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

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I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. China appeals a number of Panel findings related to certain U.S. antidumping measures, as well as with respect to an alleged unwritten measure. As demonstrated in this submission, the Panel did not err in rejecting China's claims, nor did the Panel err in interpreting and applying the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

2. The U.S. appellee submission is organized as follows, and includes detailed discussion of the following arguments.

3. Section II responds to China's appeals of certain Panel findings related to the *Nails* test applied by the U.S. Department of Commerce ("USDOC") in three challenged antidumping investigations. Section II.A presents an overview of the proper interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement, demonstrating that the pattern clause requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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.

4. Section II.B presents a description of the *Nails* test that USDOC applied in the challenged investigations. The *Nails* test is a two-part test to determine whether a pattern of export prices which differ significantly among different purchasers, regions, or time periods existed based on the domestic industry's allegation that certain purchasers, regions, or time periods had been "targeted." The *Nails* test consists of two distinct steps: the standard deviation test, which is used to establish that differences exist among export prices to different purchasers, regions, or time periods, and the gap test, which is used to determine whether identified differences are significant within the meaning of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement.

5. Section II.C demonstrates that the Panel did not err in rejecting China's claims in respect of the first and third alleged quantitative flaws with the *Nails* test. China's appeals concern factual findings made by the Panel and implicate the Panel's weighing and appreciation of the evidence. Accordingly, China should have requested that the Appellate Body examine whether the Panel made an objective assessment of the matter before it under Article 11 of the DSU. China failed to do so, and the Appellate Body should decline to consider China's arguments, as it has done in similar situations in the past.

6. China requests that the Appellate Body reverse the Panel's findings and complete the analysis by addressing these purportedly legal issues *de novo*. The Appellate Body should reject China's request because (i) the Panel made no legal findings with regard to the first and third

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[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,582 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 61,212 words (including footnotes).

alleged quantitative flaws that can be reviewed by the Appellate Body, and (ii) there are insufficient undisputed facts for the Appellate Body to complete the legal analysis.

7. Furthermore, China's arguments concerning statistical methodology lack merit. The pattern clause of the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to employ the kind of statistical probability analysis discussed by China. The *Nails* test is not inconsistent with the pattern clause simply because it does not involve the statistical methodologies that China might prefer.

8. China's arguments under Article 17.6(i) of the AD Agreement likewise lack merit. China's invocation of Article 17.6(i) of the AD Agreement is further confirmation that China should have appealed the Panel's findings under Article 11 of the DSU. Since China did not pursue an appeal under Article 11 of the DSU, China cannot argue that the Panel failed in its duty under Article 17.6(i) of the AD Agreement, which the Appellate Body has found does not conflict with or prevail over Article 11. Furthermore, China utterly fails to substantiate its claim that the Panel failed in its duty under Article 17.6(i).

9. Section II.D demonstrates that the Panel did not err in rejecting China's claims concerning USDOC's use of weighted-average export prices in connection with its application of the *Nails* test in the challenged investigations. The pattern clause of the second sentence of Article 2.4.2 of the AD Agreement does not prohibit investigating authorities from using weighted averages when undertaking a numerical analysis pursuant to the pattern clause. China's arguments concerning "parallelism" are not supported by the text of the pattern clause, China's reliance on the Appellate Body report in *US – Zeroing (Japan)* is misplaced, and China's arguments concerning the meaning of the term "pattern" lack merit.

10. China's arguments under Article 17.6(i) of the AD Agreement also fail. Again, since China did not pursue an appeal under Article 11 of the DSU, China cannot argue that the Panel failed in its duty under Article 17.6(i) of the AD Agreement, which the Appellate Body has found does not conflict with or prevail over Article 11 of the DSU. Additionally, China has done nothing to substantiate its serious claim that the Panel failed to make an objective assessment of the facts.

11. The Appellate Body should reject China's request that it complete the legal analysis because there are insufficient undisputed facts for the Appellate Body to do so.

12. Section III responds to China's appeal concerning the Panel's findings with respect to qualitative issues with the *Nails* test. China misreads or misunderstands the Panel's findings. The Panel did not, as China contends, find that an investigating authority is not required to consider objective market factors in determining whether relevant pricing differences are "significant" within the meaning of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement. Rather, the Panel found that an investigating authority is not required to consider the reasons why export prices differ, which accords with the Appellate Body's recent finding in *US – Washing Machines*.

13. China misunderstands the Appellate Body's findings in *US – Washing Machines* and argues that an investigating authority is required to consider supposedly "objective market

factors" – seasonality and fluctuating costs – that, in reality, go to the reasons why export prices differ.

14. China also asks the Appellate Body to find that investigating authorities have a duty to investigate the so-called "objective market factors" China identifies. Investigating authorities, however, are not required to examine the reasons why export prices differ, and interested parties have a role to play under the AD Agreement in providing relevant information to investigating authorities.

15. China asserts that the Panel relied on findings by the panel in *US – Washing Machines* that were reversed on appeal. China's assertion is baseless. China misreads the panel report, which referred only to the *US – Washing Machines* panel's finding that an investigating authority is not required to consider the reasons why export prices differ. That finding is consistent with the text of the pattern clause and it was upheld by the Appellate Body.

