT PRICES WHICH DIFFER SIGNIFICANTLY

1. In the challenged investigation, the USDOC applied the *Nails Test*, a two-part test composed of the standard deviation test and the gap test.

2. The Appellate Body has stated that the average-to-transaction methodology may only be used if an investigating authority finds a pattern of export prices which differ significantly among different purchasers, regions or time periods (*US – Zeroing (Japan)*). This requires findings that clearly demonstrate the existence of: (i) significant differences in export prices, and (ii) a pattern to these differences.

3. In relation to the pattern requirement, in its first written submission the United States observes that use of the average-to-transaction comparison methodology requires an investigating authority to find "a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as between different purchasers, regions, or time periods". The United States describes in detail the various stages of the *Nails test* and how the *Nails test* identifies "targeting". However, it fails to demonstrate that its methodology identifies a "pattern".

4. The text of Article 2.4.2 makes it clear that the pattern to be identified is one "of export prices". The USDOC application of the *Nails test* does not meet this requirement because the USDOC averages export prices instead of comparing them to each other. The very nature of an average is that it creates a typical value and by so doing obfuscates differences. In averaging export prices, the USDOC conceals whether or not there is a form or sequence to those prices.

5. The United States argues in its first written submission that the focus should be on differences among purchasers, regions or time periods and not individual export prices. However, this argument overlooks the requirement that there must be a pattern to these differences.

6. Article 2.4.2 requires a pattern of export prices which "differ significantly". In order for prices to "differ", there must be a point of comparison. In its first written submission, the United States rightly points out that "[a]n export price cannot 'differ significantly' on its own. Given that 'difference' is a comparative or relative concept, for something to be different, it must differ from something else". However, the USDOC distorts its gap test when it ignores lower prices among non-targeted prices, thereby eliminating non-targeted prices that may be similar to alleged targeted prices.

7. The USDOC methodology, as applied, therefore does not include a proper assessment as to whether there is a significant difference among prices and whether the variance in export prices follows any discernible sequence or "pattern".

II. THE USE OF ZEROING WHEN APPLYING AVERAGE-TO-TRANSACTION METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

8. Canada submits that, in addition to the inconsistencies described above, the USDOC's use of zeroing when applying the exceptional average-to-transaction methodology is inconsistent with Articles 2.4.2 of the Anti-Dumping Agreement.

9. When employing the average-to-transaction methodology, the USDOC calculated an intermediate result for each export transaction compared to the weighted average normal value. When aggregating these results, the USDOC did not offset the intermediate results of transactions for which the export price is lower than the normal value with intermediate results of transactions

for which the export price is found to exceed normal value. Aggregation without offsetting is commonly referred to as "zeroing".

10. The Appellate Body in *US – Zeroing (EC)* and *US – Softwood Lumber V (Article 21.5 – Canada)* has found that the practice of "zeroing" is inconsistent with the Anti-Dumping Agreement in the context of both the average-to-average and the transaction-to-transaction methodologies. It also reached the same finding in *US – Stainless Steel (Mexico)* and *US – Continued Zeroing* when considering the average-to-transaction methodology in the context of administrative reviews.

11. The principles espoused in those decisions on zeroing demonstrate that zeroing is also not permissible even when an investigating authority employs the exceptional average-to-transaction methodology set out in Article 2.4.2 in the context of initial investigations.

12. The definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. When examining the use of zeroing under the transaction-to-transaction methodology, the Appellate Body found that the concepts of "dumping" and "margins of dumping" can only be found to exist in relation to a product. Because the individual comparisons only yield intermediate results and not margins of dumping, margins of dumping cannot be found to exist under any methodology at the transaction level (*US – Zeroing (Japan)*).

13. This means that even when an investigating authority is justified in using the exceptional average-to-transaction methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

14. The United States argues in its first written submission that zeroing is permissible when applying the average-to-transaction methodology because failing to do so would lead to results that are mathematically equivalent to those obtained through the standard methodologies. We note that the Appellate Body has already rejected such reasoning (*US – Softwood Lumber V (Article 21.5 – Canada)*). Moreover, it does not follow from the fact that a given methodology may yield a mathematical difference, that this methodology is permissible under the Anti-Dumping Agreement. This simple fact does not cure the deficiencies in the U.S. methodology, including those identified in this submission.

15. Therefore, the USDOC's use of zeroing in the challenged investigations was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, in particular the GATT 1994 and the Anti-Dumping Agreement ("AD Agreement"). The European Union's comments focus on: (I) the targeted dumping methodology applied by the United States; and (II) the US' methodology for dumping determinations with regard to non-market economies (NME's). This executive summary integrates comments made by the European Union in the Third Party Hearing on 15 July 2015 and in its reply to the written questions by the Panel of 30 August 2015.

II. TARGETED DUMPING

2. The European Union considers that the purpose of the final sentence of Article 2.4.2 of the AD Agreement, as reflected in the preparatory work, is to strike a reasonable compromise between two different points of view. The first point of view is that whether or not dumping exists must be measured by taking into account the average pricing behaviour of an exporter, in both domestic and export markets, as well as average costs, irrespective, on the export side, of the purchaser, region or time period. Thus, for this purpose, the data universe includes all export transactions to all purchasers and regions and in all time periods of the investigation period, to the full value of all export transactions, whether they are less or more than the normal value. This is so whether the comparison methodology is weighted average-to-weighted average or transaction-to-transaction. The second point of view is that whether or not dumping exists may be measured by comparing each export transaction with a normal value, and, if the export price exceeds the normal value, by recording a finding of zero dumping, that is, by not allowing any off-set between positive and negative results. The compromise, as enshrined in Article 2.4.2 of the AD Agreement is that normally the first rule applies; but that exceptionally, if targeted dumping by purchaser, region or time period is demonstrated to exist, a normal value established on a weighted average basis may be compared to prices of individual export transactions.

3. What the final sentence of Article 2.4.2 of the AD Agreement does is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. Thus, in the case of regional targeted dumping, a weighted average-to-weighted average comparison might lead to a determination of no dumping. However, a closer examination of one particular regional market within the importing Member might reveal that, in fact, the relatively low priced and dumped transactions are pouring into that region and devastating the local industry, and this is being off-set by relatively high priced transactions to other regions. In such a case, what the final sentence of Article 2.4.2 of the AD Agreement does is to permit an investigating authority to respond to such a situation, by unmasking the targeted dumping. Instead of determining the existence and amount of dumping by reference to the entire territory of the importing Member, it is entitled instead to determine the existence of a pattern of export prices which differ significantly among different regions, and unmask the targeted dumping accordingly.

4. The same observations apply, *mutatis mutandis*, with respect to targeted dumping by purchaser or time period.

5. This process is not aptly described as "zeroing" as that term has been used in prior DSB reports. It is not something done when calculating a dumped amount. Rather, it is something done after a dumped amount has been lawfully calculated in accordance with the provisions of the final sentence of Article 2.4.2 of the AD Agreement.

6. The point that the European Union has been consistently making during the course of these and earlier proceedings is that the particular fact pattern and legal context with which this Panel is presented has not previously been adjudicated. That is why we disagree with China's approach of

asserting the existence of a generic concept of "zeroing" that past case law has prohibited, leading to the conclusion that it is impossible for an investigating authority to unmask targeted dumping (for example by region), because the fact of not offsetting the targeted dumped amount against a negative amount for non-targets is to be characterised as "zeroing". This is just not helpful, because the same term is being used to describe very different fact patterns and legal concepts. Therefore, if the Panel is nevertheless minded to refer to this issue as "zeroing", the European Union would strongly suggest that the Panel consider following the approach adopted in the past cases, by adopting an appropriate qualifier, such as "regional zeroing" or "purchaser zeroing" or "zeroing by time period".

7. To put the matter in these terms, the European Union does not agree with China that just because the past case law has established that "model zeroing" and "simple zeroing" are generally prohibited, it necessarily follows that "regional zeroing" is prohibited. That is because the final sentence of Article 2.4.2 expressly provides for the possibility that there is a pattern of export prices that differ significantly among different regions. Thus, even if regional zeroing would generally not be permitted, it would certainly be permitted when the exceptional circumstances set out in the final sentence of Article 2.4.2 have been demonstrated to exist. The dumped amount thus calculated would have been lawfully calculated in accordance with the provisions of the AD Agreement. It could therefore lawfully form the basis for the calculation of the margin of dumping and thus the rate of anti-dumping duty to be applied.

8. The European Union agrees with the Appellate Body in *US – Continued Zeroing* that the mathematical equivalence argument does not determine the question on the use of different methodologies in case of targeted dumping determinations, because it is most likely not to hold in the case of transaction-to-transaction comparisons, and because the data set changes.

9. Furthermore, during the Third Party Hearing Japan explained that, in order to appropriately counteract low-priced transactions to a "targeted" group, it may be most appropriate to interpret the second sentence of Article 2.4.2 as allowing an investigating authority to "focus" on the transactions for that particular targeted group, and to establish the margin of dumping on the basis of the export prices in that targeted group (e.g. in a region). The European Union understood Japan to argue that the dumped amount thereby calculated does not need to be set-off against a negative dumped amount with respect to non-targets (that is, the remainder of the data set). An anti-dumping duty may then be imposed at that rate with respect to products destined for that region. This would mean that Japan would in fact ignore the exports to non-targets in the calculation of the exporter-specific dumping margin for the investigated product. Japan would apply the same approach, *mutatis mutandis*, with respect to targeted dumping by purchaser and by time period.

10. During the oral hearing the European Union explained that it disagreed with Japan's proposition regarding the levying of the duties insofar as Japan is not taking into account the context provided by Article 4.2 of the AD Agreement. We explained that, although Article 4.2 refers to a situation in which the domestic industry has been interpreted as referring to the producers in a certain area, that is, a market as defined in paragraph 1(ii) of Article 4, nevertheless it provides relevant contextual guidance disproving Japan's proposition.[1] It expressly recognises that there may be circumstances in which the constitutional law of the importing Member does not permit the levying of anti-dumping duties only on products consigned for final consumption to a particular area. In such circumstances, it provides for the exporters to be given the opportunity to cease exporting at dumped prices or give assurances to that effect pursuant to Article 8. It also refers to the possibility of the duties being levied only on products of specific producers which supply the area in question. However, if neither of these approaches is possible, Article 4.2 expressly provides that the importing Member may levy the anti-dumping duties "**without limitation**". As we explained during the oral hearing, this certainly means at least without limitation as to the geographical area.

[1] The European Union does not consider that, for the purposes of resolving the dispute before it, the Panel needs to get into the question of the relationship between the legal concept of a "region" within the meaning of Article 2.4.2 of the AD Agreement and the legal concept of a "region" within the meaning of Article 4.2. We think that the Panel can refer to the term "without limitation" as context in support of a refutation of Japan's argument without doing that.

11. What this means is that, contrary to what Japan submits, it remains possible to impose an anti-dumping duty on the exporter in Japan's example of regional targeted dumping with respect to shipments of all products to the entire geographical area of the importing Member, that is, "without limitation" as to geographical scope. The amount of the anti-dumping duty to be imposed would be equal to the margin of dumping for that exporter. The margin of dumping for the exporter in Japan's example would not be expressed as a margin of dumping into the targeted region, that is, by dividing the dumped amount by the total value of transactions to that region. Rather, the margin of dumping for that exporter would be expressed as a margin of dumping into the entire territory of the importing Member, that is, by dividing the dumped amount by the total value of **all** transactions into the importing Member. This would mean that the investigating authority would *not* ignore the exports to non-targets in the calculation of the exporter-specific dumping margin for the investigated product. Rather, they would **all** be taken into account in the calculation of the dumping margin.

12. With respect to Japan's complaint that this would mean that an anti-dumping duty would initially be imposed on products destined for regions where no regional targeted dumping had previously occurred, we agree with what we understand the US position to be, that is, that any such issues could be addressed (to the extent that this would be necessary at all) during final assessment or refund proceedings as provided for in Article 9.3 of the AD Agreement, or through the use of a variable duty, as provided for in Article 9.4 of the AD Agreement.

13. Finally, the European Union notes that, in a normal anti-dumping calculation, that is, one that does not involve any determination of targeted dumping, an investigating authority is not required to assess the reason for which dumping is occurring. Rather, the determination of the existence and amount of dumping is based on an objective assessment of the data. If the export price is less than the normal value, then dumping exists. The European Union fails to see why the situation should be any different under the final sentence of Article 2.4.2 of the AD Agreement.

14. The reasons for which the dumping might be occurring, and specifically the reasons for the existence of the pattern and the use of the weighted average-to-transaction methodology, might be relevant to the explanation to be provided pursuant to the final sentence of Article 2.4.2 of the AD Agreement, but such reasons are not relevant to the question of whether or not a pattern of relatively low priced exports by purchaser, region or time period, has been demonstrated to exist. We think that the terms "pattern" and "significantly" can be understood quantitatively; and we agree with the United States that the term can also be understood qualitatively.

III. SINGLE ENTITY METHODOLOGIES

15. The European Union expects the Panel to follow the guidance provided by the Appellate Body in *EC – Fasteners (China)*, where a similar presumption of Single Entity in EU law was found inconsistent with Articles 6.10 and 9.2 of the AD Agreement. According to the Appellate Body, legal entities may under certain circumstances be treated as a single exporter or producer, but such singularity cannot be presumed.

16. The criteria for establishing singularity may include the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management, and control or material influence by the State in respect of pricing and output. The European Union considers the criteria referred to by the United States in line with these principles, if they are effectively applied to establish singularity (and not to rebut a presumption of singularity).

17. The European Union agrees with the United States that Article 9.4 of the AD Agreement is inapplicable to entities which have received an individual rate (which can be a Single Rate for several companies if singularity has been correctly established). Where Article 9.4 of the AD Agreement is applicable, it does not require one single "all others" rate, but allows an investigating authority to impose more than one such rate. However, any "all others rate" must not exceed the ceiling calculated according to Article 9.4 (ii). Where it cannot be calculated because there are no reference margins other than zero, *de minimis*, and facts available determinations, Members must provide methodologies which are reasonable in view of the specific circumstances of the case at hand.

18. The European Union anticipates that the Panel will take account of the Appellate Body's findings in *US – Zeroing (EC)* and in *Argentina – Import Measures* when assessing whether China has demonstrated the existence and precise content of a practice of punitive use of facts available. The European Union would like to recall that in *US – Carbon Steel (India)* the existence of such a practice was not challenged by India and hence the findings in that case are not conclusive for the present case. The EU expects that when assessing whether China has sufficiently substantiated its claim, the Panel will look closely into the characterisation of the measure by China and assess the evidence provided in the light of the specific challenge, as indicated by the Appellate Body in *Argentina – Import Measures*.

19. On information rights of individual components of the Single Entity under Article 6.1 of the AD Agreement, the EU considers that a balance must be found between the fundamental due process rights of interested parties and the interest of investigating authorities in efficient and expeditious investigations. In the European Union's view, this requires that basic information about the investigation be given, whenever possible, at the outset of the investigation, to all individual companies known by then to the investigating authorities. All companies included within the Single Entity should be informed thereof once it is established that they belong to the Single Entity, including about the composition of the Entity at that point in time, and about the fact that failure to provide complete information for the whole entity might entail the use of facts available for the Single Entity as such (see next paragraph). Subsequently, it will be for the Single Entity to channel information to its components and investigating authorities.

20. If the Single Entity has been constituted correctly, i.e. not on the basis of a presumption but establishing, for each of its companies whether the criteria set out in *EC – Fasteners (China)* are met, and if all companies included within the Single Entity have been duly informed of their inclusion and the consequences thereof, investigating authorities should be allowed to apply facts available to the extent the Single Entity has been given notice of the information specifically required and failed to provide complete information for the whole Entity. In the European Union's view, a different reading would be in contradiction with the very concept of the Single Entity.

21. Finally, the European Union also advocates a balanced approach on the question whether failure to cooperate at early stages of the investigation can justify the use of facts available at later stages of the investigation, without giving again all parties notice of the information then required. Such balanced approach could consist in giving interested parties from the outset maximum notice of the information required throughout the proceedings, but on the other hand allowing investigating authorities to cease communication with those respondents which make it clear that they do not intend to cooperate.

IV. CONCLUSION

22. The European Union considers that this case raises important questions on the interpretation of various provisions of the AD Agreement and the GATT 1994. The European Union requests the Panel to carefully review the scope of the claims in light of the observations made in its submissions.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. Due to its systemic interest, Japan will address the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") as well as the conduct of the United States Department of Commerce (the "USDOC") pertaining to Certain Methodologies and their Application to Anti-Dumping Proceedings involving China.