16. Section IV responds to China's appeal related to footnote 385 of the panel report, and explains that the United States does not object to China's request that the Appellate Body declare the statement made in footnote 385 to be moot and of no legal effect.

17. Section V responds to China's appeal related to the alleged Use of Adverse Facts Available (alleged AFA Norm). Section V.A provides an introduction to the U.S. arguments while section V.B. provides a recitation of certain findings made by the Panel.

18. Section V.C explains why the Appellate Body should exercise judicial economy over China's appeal related to the alleged AFA Norm. In particular, the United States notes that findings made by the Panel with respect to the Single Rate Presumption Norm mean that any findings concerning the alleged AFA Norm would not contribute to a positive resolution of this dispute.

19. In Section V.D, the United States responds to China's appeal related to the Panel's articulation of the standard for a norm of general and prospective application. The United States demonstrates that the Panel's identification and application of the relevant standard is fully consistent with the prior analysis of the Appellate Body. China's appeal is essentially a complaint that the Panel did not find that the evidence China proffered met China's burden.

20. In Section V.E, the United States explains that China's complaint concerning the alleged AFA Norm is in any event outside the terms of reference for this dispute. The claim China identified in its Panel Request did not specify the legal provision under which it seeks findings or identify the legal problem consistent with Article 6.2 of the DSU.

21. In Section V.F, the United States addresses the merits of China's claims concerning the alleged AFA Norm and demonstrates that China cannot establish that the United States breached its obligations under Article 6.8 and paragraph 7 of Annex II. In particular, the limited findings made by the Panel do not indicate that the USDOC fails to exercise the special circumspection required under paragraph 7 of Annex II "as such."

22. Finally, in Section V.G., the United States explains that the limited Panel Findings also mean that there are insufficient legal findings and uncontested facts for the Appellate Body to complete the legal analysis with respect to China's claims concerning the alleged AFA Norm.

II. CHINA'S APPEALS CONCERNING CERTAIN PANEL FINDINGS WITH RESPECT TO THE NAILS TEST LACK MERIT

23. China appeals the Panel's findings with respect to three of China's claims concerning the *Nails* test, which USDOC applied in three challenged investigations. Specifically, China appeals the Panel's rejection of two of China's arguments regarding alleged quantitative flaws with the *Nails* test, and China also appeals the Panel's rejection of China's challenge to USDOC's use of weighted-average export prices in its application of the *Nails* test. As demonstrated below, China's appeals lack merit.

24. Before turning to China's appeals, however, the United States first discusses the proper interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement, and then provides an overview of the *Nails* test that USDOC applied in the challenged investigations.

A. Overview of the Proper Interpretation of the Pattern Clause of the Second Sentence of Article 2.4.2 of the AD Agreement

25. China's appeals of the Panel's findings with respect to the *Nails* test applied by USDOC implicate the second sentence of Article 2.4.2 of the AD Agreement. Article 2.4.2 of the AD Agreement, in its entirety, provides that:

> 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.

26. On its face, Article 2.4.2 of the AD Agreement sets forth three comparison methodologies by which an investigating authority may determine the "existence of margins of dumping." Per the first sentence, "normally," an investigating authority "shall" do so "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." More succinctly, the two normal comparison methodologies

available to an investigating authority are the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. The Appellate Body has observed that:

> The first sentence of Article 2.4.2 sets out the two methodologies that "shall normally" be used by investigating authorities to establish "margins of dumping". Although the transaction-to-transaction and weighted average-to-weighted average comparison methodologies are distinct, they fulfil the same function. They are also equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two. An investigating authority may choose between the two depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing "margins of dumping" and that there is no hierarchy between them, it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology.[2]

27. The second sentence of Article 2.4.2 describes a third, alternative 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" (we refer to this as the pattern clause) 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" (we refer to this as the explanation clause).[3] China's appeals concern only the pattern clause of the second sentence of Article 2.4.2.

28. An interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement, undertaken in accordance with the customary rules of interpretation of public international law, requires an analysis of the ordinary meaning of the terms of the pattern clause in their context and in light of the object and purpose of the AD Agreement.[4] Such an analysis demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" means 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.

29. While Article 2.1 of the AD Agreement suggests that the term "export price" should be understood "[f]or the purpose of [the AD] Agreement" as the "price of the product exported from

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[2] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93. *See also US – Washing Machines (AB)*, para. 5.15.

[3] *See US – Washing Machines (AB)*, paras. 5.16, 5.24.

[4] *See Vienna Convention on the Law of Treaties*, Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").

one country to another," the remaining terms in the pattern clause of the second sentence of Article 2.4.2 are not defined in the AD Agreement.