II. Zeroing Is Inconsistent with the Anti-Dumping Agreement When Applying the Second Sentence of Article 2.4.2

A. The Appellate Body Consistently Has Held Zeroing to Be Inconsistent with the Anti-Dumping Agreement

2. The Appellate Body has consistently held that zeroing is incompatible with the Anti-Dumping Agreement. It emphasized that dumping and margins of dumping do not pertain to individual transactions or individual models/sub-types of a product, but to a product under investigation as a whole.[1] This conclusion is not only based on the text of Article 2.4.2 but also on the definition of "dumping" set out in Article 2.1, which defines the determination of dumping in relation to "a product", as well as on Article VI:2 of the GATT 1994, which allows a Member and its authorities to levy anti-dumping duties with respect to "any [dumped] product" or "such product". The Appellate Body also clarified that the term "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper review, and periodic reviews",[2] and that the concepts of "dumping" and "margin of dumping" "should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[3] The Appellate Body emphasized that while an investigating authority may undertake multiple comparisons and/or averaging when calculating margins of dumping, the results of such individual calculations are "not 'margins of dumping' within the meaning of Article 2.4.2", and the authority "necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."[4]

3. Zeroing is also inconsistent with the fair comparison obligation under Article 2.4 of the Anti-Dumping Agreement. The Appellate Body stated that zeroing "cannot be described as impartial, even-handed, or unbiased" (i.e., "fair") in the sense of Article 2.4, because the use of zeroing "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[5] The Appellate Body found that zeroing in W-T comparisons in the context of periodic reviews and new shipper reviews is, as such, inconsistent with Article 2.4.[6]

4. While the Appellate Body has not expressly addressed the issue of zeroing with respect to the second sentence of Article 2.4.2, nothing in the Anti-Dumping Agreement allows an investigating authority to depart from the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-wide, and not transaction-specific, concepts. The second sentence

[1] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 106.
[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.
[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.
[4] Appellate Body Report, *US – Softwood Lumber V*, para. 98; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Zeroing (Japan)*, para. 121.
[5] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 169.

expressly allows an investigating authority to compare "a normal value established on a weighted average basis" ("W") with "prices of individual export transactions" ("T"), but it does not prescribe how to deal with the results of such comparisons. Japan emphasizes that the use of the W-T comparison methodology to establish the existence of margins of dumping and the use of zeroing to disregard the intermediate comparison results in establishing the margins of dumping are clearly distinguished and must not be confused. As such, the permissibility of W-T comparisons by no means allows an investigating authority to apply zeroing. With respect to administrative reviews, the Appellate Body has clarified that the application of zeroing under the W-T methodology is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[7]

B. The Use of Zeroing Is Irrelevant to the Role and Function of the Second Sentence of Article 2.4.2 Which Is to "Unmask" "Targeted Dumping"

5. The practice of zeroing cannot be justified in light of the role and function of the second sentence of Article 2.4.2 either. The Appellate Body repeatedly confirmed that the second sentence of Article 2.4.2 is an instrument to "unmask" "targeted dumping".[8]

6. As the second sentence requires differences in export prices to be found "among different purchasers, regions or time periods", targeted dumping may be found when export prices for certain purchasers, regions or time periods "differ significantly" from export prices for other purchasers, regions or time periods. As the Appellate Body clarified, there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".[9] Japan considers that in order to find targeted dumping, export prices to a targeted purchaser, region or time period must *overall* "differ significantly" from other export prices. Differences in export prices among individual transactions or among individual models/subtypes are not relevant for a finding of targeted dumping because the second sentence of Article 2.4.2 does not differentiate among individual transactions or individual models/sub-types.

7. To "unmask" something is to effectively remove a masking effect. Suppose that export prices to a particular region (or purchaser or time period) are significantly lower than the export prices for other regions. Because the first sentence of Article 2.4.2 does not differentiate among different purchasers, regions or time periods, such "targeted" or "selective" pricing could be "masked", i.e., may not be detected and appropriately counteracted with a margin of dumping established under the first sentence of Article 2.4.2 by aggregating all export prices across *all* regions.

8. Therefore, Japan considers that the role and function of the second sentence of Article 2.4.2 is to allow the authority to compare the weighted average normal price ("W") with the prices of the individual transactions ("T") to "targeted" purchasers, regions or time periods when establishing the margin of dumping and to counteract the low-priced transactions to the "targeted" groups with the margin of dumping specifically tailored for such groups. In other words, the second sentence contemplates the price comparisons that are specifically focused on the prices of the export transactions for targeted "purchasers, regions or time periods". This interpretation is consistent with the Appellate Body's understanding of the second sentence of Article 2.4.2 that the application of the W-T comparison methodology may be limited to the "pattern", which, in the Appellate Body's view, consists of export prices that differ significantly from other export prices.[10]

9. It should be noted, however, that an investigating authority may not apply the margin of dumping established for the "targeted" purchasers, regions or time periods to "non-targeted" purchasers, regions or time periods because that margin of dumping was established for the purpose of unmasking and counteracting the low-priced export transactions to the "targeted" groups. Such an application would violate the authority's obligations under various provisions of Anti-Dumping Agreement, including Articles 9.1, 9.3 and 11.1.

[7] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133.
[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.
[9] Appellate Body Report, *EC – Bed Linen*, para. 62.
[10] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

10. In light of the above, the application of zeroing is at odds with, and goes far beyond, the role and function of the second sentence of Article 2.4.2. It is obvious and logical that the "masking" effect on the "targeted dumping" for certain purchaser, region or time period will be appropriately removed by separating and distinguishing the universe of export prices for that purchaser, region or time period, from that of the other export prices. Picking up export prices that are lower than the normal value from among those for the certain targeted purchaser, region or time period is irrelevant to unmask "targeted dumping".

C. The Mathematical Equivalence Argument Does Not Warrant an Interpretation That Zeroing Is Permitted under the Second Sentence of Article 2.4.2

11. Turning to the argument of mathematical equivalence, as the United States itself admits, this argument rests on the assumption that "for both [W-W and W-T] methodologies, *all of the normal value and sales data that are fed into the calculations … are identical*".[11] This assumption has no basis in the Anti-Dumping Agreement. The Appellate Body explained the U.S. argument in a previous dispute, stating it would apply only "under the specific assumptions of the hypothetical scenario".[12]

12. The Appellate Body ruled in *US – Zeroing (Japan)* that under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, an investigating authority may unmask targeted dumping by limiting the "universe" of the dumping investigation to export transactions that constitute a "pattern" when conducting W-T comparisons under that provision.[13] Thus, the export prices compared to the weighted average normal value under the second sentence of Article 2.4.2 would be different from the export prices considered under the first sentence.

13. In addition, an investigating authority may use different pools of home market transactions when calculating the weighted average normal value for the W-W comparison and the weighted average normal value for the W-T comparison. In this regard, Japan notes that the USDOC has applied the W-T comparison methodology pursuant to the second sentence of Article 2.4.2 to administrative reviews, in which it seemingly calculates the normal values on a monthly basis, in contrast to the USDOC calculating the normal values on a yearly basis when applying the W-W comparison methodology in original investigations. Japan also emphasizes that the T-T comparison methodology under the first sentence will almost certainly never yield the same results as the W-T comparison methodology under the second sentence.

III. The Methodology Employed by the USDOC to Invoke the Second Sentence of Article 2.4.2 Is Inconsistent with its Obligations As Set Forth in that Provision

14. Japan emphasizes that the first sentence of Article 2.4.2 provides that the existence of margins of dumping "shall normally" be established in accordance with that sentence. Given that it is perfectly normal to observe certain differences in export prices of a product in a given market, such variations are expected to be addressed by the methodologies available under the first sentence, which "shall normally" be used. As such, it is critical to ensure that the requirements of the second sentence not be construed so broadly as to capture the kinds of pricing variations that are "normally" observed in the market in question.

A. The Methodology Employed by the USDOC to Find a "Pattern" Is Inconsistent with its Obligations As Set Forth in the Second Sentence of Article 2.4.2

15. A textual interpretation of the term "pattern" suggests that it is "a regular and intelligible form or sequence discernible in certain actions or situations".[14] In order to be discernible, the arrangement or order must be meaningful to the objective of the analysis. Further, the "pattern" referred to in the second sentence of Article 2.4.2 must also relate to export prices which "differ significantly". Japan agrees with China and the United States that the word "significant" is defined as "in a significant manner; *esp*. so as to convey a particular meaning expressly, meaningfully".[15]

[11] U.S. First Written Submission, para. 237. Emphasis added.
[12] Appellate Body Report, *US – Softwood Lumber V (Art. 21. 5 – Canada)*, para. 99.
[13] Appellate Body Report, *US – Zeroing (Japan),* para.135.
[14] Oxford English Dictionary Online (CHN-90).
[15] China's First Written Submission, para. 137; U.S. First Written Submission, para. 44.

As such, the term "significantly", in Japan's view, has both qualitative and quantitative aspects, and therefore the "difference" in export prices must be qualitative as well as quantitative.[16] It should be also noted that the drafters of the second sentence of Article 2.4.2 did not employ a unified, purely quantitative threshold for the determination of a "pattern", but adopted instead the phrase "differ significantly", which sets forth criteria that may be construed on a case-by-case basis. Thus, an investigating authority must qualitatively assess the differences observed among different purchasers, regions or time periods with respect to the specific facts before it. Here, one needs to take into account the characteristics of the relevant product and market, including the price variances of such a product in the market.

16. Moreover, Japan also considers that in order to properly examine whether export prices "differ significantly" by *comparing* the export prices to certain purchasers, regions or time periods with the export prices to other purchasers, regions or time periods, an investigating authority must ensure that the former prices be *comparable* with the latter prices in light of all the facts and the evidence before it. In so doing, the authority must take into account various factors that may affect the price comparability, such as conditions and terms of sale, levels of trade, transaction scales, seasonal trends, increase or decrease in costs.

17. The methodology adopted by the USDOC in its *OCTG* OI, *Coated Paper* OI and *Steel Cylinders* OI[17] in the form of the *Nails* test is inconsistent with the second sentence of Article 2.4.2, for it appears to have consistently and exclusively relied on purely quantitative and inflexible benchmarks such as one standard deviation (pattern test) and 5% (gap test) in order to find a "pattern", and there is no evidence that the USDOC examined whether these numerical criteria were appropriate for each specific case at hand. Even if an investigating authority is not prohibited from using certain numerical benchmarks or criteria for the assessment as to whether the export pricing data at hand meets the requirement under the second sentence of Article 2.4.2, it cannot *ex ante* choose a unified and inflexible threshold values that are applicable to all cases. The USDOC also failed to interpret the meaning of the results of the application of those criteria in a qualitative and holistic manner.

18. Japan considers that the problem with the USDOC's methodology could be particularly significant in situations like the *Steel Cylinders* investigation, where an investigating authority allegedly finds a "pattern" based exclusively on mathematically lower prices in certain months during the POI. Such a methodology could unreasonably lead to a finding of a "pattern" in most, if not all, situations, because it is perfectly common and usual for export prices to fluctuate over time, reflecting various factors such as increases or decreases in input costs and seasonal trends.

19. The second sentence of Article 2.4.2 requires export prices to differ significantly "among different purchasers, regions and time periods"; it does not differentiate between different *models* or *sub-types* of a product under investigation. Accordingly, in order to find targeted dumping, an investigating authority must find that the export prices to certain purchasers (or regions or time periods) differ significantly from the export prices to other purchasers (or regions or time periods), taking into account *all models*. In this regard, the *Nails* test is inconsistent with the second sentence of Article 2.4.2, because it divides export transactions for a particular purchaser (or region or time period) by different *models* and focuses only on deviations of export prices observed with respect to *certain* models in order to identify a "pattern".

B. The USDOC Acted Inconsistently with the Second Sentence of Article 2.4.2 by Failing to Provide an "Explanation"

20. Given the role of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to provide an *exception* to the W-W or T-T comparison methodologies which "shall normally" be used, the obligation to provide an explanation imposes a high standard. This is underscored by the context that allows the exception only if the W-W or T-T comparisons "cannot" be used – or if their use is "not possible" ("il n'est pas possible") as the French text of Article 2.4.2 of the Anti-Dumping Agreement puts it. As explained, export prices usually vary because each export price is determined based on various factors, and such variations are expected to be captured by the comparison methodologies available under the first sentence which "shall normally" be used. Therefore, an investigating authority is required to provide an explanation at least as to why the

[16] China's First Written Submission, para. 140.
[17] China's First Written Submission, para. 61.

observed variations in export prices are not a mere reflection of factors that normally exist in a given market, or otherwise why those variations do not allow to establish an appropriate margin of dumping under the first sentence.

21. The USDOC's interpretation of the "explanation" clause of the second sentence of Article 2.4.2 falls short of its obligations set forth in that provision. First, under the *Nails* test the USDOC considers the "explanation" clause to be satisfied as soon as it finds a "meaningful difference" to exist between the margin of dumping calculated with the use of the W-T comparison methodology (with zeroing) provided for under the second sentence of Article 2.4.2 and the margin of dumping calculated with the use of the W-W comparison methodology (without zeroing) provided for under the first sentence. However, in light of the fact that the USDOC employs zeroing in its W-T comparison methodology, while it is barred from doing so in the W-W comparison methodology, such an argument renders the "explanation" requirement of the second sentence of Article 2.4.2 practically inutile. Second, the USDOC does not provide any explanation about the inability or impossibility to take into account appropriately differences in export prices by the use of the W-W comparison methodology. Finally, the USDOC fails to provide any explanation as to why the price differences cannot be taken into account appropriately by the use of the T-T comparison methodology. Japan considers that in a situation like the *Steel Cylinders* investigation, the T-T comparison methodology could have properly taken into account increases or decreases in input costs and seasonal trends, given that under such a methodology both export transactions and domestic transactions are to be considered in close temporal proximity.

IV. The Use of Zeroing in Administrative Reviews Is Inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

22. As explained above, the Appellate Body has also found that applying zeroing in administrative reviews involving the W-T comparison methodology is, as such, inconsistent with the Anti-Dumping Agreement.[18] Therefore, zeroing in administrative review is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

V. Conclusion

23. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

[18] Appellate Body Report, *US – Zeroing (Japan)*, para. 166.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF KOREA

I. The USDOC's Methodology for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement Are Inconsistent with the Obligations Set Forth in That Provision

A. Pattern Clause

1. The term "pattern" is defined by the Oxford English Dictionary as "[a] regular and intelligible form or sequence discernible in certain actions or situations."[1] The word "pattern" or its equivalent in other languages implies certain important characteristics. First, any variation in prices may not be simply random, but rather must display a discernible, regular form or design. The variation must have some relationship to each other so that this form can be discerned (that is, they must be "intelligible"). Second, to be "intelligible" or to "serve to govern the execution of something," the pattern must be meaningful to the purpose of what is being undertaken. In the context of Article 2.4.2, the differences in prices must be meaningful for the purpose of determining whether use of the W-T comparison set forth in the second sentence of Article 2.4.2 is justified.

2. This conclusion is reinforced by the requirement in Article 2.4.2 that the prices differ not only by customer, region or time period, but also that they differ "significantly." In English, the word "significant" conveys both qualitative and quantitative aspects. Anti-Dumping Agreement uses the word "significant" or "significantly" with the intent of conveying a meaning that is qualitative as well as, or instead of, quantitative. For example, Article 3.2 refers to "significant price undercutting" and "significant price depression." As the Appellate Body has recognized, the use of the term "significant" in this context has both quantitative and qualitative aspects.[2] The same is true in Article 2.4.2.

3. Conversely, when the Anti-Dumping Agreement seeks to describe a difference in purely quantitative terms, it uses a word other than "significant" in English, "notable" in French or "significativo" in Spanish. The Agreement uses the word "large" in English, "grand" or "elevé" in French, and "grande" or "elevado" in Spanish. The clearest example of this word choice is found in Article 6.10.

4. In light of these ordinary meanings and contextual considerations, the use of the word "significantly" to describe the price differences that must be found to trigger the W-T comparison in Article 2.4.2 must mean something other than merely "large" quantitative differences. Rather, the requirement that prices differ "significantly" must mean that the price differences reflect a meaning or purpose other than random price variation or price differences that reflect normal commercial factors.

5. Prices for agricultural products often follow seasonal pricing patterns, with lower prices during the harvest season when supply is greater than in the offseason, when prices are higher. Prices for consumer goods are often discounted during key holiday seasons, by all market participants, not just exporters. Similarly, both domestic and foreign suppliers will tend to charge larger volume customers lower prices than they charge smaller volume customers. Prices for most products normally go up or down over time when the underlying costs of production change. This is most evident in the case of many basic commodities, where one or two raw materials constitute a large percentage of the cost of producing the finished product, and in the case of certain high

[1] *OxfordDictionaries.com*, Oxford University Press, accessed 7 May 2015, <http://www.oxforddictionaries.com/us/definition/american_english/pattern>. Similarly, the Oxford English Dictionary defines "pattern" as "[a]n arrangement or order discernible in objects, actions, ideas, situations, etc." The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 2, p. 2126.

[2] Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft*, para. 1272 (citing Appellate Body Report, *EC – Measures Affecting Trade in Large Civil Aircraft*, para. 1218).

technology products, where costs of production typically decline dramatically over the life-cycle of the product.

6. Contrary to the ordinary meaning of the terms "pattern" and "significantly," however, the USDOC applied its so-called "pattern test" and "gap test" as purely quantitative tests. The USDOC applied these tests mechanically, and then it analysed only the quantitative differences among those average prices; the USDOC never examined the reasons why the alleged "pattern" of "significant" price differences exists.