30. The Appellate Body has explained that an ordinary meaning analysis "may start with the dictionary definitions of the terms to be interpreted," but the Appellate Body has cautioned that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words–be those meanings common or rare, universal or specialized."[5] Rather, as the panel explained in *US – Section 301 Trade Act*:

> For pragmatic reasons the normal usage … is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.[6]

31. The word "pattern," for example, has a wide variety of dictionary definitions, including noun and adjective forms, as well as numerous compound forms. Altogether, there are dozens of entries in the dictionary for the word "pattern," ranging, for example, from "a model, example, or copy" and "an example or model to be imitated," to "a quantity of material sufficient for making a garment," or "a regular or decorative arrangement," or "the distribution of shot fired from a gun."[7]

32. The most apt definition, though, as China appears to agree,[8] and as the Appellate Body found recently in *US – Washing Machines*,[9] is "a regular and intelligible form or sequence discernible in certain actions or situations."[10] The *Oxford English Dictionary*, from which all of the above definitions are drawn, notes that this definition is used "[f]req[uently] with *of*, as *pattern of behaviour*." In the second sentence of Article 2.4.2, the word "pattern" appears together with "*of* export prices . . .," which is a contextual indication of the proper ordinary meaning of the word "pattern" as it is used there. Thus, it would appear that the term "pattern of export prices . . ." can be understood to mean a regular and intelligible form or sequence discernible in export prices.

33. The relevant pattern at issue in the second sentence of Article 2.4.2 is that of export prices "which differ significantly . . . ." The dictionary contains several definitions of the word

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5 *US – Gambling (AB)*, para. 164 (citations omitted; emphasis in original).

6 *US – Section 301 Trade Act*, para. 7.22 (cited by the Appellate Body in *US – Gambling (AB)*, note 191).

7 *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit CHN-90).

8 China's First Written Submission (Confidential) (March 6, 2015) ("China's First Written Submission"), para. 128; China's Appellant's Submission (Confidential) (November 18, 2016) (China's Appellant Submission"), para. 82.

9 *US – Washing Machines (AB)*, para. 5.25.

10 *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 11 (Exhibit CHN-90).

"differ."[11] As the Appellate Body agreed recently,[12] the most appropriate definition, in the sense in which the term is used in the second sentence of Article 2.4.2, appears to be "to have contrary or diverse bearings, tendencies, or qualities; to be not the same; to be unlike, distinct, or various, in nature, form, or qualities, or in some specified respect."[13] This is confirmed when the word "differ" is read together with the word "among."

34. The preposition "among" is defined, *inter alia*, as "of relation between object and objects"; "of the relation of a thing (or things) to the whole surrounding group or composite substance"; "of the relation of anything in a local group to the other members of the group, although these do not actually surround it; as of an individual to the other members of the same community"; "of the relation of a thing to others in the same nominal or logical group: In the number or class of"; and "*esp.* of things distinguished in kind from the rest of the group: Preeminent among, as distinguished from, in comparison with, above the others."[14] The preposition "among" thus references a relationship between one thing, for example, a purchaser, region, or time period, and other similar things of the same type, *e.g.*, other purchasers, regions, or time periods.

35. Thus, when the second sentence of Article 2.4.2 refers to "exports prices which differ significantly among different purchasers, regions, or time periods," this suggests the need for a comparison, for example, of export prices to one purchaser with export prices to another purchaser or purchasers to ascertain whether the export prices to the former are not the same, or are unlike, or are distinct from the export prices to the latter in some respect.[15]

36. The word "differ" in the second sentence of Article 2.4.2 is modified by the word "significantly." Thus, not only must there be a pattern of export prices that "differ" among purchasers, regions, or time periods, the export prices must differ "significantly." The word "significantly," when used as an adverb, as it is in the "pattern clause," is defined as "in a significant manner; *esp.* so as to convey a particular meaning; expressively, meaningfully"; "importantly, notably"; or "to a significant degree or extent; so as to make a noticeable

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[11] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-1).

[12] *See US – Washing Machines (AB)*, para. 5.26.

[13] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-1). The word "differ" is also defined as "to put apart or separate from each other in qualities." Along with being described as "now unusual" in the dictionary, the term is also a transitive verb, suggesting action, while the definition above is that of an intransitive verb. Thus, this definition seems less apt. Also, it is unlikely that a definition related to "heraldry" is appropriate; nor does a definition relating to holding different opinions or being in disagreement (in that same sense) appear suitable.

[14] *See* Definition of "among" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-2).

[15] We refer in this sentence only to an analysis of purchasers for the sake of clarity. There does not appear to be any disagreement between the parties that the appropriate comparison is between the export prices to one purchaser and the export prices to another purchaser or purchasers, or between the export prices to one region and the export prices to another region or regions, or between the export prices in one time period and the export prices in another time period or time periods. No party appears to suggest that the second sentence of Article 2.4.2 calls for a comparison, for example, of export prices to a purchaser with export prices to a region.

difference; substantially, considerably."[16] This latter definition of the word "significant" is in accord with a definition of that term that has been accepted by the Appellate Body, which observed that "[t]he term 'significant' has been understood by the Appellate Body as 'something that can be characterized as important, notable, or consequential.'"[17]

37. Viewed together, the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement provide that, in order for an investigating authority to use the alternative, average-to-transaction comparison methodology in an investigation, the investigating authority first must 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.