B. Explanation Clause

7. Under the second sentence of Article 2.4.2, an investigating authority may use the W-T comparison methodology only if it provides "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." The W-T comparison methodology is not permitted if there is any way in which the W-W or T-T comparison methodology can produce a dumping margin calculation in which the pattern of significantly differing prices to the purchaser (or region, or time period) in question can be taken into account appropriately.

8. In the *Nails* test, the USDOC made no pretence of meeting this explicit requirement of the second sentence of Article 2.4.2. After finding the existence of "targeting" through a mechanical application of its "pattern test" and "gap test," the USDOC compared the respondents' dumping margins using the W-W comparison methodology (without zeroing) and the W-T comparison methodology (with zeroing). Based on this comparison, the USDOC determined that there is a "meaningful difference," and concluded that it must apply the W-T comparison methodology to all sales. These "explanations" are facially inadequate to meet the high standard that the second sentence of Article 2.4.2 imposes. Indeed, the USDOC's statements are wholly conclusory and provide no explanation at all.

9. A mere comparison of the results from W-W (without zeroing) and W-T (with zeroing) does not adequately explain why the two symmetrical comparisons cannot take into account appropriately the significant difference. Simply, the margin increase resulting from the W-T comparison comes from the use of zeroing. This is problematic because even the result of the W-W comparison on the same sales data will be different depending on the use of zeroing. This implies that the United States cannot meet the explanation clause without using the zeroing methodology.

10. Finally, the explanation under the *Nails* test does not address at all why the T-T methodology cannot take into account appropriately the pattern of significantly differing prices it found to exist, as clearly required by the second sentence of Article 2.4.2.

C. All the transactions

11. The structure and language of Article 2.4.2 confirm that the W-T comparison methodology only apply to those transactions determined to have met the criteria for invocation of the exception, and not to all export transactions. The Appellate Body in *US – Zeroing (Japan)* stated that "The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions 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. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.[3]"

12. It necessarily follows that the "symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply" to the export transactions not falling with the "pattern of export prices which differs significantly among different purchasers, regions or time periods."

[3] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

13. The United States itself previously shared the Appellate Body's understanding of the operation of the second sentence of Article 2.4.2. As the Appellate Body noted in *United States – Softwood Lumber V (Article 21.5 - Canada),* before the panel in that proceeding the United States indicated that if the USDOC found targeted dumping to exist, "the USDOC would apply the weighted average-to-transaction comparison methodology to export transactions falling within the 'pricing pattern' and would examine the other export transactions using the weighted average-to-weighted average methodology."[4] This understanding is further reinforced by the USDOC's original targeted dumping regulation, which stated that "…the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section."[5]

14. Under the correct interpretation of Article 2.4.2, therefore, application of W-T with zeroing to all the transactions will be unnecessarily punitive, and inconsistent with the second sentence. However, once a pattern was found by the problematic *Nails* test, the USDOC applied the W-T comparison methodology with zeroing to the all the transactions.

15. Additionally, the United States suggested a new concept that is foreign to the second sentence. It argues that a pattern within the meaning of the second sentence encompasses all the transactions which are composed of lower and higher prices.[6] This new concept is just meritless, because the United States confuses a situation where the second sentence should be invoked with a situation where the first sentence should be invoked. Furthermore, the US argument is self-contradictory, because the *Nails* test was only applied to the allegedly targeted purchasers, regions, or time periods, and did not test whether the export sales to other purchasers, regions, or time periods also may have been targeted.

D. Other Problems in the *Nails* Test

16. There are two more problems entrenched in the *Nails* test. First, the USDOC calculated standard deviations based on average export prices, not the actual "export prices" themselves. This approach ignored the textual obligation to analyse "export prices," not averages, which necessarily made the standard deviations smaller. Because of this method, the benchmark price (one standard deviation below the average price) was increased, which also meant the possibility of finding a pattern was increased arbitrarily.

17. Second, it does not consider the lower priced transactions below the alleged transaction in calculating 'average price gap' under the 'gap test.' In the example the United States provided, the price of $5.75 would be omitted from the gap test.[7] The United States acknowledged this problem. However, the United States did not provide any reason why it omitted the price. One possible concern is that if a petitioner wants to protect its market by applying W-T comparison with zeroing to all the imported products, it can do so simply by cherry-picking the most possible transactions to successfully pass the *Nails* test. Here an argument can be made that the omission by the USDOC passes its role as investigating authority to the petitioners. Petitioners are private companies that are inherently prone to protect its market share from the imports.

II. The Use of Zeroing When Applying Article 2.4.2, the Second Sentence, Has No Basis under the Anti-Dumping Agreement and Prior Appellate Body Rulings

18. The Appellate Body ruled that for the purposes of Articles 2.1 and 2.4.2 of the Anti-Dumping Agreement, the terms "dumping" and a "margin of dumping" must be established for the "product as a whole."[8] Moreover, the Appellate Body has held that the concepts of "dumping" and "margin of dumping" are exporter-specific, in that they relate to the aggregated pricing behaviour of the exporter.[9] The Appellate Body further held that the definition of "dumping" as a product-wide and exporter-specific concept must be applied in a coherent and consistent manner to *all* provisions of

[4] Appellate Body Report, *United States – Softwood Lumber V (Article 21.5 - Canada)*, para. 98.
[5] Targeted Dumping Proposed Final Rule, p. 27416; 19 C.F. R. § 351.414(f) (2007).
[6] US First Written Submission, paras. 55, 202, 289.
[7] US First Written Submission, paras. 91 – 104.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93.
[9] Appellate Body Report, *US – Continued Zeroing*, para. 283; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 89-90; Appellate Body Report, *US – Zeroing (EC)*, para. 128.

the Anti-Dumping Agreement, regardless of the specific anti-dumping proceeding and of the particular comparison methodology applied by the investigating authority.

19. The Appellate Body also observed that the Anti-Dumping Agreement deals with "injurious dumping," and that the very purpose of an anti-dumping duty is to counteract injury caused by "dumped imports" to the domestic industry producing a "like product." For this reason, the concepts of "dumping," "injury," and "margin of dumping" are "interlinked and should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[10] In *US – Stainless Steel (Mexico)*, the Appellate Body summarized the above jurisprudence.[11]

20. These findings of the Appellate Body are dispositive of the interpretation advanced by the USDOC as a basis for applying zeroing under the second sentence of Article 2.4.2. The use of zeroing invariably results in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons when aggregating those results for the purposes of calculating the margin of dumping for the product as a whole and for each individual exporter or foreign producer. For this reason, it is inconsistent with the second sentence of Article 2.4.2.

21. The United States supports its position, *inter alia*, by arguing the following three points: unmasking, exception, and mathematical equivalence. However, all of these theories fail for the following reasons.

A. Unmasking

22. The United States argues that an investigating authority should use W-T with zeroing to all the transactions in order to unmask the targeted dumping. Based on this unmasking theory, the United States has been applying the zeroing methodology to all the transactions, once it had found a pattern. However, the United States' assertion based on the "unmasking" theory is simply baseless.

23. First of all, the use of the term, "unmask," does not provide the United States with justification of using zeroing. The meaning of "unmasking" as guided by the Appellate Body is to "find" or "distinguish" a pattern where prices differ significantly, not to raise the margins of dumping as a remedy for the injury caused by the targeted dumping. The use of zeroing as employed by the USDOC does not contribute to "unmask" targeted dumping. The use of zeroing simply inflates the margin of dumping, which has nothing to do with unmasking. Therefore, the "unmasking" theory is flawed.

24. Second, the problem of masking also exists in W-W and T-T comparison, because lower prices and higher prices co-exist in the symmetrical comparison as well. Nonetheless, the Appellate Body has ruled against the use of zeroing in W-W and T-T comparison. If the U.S. argument on "unmasking" should be accepted by this Panel, the United States has to provide persuasive evidence of why the use of zeroing is necessary to unmask particularly in the case of targeted dumping situation, as opposed to the clear and consistent Appellate Body rulings against the use of zeroing in W-W and T-T where the problems of masking also exist. The United States failed to do so.

B. Exception

25. The United States asserts that the second sentence of Article 2.4.2 is an exception, and therefore, a new interpretation is required, and the Appellate Body rulings do not apply to this situation. With the "exception" argument, the United States is trying to prolong the life of zeroing through the unacceptable interpretation of the second sentence.

26. The United States shares the same understanding with Korea with respect to the Appellate Body rulings on the concepts of "dumping" and "margin of dumping."[12] However, the United States

[10] Appellate Body Report, *US – Continued Zeroing*, para. 284; see also Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94; Appellate Body Report, *US – Zeroing (Japan)*, para.114.

[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[12] US First Written Submission, para. 216.

omitted the equally important Appellate Body's ruling that these concepts must apply with equal force to the entire Anti-Dumping Agreement. Obviously, Article 2.4.2, the second sentence is also a provision of the Anti-Dumping Agreement. The United States cannot avoid this Appellate Body ruling by arguing that the second sentence is an "exception."