38. Additionally, we note, as context, that the pattern clause appears in the second sentence of Article 2.4.2 of the AD Agreement and is a condition for resorting to the "exceptional"[18] average-to-transaction comparison methodology, which is an alternative to the comparison methodologies that investigating authorities "normally"[19] are to use. Accordingly, an investigating authority examining whether there exists a "pattern of export prices which differ significantly" should employ rigorous analytical methodologies and view the data holistically to ascertain whether a pattern of differences in export prices exists, and whether the export price differences among different purchasers, regions, or time periods are significant.

39. Finally, the United States observes that the interpretation of the "pattern clause" set forth above is consistent with and supports the object and purpose of the AD Agreement. While the AD Agreement "does not contain a preamble or an explicit indication of its object and purpose,"[20] guidance can be found in Article VI:1 of the GATT 1994, in which Members have recognized that injurious dumping "is to be condemned." Of course, the AD Agreement also provides detailed rules governing the application of antidumping measures, including procedural safeguards for interested parties and substantive rules for the calculation of dumping margins. The AD Agreement thus appears to be aimed at providing a balanced set of rights and obligations regarding the use of antidumping measures.

40. The second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[21] in "exceptional"[22] situations. As the Appellate Body explained recently in *US – Washing Machines*, "[t]he function of the second sentence of Article 2.4.2 is …

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16 *See* Definition of "significantly" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit CHN-91).

17 *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (*citing US – Upland Cotton (AB)*, para. 426). *See also US – Washing Machines (AB)*, para. 5.62.

18 *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131; *US – Washing Machines (AB)*, para. 5.18.

19 AD Agreement, Art. 2.4.2, first sentence.

20 *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 118.

21 *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

22 *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

to enable investigating authorities to identify so-called 'targeted dumping' and to address it appropriately."[23] Interpreting the "pattern clause" as discussed above – *i.e.*, as requiring an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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 – serves the aim of the second sentence of Article 2.4.2 and is consistent with the overall balance of rights and obligations struck in the AD Agreement.

B. Description of the *Nails* Test that USDOC Applied in the Challenged Investigations[24]

41. In each of the challenged investigations, USDOC applied a two-part test to determine whether a pattern of export prices which differ significantly among different purchasers, regions, or time periods existed based on the domestic industry's allegation that certain purchasers, regions, or time periods had been "targeted." The test that USDOC applied was developed in the context of antidumping duty investigations of steel nails from China and the United Arab Emirates,[25] and we refer to it as the *Nails* test. In applying the *Nails* test, USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by respondents. USDOC described the analyses that it applied in its determinations and associated memoranda.[26]

42. At the time of the challenged antidumping investigations, USDOC required an allegation of "targeted dumping"[27] by a member of the domestic industry before USDOC would examine whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods. In the each of the challenged investigations, the domestic

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[23] *US – Washing Machines (AB)*, para. 5.17.

[24] The Panel offered its own description of the *Nails* test in the panel report. *See* Panel Report, paras. 7.39-7.48.

[25] *See Antidumping Duty Investigations of Certain Steel Nails from the Peoples Republic of China (PRC) and the United Arab Emirate (UAE), Post-Preliminary Determinations on Targeted Dumping*, at 8 (April 21, 2008) (Exhibit CHN-67). *See also Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (June 16, 2008) (Exhibit CHN-74), and accompanying issues and decision memorandum (excerpted) (Exhibit CHN-78).

[26] *See* Coated Paper OI Final I&D Memo, Comment 4 (Exhibit CHN-64); *Less-Than-Fair-Value Investigation on Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Targeted Dumping Analysis of Mandatory Respondents- Final Determination*, at 2-3 (September 20, 2010) ("Coated Paper OI Final Targeted Dumping Memo") (Exhibit CHN-3) (BCI); *Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the People's Republic of China*, at Comment 2 ("OCTG OI Final I&D Memo") (Exhibit CHN-77); *Less-Than-Fair-Value Investigation on Oil Country Tubular Goods from Peoples Republic of China: Targeted Dumping - Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Steel Tube Co., Ltd. (collectively, "Changbao") and Tianjin Pipe (Group) Co. ("TPCO")*, at 5-6 (March 2, 2010) ("OCTG OI Targeted Dumping Memo") (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 22-24 (Exhibit CHN-66).

[27] The phrase "targeted dumping" is a short-hand means of referring to the textual requirements of the second sentence of Article 2.4.2 of the AD Agreement. Of course, the terms of the AD Agreement itself establish the obligations to which Members have agreed, and those terms must be interpreted by applying the customary rules of interpretation of public international law.

industry alleged that one or more respondents had "targeted" certain purchasers, regions, or time periods in the export market (*i.e.*, the U.S. market), and put forth evidence to support its claims.[28]

43. Applying the *Nails* test, USDOC examined whether export prices to the allegedly "targeted" purchasers, regions, or time periods were at significantly different (*i.e.*, lower) levels than the export prices to other purchasers, regions, or time periods, based on the domestic industry's allegation of which purchasers, regions, or time periods had been "targeted." In other words, USDOC applied the *Nails* test only to the purchasers, regions, or time periods that were specified in the allegation from the domestic industry, and did not test whether the export sales to other purchasers, regions, or time periods also may have been "targeted."[29]

44. The *Nails* test that USDOC applied in the challenged antidumping investigations consisted of two distinct steps: the standard deviation test and the gap test, both of which are described below.