27. Moreover, the exception argument misleads this Panel. The Appellate Body found that the second sentence may be applied in an "exceptional" situation. The Appellate Body did not even mention that the second sentence is an "exception" to the existing jurisprudence under the Anti-Dumping Agreement. Therefore, the consistent Appellate Body ruling that the concepts of "dumping" and "margins of dumping" must apply with equal force to the second sentence as well.

C. Mathematical Equivalence

28. The United States seems to acknowledge that the issue of mathematical equivalence is just a matter of assumption. Korea agrees. The issue is whether the United States' assumption is consistent with the second sentence or not. The United States adopted an assumption in favour of itself to produce mathematical equivalence. However, its logic is just vulnerable. This is true because the Appellate Body in *US – Stainless Steel (Mexico)* and *US – Zeroing (Japan)* also found that mathematical equivalence may occur under certain circumstances, (a.k.a., assumptions) and therefore, the second sentence would not be inutile.

29. The United States is trying to argue that the meanings of the terms in the first sentence and the second sentence of Article 2.4.2 are the same.[13] However, the plain reading of the first and second sentences demonstrates that the meanings of the terms could be different. In the first sentence, it is stated "a weighted average normal value," while in the second sentence it is stated, "a normal value established on a weighted average basis." If the drafters were to intend the same meaning, they should have drafted as such. However, they did not. Therefore, there is no clue in the provision that these two normal values should be the same.

30. Second, more accurate comparison would be possible if the normal value is changed, and thus allowed a W-W or T-T comparison to properly and "appropriately" take into account price differences. For example, the use of monthly normal values would allow a more precise comparison of prices that may be changing over time. Prices may change over time because of seasonality, or because costs are changing over time. By comparing the monthly average export sale in one month to the monthly average normal value for the same month, the adjusted W-W method might well appropriately take into account the price differences. Similarly, in W-T comparison, comparing a specific export sale in one month to the monthly average normal value for the same month, the adjusted W in the W-T comparison might well take into account the price differences. The key point is that the method for determining the W for normal value is not fixed, and can be adjusted to better reflect the particular circumstances of a case.

31. Korea notes that the USDOC itself uses monthly comparisons in administrative reviews, because it considers monthly normal values to be more contemporaneous and thus more accurate. This shift from annual average normal value to monthly average normal value is a routine part of the USDOC practice. The USDOC does not limit monthly normal value to some cases; it applies this more contemporaneous approach to all its administrative reviews for the market economies.

32. Once one recognizes that there are some reasons to use a different normal value, mathematical equivalence is broken. As an argument for treaty interpretation, mathematical equivalence (relying on the inutile principle) only works when it exists in *all* cases. Mathematical equivalence in some cases, or even most cases, does not establish that a treaty provision has been rendered inutile.

[13] See US First Written Submission paras. 219 – 227.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. THE USE OF ZEROING

A. Interpretation of the Anti-Dumping Agreement

1. The Appellate Body has pointed out on several occasions that it is clear from the opening phrase of Article 2.1 – "[f]or the purposes of this Agreement" – that the definition of "dumping" contained in that article applies to the entire Anti-Dumping Agreement.[1] According to the Appellate Body, "dumping" and "dumped imports" must have "the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews".[2]

2. The Appellate Body has repeatedly found that the texts of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 clearly indicate that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[3] Furthermore, the Appellate Body has concluded that the concepts of "dumping" and "margin of dumping" are exporter-specific,[4] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[5] The cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.

3. Moreover, the Appellate Body has held that Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement require aggregation of <u>all</u> results of intermediate comparisons when calculating the dumping margin.[6] In *US – Softwood Lumber V*, the Appellate Body ruled that the individual comparisons only represent "intermediate values" that the investigating authority had to aggregate in order to arrive at the margin of dumping for the product as a whole. Furthermore, the investigating authority "necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[7] Disregarding or artificially reducing to zero the results of intermediate comparisons, through the application of zeroing, is at odds with this and thus inconsistent with Article 2.4.2.

4. This interpretation has been confirmed by the Appellate Body, both in the context of the "transaction-to-transaction" methodology,[8] as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews.[9]

5. Norway cannot see anything in the wording of the second sentence of Article 2.4.2 that suggests a different interpretation. On the contrary, Norway agrees with China that although the second sentence of Article 2.4.2 provides an exception from the first sentence in terms of the

[1] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 109; Appellate Body Report, *US - Softwood Lumber V*, para. 93; *US – Zeroing (EC)*, para. 125; *US – Stainless Steel (Mexico)*, para. 84; and *US – Zeroing (Japan)*, para. 109.

[2] Appellate Body Report, *US - Zeroing (Japan),* para. 109. See also Appellate Body Report, *US - Softwood Lumber V*, para. 93.

[3] Appellate Body Report, *EC – Bed Linen,* para. 53; Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93 and 96; Appellate Body Report, *US – Zeroing (EC)*, para 126.

[4] Appellate Body Report, *US – Stainless Steel (Mexico*), para. 94; Appellate Body Report; *US – Zeroing (EC)*, paras. 128-129.

[5] Appellate Body Report, *US – Continued Zeroing*, para. 283. See also Appellate Body Report, *US – Zeroing (EC)*, para. 128; Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 89.

[6] Appellate Body Report, *EC – Bed Linen*, para, 53; and Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[7] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (emphasis original).

[8] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.

[9] Appellate Body Report, *US - Stainless Steel (Mexico),* para. 133.

comparison methodology used to compare normal value and export price in investigations, this is not an exception from the requirement to determine "margins of dumping".[10] Furthermore, the object and purpose of the provision is to address possible dumping targeted at particular purchasers, regions or time periods. These dumping situations reflect a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining higher prices for other sales. The very nature of targeted dumping thus necessitates a reference to the overall pricing behaviour of the exporter, in order to identify this type of dumping. A logical consequence of this is that dumping cannot take place at the level of each individual transaction. This was reflected in *US – Stainless Steel (Mexico)* when the Appellate Body noted that "[a] proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transaction over a period of time".[11]

B. The negotiating history of the Anti-Dumping Agreement

6. Norway notes that the United States claims that the negotiation history of the Anti-Dumping Agreement confirms that zeroing should be permissible under the second sentence of Article 2.4.2.[12] As Norway understands it, the gist of this argument seems to be that communications of two delegations and minutes of a negotiating meeting could be read as proof that the asymmetrical comparisons, that is comparisons between individual export transactions and weighted average normal value in anti-dumping investigations, and zeroing, were viewed as the same thing. Norway strongly disagrees with this assumption. In our opinion, the material only show that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is indeed very different from deducting a permission of applying zeroing when using the said comparison methodology.

7. Furthermore, we note that the United States has previously described the negotiating history of Article 2.4.2 in quite a different way. In *US – Softwood Lumber V*, the United States argued that there were two practices employed by Members to establish "margins of dumping" at the time of the Uruguay Round negotiations that were relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, while the second practice was zeroing. The United States asserted that, because the negotiators were able to agree only on the issue of "asymmetry", it would be reasonable to expect that, absent modified text in the Anti-Dumping Agreement addressing zeroing, that practice would continue to be consistent with the Anti-Dumping Agreement.[13] In that particular case, the United States clearly saw these two practices as two separate issues.[14] The Appellate Body did not agree with the United States in those proceedings. Similarly, the material at hand does not in any way prove that the negotiators intended to allow zeroing when applying the third comparison methodology.

C. The obligation to make a "fair comparison"

8. Moreover, the use of zeroing when applying this third comparison methodology is inconsistent with the obligation of Article 2.4 of the Anti-Dumping Agreement to make a "fair comparison" between the export price and the normal value. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness or lack of bias".[15] The Appellate Body has found that zeroing tends to inflate the margins calculated, and that it can, in some instances, turn a negative margin of dumping into a positive margin of dumping.[16] Thus, the Appellate Body has emphasised that there is an "inherent bias" in zeroing,[17] and that "this way of calculating cannot be described as impartial, even-handed or unbiased".[18] As with the other two comparison methodologies, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias,

[10] First Written Submission of China paras. 217-218.
[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.
[12] First Written Submission of the United States, paras. 242-250.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[14] Appellate Body Report, *US – Softwood Lumber V,* para. 108.
[15] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[16] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.

making a positive determination of dumping more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the Anti-Dumping Agreement.