45. We note that China has recognized the role of intermediate comparisons when calculating the margin of dumping for an exporter.[30] Similar to comparing export prices to normal value, when comparing export prices to determine whether they differ significantly among different purchasers, regions, or time periods, it may be necessary for an investigating authority to make intermediate comparisons of export prices on a sub-product level (*i.e.*, model-specific comparisons by CONNUM)[31] to ensure that apparent price variations are not attributable to differences in physical characteristics among different product types. USDOC relied on CONNUMs in its application of the *Nails* test in the challenged antidumping investigations.[32]

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[28] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 Fed. Reg. 248,92, 24,897 (May 6, 2010) ("Coated Paper OI Preliminary Determination") (Exhibit CHN-63); *Certain Oil Country Tubular Goods from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 74 Fed. Reg. 59,117, 59,118 (November 17, 2009) ("OCTG OI Preliminary Determination") (Exhibit CHN-62); *High Pressure Steel Cylinders From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 77,964, 77,968 (December 15, 2011) ("Steel Cylinders OI Preliminary Determination") (Exhibit CHN-65).

[29] *See* Coated Paper OI Final I&D Memo, at Comment 4 (p. 25 of the PDF version of Exhibit CHN-64); Coated Paper OI Final Targeted Dumping Memo, at 1 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, at 1 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66); Steel Cylinders OI Preliminary Determination, at 77,968 (Exhibit CHN-65).

[30] *See, e.g.*, China's First Written Submission, at paras. 209-210.

[31] A CONNUM is programming code term that refers to a control number used to identify a particular model of the product based upon the product's physical characteristics.

[32] *See* Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3); OCTG OI Final I&D Memo, Comment 2 (p. 8 of the PDF version of Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at 22 (Exhibit CHN-66) (discussing calculation of standard deviation on a product-specific basis (i.e., by CONNUM) using the POI-wide weighted-average sales prices for the allegedly targeted groups and the groups not alleged to have been targeted).

1. The Standard Deviation Test

46. At the outset of its application of the *Nails* test, for purposes of the standard deviation test, USDOC calculated the weighted-average export price for each purchaser, region, or time period by CONNUM. USDOC then determined the variance between each of the weighted-average export prices[33] to each purchaser, region, or time period during the period of investigation and calculated the standard deviation of the weighted-average export prices.[34] The standard deviation measures the extent of the differences within a set of numbers. Calculating the standard deviation enables USDOC to determine what a normal range of weighted-average export prices is for the period of investigation, and whether certain weighted-average export prices are lower than that norm. The weighted-average export prices which USDOC considered included all of the individual export sales reported by each exporter during the period of investigation. USDOC calculated the weighted-average export prices and the standard deviation on a model-specific basis, *i.e.*, by CONNUM.

47. It is important to note that USDOC used weighted-average export prices to each purchaser, region, or time period in its application of both stages of the *Nails* test. USDOC did not look to price variance at the transaction-specific level because the second sentence of Article 2.4.2 is concerned with export prices that "differ significantly *among* different purchasers, regions or time periods."[35] In other words, for this approach, the relevant price variance to be considered is the variance among purchasers, regions, or time periods, not among specific transactions.

48. We offer the following simple example to illustrate how the standard deviation test operates. A respondent makes export sales during the period of investigation to five purchasers in the export market. Assume for the sake of this example that all of the respondent's sales were of the same model and the respondent sold one unit of this model to each purchaser. The domestic industry alleges that an exporter's sales to Purchaser A are "targeted."

	Purchaser A	Purchaser B	Purchaser C	Purchaser D	Purchaser E
Weighted-Average Export Price	$6.00[36]	$9.50	$9.25	$8.00	$5.75

49. To calculate the variance and the standard deviation for the weighted-average export prices, USDOC first calculates the weighted average of the weighted-average export prices to each purchaser. Because, in the example, the quantity sold to each purchaser is one, each of

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33 The sales are weighted by quantity.

34 *See* Coated Paper OI Final Targeted Dumping Memo, at 2-3 (Exhibit CHN-3); OCTG OI Final I&D Memo, Comment 2 (p. 8 of the PDF version of Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at 22-23 (Exhibit CHN-66).