II. THE MATHEMATICAL EQUIVALENCE ARGUMENT

9. The United States argues that prohibiting the use of zeroing under the weighted average-to-transaction comparison methodology would lead to results that are "mathematically equivalent" to the comparison methodologies under the first sentence of the provision. According to the United States, this would render the second sentence of Article 2.4.2 redundant. The United States draws this conclusion from findings by the Appellate Body in other disputes that the first two comparison methods should not "lead to results that are systematically different".[19] Thus, the United States asserts that the third comparison method "logically" should lead to results that *are* systematically different, and that any interpretation to the contrary would mean that Article 2.4.2 would no longer be "exceptional" and therefore inutile.[20] Norway disagrees with this reasoning.

10. The mathematical equivalence argument is based on the assumption that the investigating authority must use the same set of pricing data. This is a consequence of the United States' interpretation of the term "a weighted average normal value" in the first sentence as meaning the same as "a normal value established on a weighted average basis" in the second sentence. In Norway's view, this interpretation is incorrect, and it does not follow from the wording of Article 2.4.2 that these two normal values should be the same. On the contrary, an investigating authority may use different pools of home market transactions when calculating the two different normal values. We would also point to the fact that this argument has already been rejected by the Appellate Body.[21]

11. In any event, the "mathematical equivalence" argument is misleading. The focus of the exceptional methodology in the second sentence of Article 2.4.2 is, after having examined all transactions, to show a pattern of dumping targeted at particular purchasers, regions or time periods. What is then allowed is to address such targeted dumping with targeted measures.

[19] United States' First Written Submission, para. 229.
[20] United States' First Written Submission, paras. 229-230.
[21] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 99.

ANNEX C-7

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF TURKEY[*]

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes this opportunity to submit her views as a third party in this case. Turkey's objective is to contribute to the accurate and consistent interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "ADA").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining her systematic interest, Turkey would like to limit her third party submission to the discussion on the rights and obligations of an investigating authority under Article 2.4.2 of the ADA.

II. INTERPRETATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2

3. Turkey observes that the discussion concerning the legal interpretation of the second sentence of Article 2.4.2 of the ADA has already become a frequently addressed subject in several panel proceedings. Turkey's third part contribution in some of these proceedings aimed to bring a clear perspective to this contentious issue which is cardinal to understand the methodology on how the dumping margin will be calculated in case of "*targeted dumping*".

4. Turkey understands that the arguments presented by the parties concerning this issue focus primarily on the interpretation of the conditions that trigger the use of weighted average normal value-individual transactions comparison (hereinafter referred to as "W-T comparison" or "W-T") and whether this methodology, by definition, renders the use of zeroing inevitable and most importantly legal. Turkey will address these two issues separately.

Interpretation of the conditions concerning W-T comparison

5. In Turkey's understanding the second sentence of Article 2.4.2 of the ADA, on its face, stipulates one substantive and one procedural condition. Article 2.4.2 reads as follows:

> 2.4.2.[A] normal value established on a weighted average basis may be compared to prices of individual export transactions *if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods,* and *if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison.*(emphasis added)

6. As the substantive condition, the investigating authority has to reach a conclusion that a pattern of export prices displaying a significant difference among purchasers, regions or time periods is present. As the procedural condition, the investigating authority has to bring an explanation why these differences cannot be taken into account appropriately by the use of the usual comparison methodologies.

7. The article refrains from elaborating on the methodology on how the "pattern of significantly different export prices" will be established. In that manner, the drafters of the article have given legal leeway to the investigating authority to define the steps that lead to the conclusion that a pattern of significantly differing export prices among purchasers, regions and time periods is present. Turkey understands that investigating authority has discretion to employ any methodology that is appropriate to analyze whether the export sales display a pattern which may also include statistical data analysis. Neither in the ADA nor in the case law there is any obligation to use specific means to construct the pattern test.[1] Nevertheless, the investigating authority

[*] Turkey requested that its written submission serve as its executive summary.

[1] China's first written submission, p.154; United States' first written submission, p.116

is under the obligation to act in an even-handed and unbiased manner while defining the mechanics of the methodology to evaluate the existence of a possible pattern.

8. The United States of America (hereinafter referred to as "U.S") interprets the word "pattern" in a contextual manner and underlines that a "pattern" shows a regular and intelligible form or sequence of export prices which significantly differ among purchasers, regions and time periods[2]. Turkey considers that the assessment focusing on a group of export transactions, to understand whether a pattern exists, primarily depends on the examination whether transactions repeat themselves consistently during the investigation period and such repetition form a structure that significantly differ among purchasers, regions and time periods. As a matter of fact, such an evaluation puts weight equally on the transactions itself and the export sales as a whole to pinpoint whether the repeating lines in export sales form a grouping or differing structure.

9. As explicitly stipulated in the Article 2.4.2, such a pattern should not only differ among purchasers, regions and time periods but that difference must be significant in scale. Turkey is in the same line with the case law that "*significant*" has a meaning of "*notable, important or consequential*" [3]. We equally agree that the word "significant" may have both quantitative and qualitative aspects that necessitate a more comprehensive look to the definition[4]. Yet, Turkey considers that, in Article 2.4.2, the quantitative aspect of the word "*significant*" becomes more pronounced than its qualitative side. The negotiation history confirms such a conclusion. In Carlise I and II texts, this part has been drafted as "[w]*hen a significant portion of export sales*.". This phrase turns into "*significant degree*" in New Zealand I and II texts. In New Zealand III (Ramsauer) text "*significant degree*" is omitted altogether. The last version of this part of the sentence receives its final shape in Dunkel Draft which is formulated as " ...[d]*iffer significantly among purchasers, regions or time periods*.."[5]. In Turkey's understanding the words "*degree*" and "*portion*", as used in the previous version of the text, reveal implicitly that the drafters aimed to design the article so that the word "*significantly*" could show a level of comparison that is quantifiable and discernable.

10. Closely connected with this point, Turkey disagrees with the argument that the targeted sales of the product under consideration should be necessarily an outcome of a specific intent. According to this approach, usual commercial practices, based on seasonality or other commercially driven rationales, are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices[6]. Turkey underlines that neither the reading of Article 2.4.2 nor the examination of case law confirms the possibility that so called "*usual commercial*" practices are rendering targeted dumping plausible[7].

11. Finally, the plain reading of the Article 2.4.2 shows that the W-T comparison acts as an exception and that the investigating authority can resort to the methodology only under certain conditions[8]. As an expected result of the due process requirement, diversion from the general rule requires an explanation on why normal methodologies, stipulated in the first sentence of Article 2.4.2, cannot be used appropriately. Turkey understands that this explanation should be in such a context that it should not deprive the interested parties from using their right of presenting evidences they consider relevant.

The relevance of zeroing in W-T comparison methodology

12. At this stage of the proceedings Turkey refrains from commenting on the specifics of the U.S. methodology and on mathematical equivalence argument.

[2] United States' first written submission, para.36

[3] US – Large Civil Aircraft (Second Complaint) (AB), para. 1272 (citing US-Upland Cotton (AB), para.426)

[4] Ibid, para.1272

[5] Understanding The WTO Anti-Dumping Agreement; Negotiating History and Subsequent Interpretation; James P.Durling, Matthew R.Nicely (Cameron May International Law and Policy, 2002); p.93-95

[6] China's first written submission, para. 143

[7] United States' first written submission, para.78

[8] U.S. - Softwood Lumber VI, Article 21.5 (Panel), para.5.33

13. Nevertheless, Turkey underscores once more that the second sentence of Article 2.4.2 operates as an exception to the first sentence part of the Article and that the rules and procedures to be followed differ in terms of legal obligations and burden of explanation.

14. Turkey understands that the W-T comparison methodology was designed to address a specific case, namely targeted dumping. In this framework, it should be assessed carefully whether applying the legal discipline that was devised to mark the boundaries of the normal comparison methodologies of the first sentence of Article 2.4.2 can really fit the exceptional structure of the comparison methodology stipulated in the second half of the Article.

15. As a matter of legal interpretation, Turkey would like to share her view that the application of the legal discipline envisaged for the first two methodologies shown in Article 2.4.2 may act contrary to the legal rationale of this provision stipulated in the second half of Article 2.4.2 and erode the effectiveness of the results expected from the W-T comparison methodology which is exceptional in nature and asymmetric in terms of comparison structure.

III. CONCLUSION

16. With these comments, Turkey expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its views on this relevant debate, regarding the interpretation of the ADA.

ANNEX C-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF VIETNAM

I Introduction

1. In this third party executive summary, Viet Nam comments on two issues as follows:

(i) The United States Department of Commerce's (USDOC) application of the "targeted dumping" methodology in its determinations is inconsistent with the obligations of the United States under Article 2.4.2 of the Anti-Dumping Agreement;

(ii) The USDOC's presumption that all producers/exporters are part of a single government-controlled "NME-wide entity" and its application of an NME-wide rate to all producers/exporters from NMEs that do not successfully demonstrate that they are not subject to government control and are entitled to a separate rate is inconsistent with the requirements of Articles 6.10 and 9.2 and 9.4 of the Anti-Dumping Agreement.

II The USDOC's "targeted dumping" methodology violates Article 2.4.2 of the Anti-dumping Agreement because it does not comply with the conditions that govern recourse to W-T comparison methodology

2. The second sentence of Article 2.4.2 of the Anti-Dumping Agreement establishes an exception whereby investigating authorities are authorized to depart from the default rule mandating the use of a symmetrical comparison methodology to determine a margin of dumping. These conditions include, among other things, the existence of a "pattern" of prices that "differ significantly among different purchasers, regions or time periods", as well as a meaningful explanation why the two "normally" used comparison methodologies are insufficient to capture such differences.

3. Article 2.4.2 second sentence must be interpreted in a manner that preserves the useful effect of these conditions. These conditions must not be converted into mere formalities that are easily satisfied by an investigating authority in many cases. However, that appears to be precisely what the United States would have the panel do.

4. Under the Nails Test, the USDOC examined the existence of pricing patterns when targeted dumping was alleged by petitioners. To determine whether a pricing pattern exists, under the Nails Test approach, the United States uses one standard deviation as one of the criteria. Whatever the discretion of an investigating authority, this would appear to be far too low a threshold for the phrases "pattern" and "differ significantly". Viet Nam would urge the panel to engage in a thorough statistical and quantitative analysis of this point. Additionally, Viet Nam assumes that, in the event that the W-T methodology may be used, it may only be applied to the transactions found to "differ significantly", that is, within the pattern. Outside of the pattern, one of the two "normal" transactions shall be used.

5. Also, Viet Nam is concerned that the USDOC' practice reduces to an empty formality the requirement to provide an "explanation" as to why the two "normally" applicable methodologies cannot be used. First, the U.S. fails to provide any explanation with respect to the T-T methodology, contrary to the plain meaning of Article 2.4.2. Second, the explanation that the W-W methodology "conceals" certain price differences is merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T methodology with zeroing yields a higher margin than the W-W methodology without "zeroing" is not an explanation why price differences "cannot be taken into account appropriately" by the W-W methodology. When "zeroing" is applied, the margins of dumping will always be higher than if zeroing is not applied because of the absence of any offset for the margin by which export prices exceed normal value. Recourse to the W-T methodology cannot be driven, or justified, by the fact that the application of "zeroing" will always result in the highest possible dumping margin. Nothing in Article 2.4.2 supports such an interpretation when choosing among the possible methodologies for determining the margins of dumping.

6. Moreover, "zeroing" is as prohibited under the W-T comparison methodology as it is prohibited under the W-W and T-T methodologies under the second sentence of Article 2.4.2 of the Anti-dumping Agreement. Viet Nam disagrees with the United States' reading of the second sentence of Article 2.4.2 of Anti-dumping Agreement as permitting recourse to the "zeroing" methodology. The W-T comparison is an exception to the comparison methodologies in the first sentence of Article 2.4.2, but is not an exception to the fair comparison requirement of Article 2.4. Therefore, if "zeroing" is considered "unfair", it would be "unfair" and equally impermissible to "zero" when using the "targeted dumping" methodology.

III The USDOC's Single Rate Presumption for NME is inconsistent with the United State' obligations under Articles 6.10, 9.2 and 9.4 of the Anti-dumping Agreement

7. The Single Rate Presumption is, as such, inconsistent with the United States' obligation under Article 6.10 and 9.2 of the Anti-dumping Agreement. It is because under the Single Rate Presumption, the USDOC fails to determine an individual margin of dumping for each exporter or producer, and fails to specify duties for each supplier separately. The USDOC, by conditioning access to individual duties upon proof of absence of government control through the Separate Rate Test, the Single Rate Presumption, as such, also violates Article 9.4 of the Agreement.

1. The USDOC's "NME-Wide Entity" Rate is inconsistent with the requirements of Articles 6.10 and 9.2 of the Anti-Dumping Agreement

8. A presumption that all producers and exporters are part of a single NME-wide entity to which a single dumping rate is assigned, is inconsistent with the obligations established in (1) Article 6.10 of the Anti-Dumping Agreement to determine an individual margin of dumping for each exporter or producer; and (2) Article 9.2 of the Anti-Dumping Agreement to specify duties for each supplier separately.

a. The plain language of Articles 6.10 and 9.2 of the Anti-Dumping Agreement requires the calculation of individual anti-dumping margins and assessment of individual anti-dumping duties

9. Article 6.10 articulates an authority's obligation to determine individual anti-dumping margins for exporters under investigation. The plain language of Article 6.10 imposes a mandatory requirement, with an explicit exception. It is unambiguous: an authority must determine an individual anti-dumping margin for all known producers or exporters, subject to the limited and defined exception.

10. Article 9.2, like Article 6.10, imposes a general requirement that exporters and suppliers be individually identified. Unless the authority can demonstrate that the factual circumstances fit within the defined exception in each provision, it has failed to comply with the obligations within these articles.

b. The USDOC's practice of determining the NME-wide entity rate is, as such, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

11. The USDOC's presumption of the existence of an NME-wide entity and the application of an NME-wide entity rate does not comply with the plain language of Articles 6.10 and 9.2. These provisions require an authority to determine anti-dumping margins and impose anti-dumping duties on an individual basis. The USDOC's use of an "NME-wide entity" rate is inconsistent with this unambiguous obligation.

12. The USDOC's practice violates the requirement of Articles 6.10 and 9.2 that authorities determine individual anti-dumping margins and anti-dumping duties to exporters and producers. The NME-wide entity is not an individual exporter/producer, but rather is a collection of exporters and suppliers that the USDOC collapses into a single entity without performing the collapsing analysis required under Article 6.10.

13. The USDOC's practice does not fit within the single, limited exception to the requirements of Articles 6.10 and 9.2: that it would be impracticable to individually identify exporters and suppliers.

2. The USDOC's practice of determining the NME-wide entity rate is, as such, inconsistent with Article 9.4 of the Anti-Dumping Agreement

14. Article 9.4 provides the parameters to be followed when calculating an anti-dumping duty where the administering authority has limited individual examination to only selected exporters/producers, pursuant to Article 6.10 of the Anti-Dumping Agreement. As discussed above, Article 6.10 requires the administering authority to determine an individual margin of dumping for each known producer or exporter.[1] In exceptional circumstances, the authority may limit the number of exporters/producers individually investigated.[2] Article 9.4 governs such a situation and limits the discretion of an authority when calculating the anti-dumping margins of exporters/producers not individually investigated.

15. Article 9.4, exclusively, governs the anti-dumping duty applied to companies not selected for individual examination. The article does not provide for exceptions: where examination has been limited, the calculation of the rate for all other exporters/producers is governed by Article 9.4. Article 9.4 then explicitly instructs the authority on the maximum permissible anti-dumping rates that can be applied to the exporters not individually investigated or reviewed.

16. The USDOC's failure to assign an NME-wide entity a rate consistent with the methodology required by Article 9.4 of the Anti-Dumping Agreement for all companies not individually investigated amounts to a violation, as such, of the United States' WTO obligations.

17. The USDOC's practice requires that the NME-wide entity receive a rate that is distinct from the "separate rate" that is calculated in a manner consistent with Article 9.4. The USDOC's Manual states that "[i]n an antidumping investigation, all companies other than those that have been determined to be eligible for a separate rate are part of the NME entity and receive the NME-wide rate."[3] This follows the USDOC's discussion on how rates are to be calculated for companies that are eligible for a separate rate; namely, in a manner that is generally consistent with Article 9.4 of the Anti-Dumping Agreement.

18. Under the USDOC's practice, the NME-wide entity does not receive a rate consistent with Article 9.4, despite its non-selection as an individually investigated company. The Anti-Dumping Agreement requires that companies not selected for individual examination, per Article 6.10, are to receive rates calculated pursuant to Article 9.4. The NME-wide entity qualifies as a company not selected for individual examination. The USDOC's failure to assign the NME-wide entity an Article 9.4-consistent rate is a violation, as such, of the Anti-Dumping Agreement.

IV Conclusion

19. For the reasons explained above, Viet Nam would like to urge the Panel to rule that the USDOC' "targeted dumping" methodology as well as other aspects of its approach to the W-T methodology, are inconsistent with Article 2.4.2 of the *Anti-dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994.

20. Also, Viet Nam would like to request the Panel to find that the USDOC' Single Rate Presumption, as such, is inconsistent with Article 6.10, 9.2, and 9.4 of the *Anti-dumping Agreement.*

[1] Article 6.10 of the Anti-Dumping Agreement.
[2] Ibid.
[3] Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, p. 7.