35 Emphasis added.

36 Again, this is a weighted-average export sales price, not an individual, transaction-specific export price.

these weights is also one, and thus is not shown in the equation below. The total quantity sold (*i.e.*, 5) is in the denominator of the weighted average.

$$\frac{(6.00 + 9.50 + 9.25 + 8.00 + 5.75)}{5} = 7.70$$

50. Next, USDOC calculates the difference between the weighted-average export prices to each purchaser and the weighted-average export price to all purchasers.

$$6.00 - 7.70 = -1.70$$
$$9.50 - 7.70 = 1.80$$
$$9.25 - 7.70 = 1.55$$
$$8.00 - 7.70 = 0.30$$
$$5.75 - 7.70 = -1.95$$

51. Then, USDOC calculates the square of each of these differences.

$$(-1.70)^2 = 2.89$$
$$(1.80)^2 = 3.24$$
$$(1.55)^2 = 2.4025$$
$$(0.30)^2 = 0.09$$
$$(-1.95)^2 = 3.8025$$

52. Then, USDOC calculates the weighted average of these results to determine the variance. Again, because the quantity sold to each purchaser is one, each of these weights is also one, and thus is not shown in the equation below. The total quantity sold (*i.e.*, 5) is once again in the denominator of the weighted average.

$$\frac{(2.89 + 3.24 + 2.4025 + 0.09 + 3.8025)}{5} = 2.485$$

53. Finally, USDOC calculates the standard deviation as the square root of the variance.

$$\sqrt{2.485} = 1.58$$

54. Thus, in this example, the standard deviation is 1.58. USDOC would then consider whether Purchaser A's weighted-average export price is more than one standard deviation below the weighted-average export price to all purchasers (*i.e.*, 7.70).

$$7.70 - 1.58 = 6.12$$

55. Then, USDOC would determine the volume of the allegedly "targeted" purchaser's sales of subject merchandise that are at weighted-average export prices that are more than one standard deviation below the weighted-average export price to all purchasers during the period of investigation. If the volume of sales to the allegedly "targeted" purchaser that are priced at more

than one standard deviation below the weighted-average export price to all purchasers exceeds 33 percent of the total volume of the respondent's sales of subject merchandise to the allegedly "targeted" purchaser, then USDOC will evaluate these sales, which have satisfied the standard deviation test, under the gap test.

56. In the example above, which only included the sale of a single model, 100 percent of the volume of export sales to Purchaser A are priced at more than one standard deviation below the weighted-average export price to all purchasers. Recall that the weighted-average export price to Purchaser A is 6.00; recall, also, that one standard deviation below the weighted-average export price to all purchasers is 6.12. Thus, the weighted-average export price to Purchaser A of 6.00 is more than one standard deviation (1.58) below the weighted-average export price to all purchasers (7.70).

57. In the challenged antidumping investigations, on a CONNUM-specific basis, USDOC determined that there were export sales to the alleged "targets" (*i.e.*, purchasers, regions, or time periods) where the weighted-average export prices to those alleged "targets" were more than one standard deviation below the weighted-average export price to all of the "non-targets," and the volume of such sales to each alleged "target" exceeded 33 percent of the volume of export sales to each alleged "target."[37]

2. The Gap Test

58. The second stage of the *Nails* test is called the gap test. In applying the gap test, USDOC determined the total volume of sales for which the difference, or gap, between the weighted-average sale price to the alleged "target" and the next higher weighted-average sale price for a "non-target" exceeds the weighted-average gap among "non-targets." The next higher price is the weighted-average sale price to a "non-target" that is greater than the weighted-average sale price to the alleged "target." The weighted-average gap is calculated as the average of the gaps between "non-targets" weighted by the sum of the export sale quantities to the two "non-targets" that define the gap. The gap test is only performed for the export sales which passed the standard deviation test. For purposes of the gap test, USDOC omits weighted-average sale prices to "non-targets" that are lower than the weighted-average sale price to the alleged "target."[38]

59. Returning to the example above, the weighted-average export price to Purchaser A is $6.00 and the weighted-average export prices to the non-targeted purchasers are $9.50, $9.25, $8.00, and $5.75. Because USDOC omits weighted-average export prices to "non-targets" that are lower than the weighted-average export price to the alleged "target," the export price to Purchaser E of $5.75 would be omitted from the gap test performed for Purchaser A. Commerce calculates the gap between $6.00 and $8.00 because $8.00 is the next higher weighted-average

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[37] *See* Coated Paper OI Final Targeted Dumping Memo, at 2-3 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, at 6-9 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 22-24 (Exhibit CHN-66).

[38] *See* Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, at 6 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 23 (Exhibit CHN-66). The Panel found that this aspect of the *Nails* test, as applied in two of the three challenged investigations, is inconsistent with the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement, and the United States has not appealed that finding. *See* Panel Report, paras. 7.85-7.93, 8.1.a.i.

export price to a non-targeted purchaser above $6.00. Thus, the gap between Purchaser A and the purchaser with the next higher weighted average export price, Purchaser D, is $2.00. The gaps between the non-targeted purchasers that form the basis of the weighted-average gap are $0.25 (Purchaser B and Purchaser C), and $1.25 (Purchaser C and Purchaser D). The weighted-average gap is thus $0.75.

60. If the volume of the export sales to the alleged "target" that met this test exceeded five percent of the total volume of export sales of subject merchandise to the alleged "target," then USDOC would determine that the sales which satisfy this five percent threshold pass the gap test.[39] In the example above, the volume of the sales that met this threshold is 100 percent, and thus exceeds five percent of the total volume of sales of subject merchandise to Purchaser A.

61. Where USDOC found that a sufficient percentage of total sales to an alleged target passed both the standard deviation test and the gap test, it concluded that the requirements of the *Nails* test and, thus, the pattern clause, were met and "targeted dumping" had been established.[40] USDOC then proceeded to consider whether one of the two normal comparison methodologies could account for such differences (*i.e.*, the explanation clause of the second sentence of Article 2.4.2 of the AD Agreement).

62. In the coated paper, OCTG, and steel cylinders antidumping investigations, USDOC applied the analysis described above to each exporter's export sales data, based on the allegations of "targeted dumping" from the domestic industry, and determined for each exporter that there existed a sufficient volume of sales to the alleged "target" which passed the *Nails* test.[41]

63. As reflected in the description above and in the discussion in the final determinations and explanatory memoranda issued in connection with the challenged investigations, USDOC undertook a rigorous, holistic examination of each exporter's 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, consistent with the requirements of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement.

64. In addition to explaining its analytical approach in the final determinations and explanatory memoranda for these investigations, USDOC addressed numerous arguments raised

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[39] *See* Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, at 6 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 23 (Exhibit CHN-66).

[40] *See, e.g.*, Coated Paper OI Final Targeted Dumping Memo, at 1 (Exhibit CHN-3); *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from the People's Republic of China*, dated December 3, 2012, at 18 (Exhibit CHN-104) ("If the Department's two-step analysis confirmed the allegation of targeting and sufficient sales were found to have been targeted (i.e., to have passed the two-step Nails test), then the Department considered whether the average-to-average method could take into account the observed price differences.").

[41] *See* Coated Paper OI Final I&D Memo, at Comment 4 (Exhibit CHN-64); Coated Paper OI Final Targeted Dumping Memo, at 3-3 (Exhibit CHN-3); OCTG OI Final I&D Memo, at Comment 2 (p. 10 of the PDF version of Exhibit CHN-77); OCTG OI Targeted Dumping Memo, at 6 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 23 (Exhibit CHN-66).

by interested parties concerning the analysis applied in the examination of the existence of a pattern of export prices which differed significantly among different purchasers, regions, or time periods. For example, USDOC responded to arguments concerning the use of weighted-average sales prices in its analysis,[42] the use of a one-standard-deviation threshold versus a two-standard-deviation threshold,[43] whether other statistical tests should be applied,[44] and whether a *de minimis* threshold should apply.[45] In many cases, USDOC had previously considered these arguments, and thus the final issues and decision memoranda make reference to prior USDOC determinations that also discuss USDOC's positions.

65. The United States recalls the Appellate Body's elaboration of the standard of review to be applied by panels when reviewing an investigating authority's antidumping determination:

> [T]he task of a panel [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. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."[46]

The United States observes that China appears to agree that this is a correct articulation of the standard of review to be applied by WTO panels.[47]

66. As discussed above, and as demonstrated in the final determinations and explanatory memoranda in the challenged antidumping investigations, USDOC's conclusion that there existed for each exporter a pattern of export prices which differed significantly among different purchasers, regions, or time periods is reasoned and adequate in light of the evidence on the record. USDOC's reasoning is coherent and internally consistent. The explanations disclose how USDOC treated the record evidence and whether positive evidence supported each

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[42] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); Coated Paper OI Final I&D Memo at Comment 3 (Exhibit CHN-64).

[43] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66).

[44] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); Coated Paper OI Final I&D Memo at Comment 3 (Exhibit CHN-64).

[45] Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66).

[46] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

[47] *See* China's First Written Submission, para. 583-584.

inference that USDOC made and each conclusion that USDOC reached. The explanations demonstrate that USDOC took proper account of the relevance of all factual evidence before it. And USDOC explained why it rejected or discounted alternative explanations and interpretations of that evidence.

67. Accordingly, and as further explained below, the Panel did not err in finding that, with respect to the claims China has appealed, USDOC did not act inconsistently with the requirements of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement, as that clause is properly interpreted.

C. The Panel Did Not Err in Rejecting China's Claims in Respect of the First and Third Alleged Quantitative Flaws with the *Nails* Test

68. China appeals the Panel's rejection of two of China's claims relating to alleged quantitative flaws with the *Nails* test applied by USDOC in three challenged antidumping investigations. As demonstrated below, China's appeals fail.

69. As a threshold matter, China's appeals concern factual findings made by the Panel and implicate the Panel's weighing and appreciation of the evidence. Accordingly, China should have requested that the Appellate Body examine whether the Panel made an objective assessment of the matter before it under Article 11 of the DSU. China failed to do so, and the Appellate Body should decline to consider China's arguments, as it has done in similar situations in the past.

70. China requests that the Appellate Body reverse the Panel's findings and complete the analysis by addressing these purportedly legal issues *de novo*. The Appellate Body should reject China's request because (i) the Panel made no legal findings with regard to the first and third alleged quantitative flaws that can be reviewed by the Appellate Body, and (ii) there are insufficient undisputed facts for the Appellate Body to complete the legal analysis.

71. If the Appellate Body agrees to consider China's arguments, the Appellate Body should find that they lack merit. The pattern clause of the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to employ the kind of statistical probability analysis discussed by China, and the *Nails* test is not inconsistent with the pattern clause simply because it does not involve the statistical methodologies that China might prefer.

72. China's arguments under Article 17.6(i) of the AD Agreement likewise lack merit. China's invocation of Article 17.6(i) of the AD Agreement is further confirmation that China should have appealed the Panel's findings under Article 11 of the DSU. Since China did not pursue an appeal under Article 11 of the DSU, China cannot argue that the Panel failed in its duty under Article 17.6(i) of the AD Agreement, which the Appellate Body has found does not conflict with or prevail over Article 11 of the DSU. Furthermore, China utterly fails to substantiate its claim that the Panel failed in its duty under Article 17.6(i) of the AD Agreement.

73. Accordingly, the Appellate Body should uphold the Panel's findings with respect to China's claims concerning the first and third alleged quantitative flaws.

1. The Panel Rejected China's Claims Concerning the First and Third Alleged Quantitative Flaws on the Basis of Factual Findings, Which China Has Not Properly Placed Before the Appellate Body on Appeal

74. Pursuant to Article 17.6 of the DSU, appeals are "limited to issues of law covered in the panel report and legal interpretations developed by the panel."[48] Where an appellant has attempted to make arguments challenging a panel's "factual conclusions" during the course of an appeal, the Appellate Body has declined to rule on such arguments.[49] If an appellant wishes to request that the Appellate Body review a panel's "assessment of the facts of the case," it must do so pursuant to Article 11 of the DSU.[50] As the Appellate Body explained in *EC – Seal Products*, "allegations implicating a panel's assessment of the facts and evidence fall under Article 11 of the DSU. By contrast, '[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is … a legal characterization issue' and therefore a legal question."[51]

75. As explained below, the Panel resolved China's claims relating to the first and third alleged quantitative flaws on the basis of factual findings, and China has not properly appealed those factual findings under Article 11 of the DSU. Accordingly, the Appellate Body should decline to rule on China's arguments concerning the first and third alleged quantitative flaws.

a. The Panel Resolved China's Claim Relating to the First Alleged Quantitative Flaw on the Basis of Factual Findings

76. The Panel described China's claim with respect to the first alleged quantitative flaw in the following terms:

> 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. . . . 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. . . .[52]

77. The Panel considered that "[t]he 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,

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48 *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 384.

49 *See EC – Bananas III (AB)*, para. 239; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 420.

50 *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 385; *see also id.*, paras. 420, 424.

51 *EC – Seal Products (AB)*, para. 5.232 (citations omitted).

52 *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, Report of the Panel, WT/DS471/R (October 19, 2016) ("Panel Report"), para. 7.56.

and if so, whether the USDOC verified that the export price data in the three challenged investigations were of that nature."[53]

78. After considering the arguments of the parties and examining the *Nails* test that USDOC applied in the challenged investigations, the Panel found:

> 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.[54]

79. Accordingly, the Panel concluded that China:

> ha[d] not shown that the Nails test is of such a nature that it could only be used if the export price data were normally distributed or single-peaked and symmetric. 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.[55]

80. In other words, the Panel found that China failed to establish the factual premise of its claim, *i.e.*, the Panel found that the *Nails* test does not depend on an assumption that the export price data were normally distributed or single-peaked and symmetric. This is a factual finding. It is not an "issue[] of law covered in the panel report [or a] legal interpretation[] developed by the panel,"[56] nor is it a "'legal characterization' of facts and, as such, a matter of law."[57]

81. The Panel's consequent rejection of China's claim under the pattern clause of Article 2.4.2 in respect of the first alleged quantitative flaw followed naturally from the Panel's factual

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53 Panel Report, para. 7.59.

54 Panel Report, para. 7.64.

55 Panel Report, para. 7.67.

56 DSU, Article 17.6.

57 *US – Softwood Lumber V (AB)*, para. 163.

finding, and likewise does not constitute a legal characterization of facts. It simply was an acknowledgement that China had failed to establish the factual premise of its claim, and for that reason China's claim failed.

82. On appeal, China does not ask the Appellate Body to evaluate whether the Panel made an objective assessment of the facts under Article 11 of the DSU. Instead, China contends that "the Panel developed and applied an erroneous legal standard under Article 2.4.2, second sentence."[58] China's own arguments, however, reveal that China is attacking the Panel's weighing and appreciation of the evidence. For example, China explains that:

> The Panel considered that it cannot be said that an export price is not "unusually or sufficiently low", just because a large number of export transactions are made at such low level of prices. The Panel reasoned that it was possible, for instance, that an exporter makes repeated low priced sales to a targeted purchaser (or time period or region). 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.[59]

China asserts that "[t]he Panel's reasoning is incorrect."[60] The reasoning China assails, however, is factual in nature. Specifically, the Panel's reasoning relates to the factual question of whether a particular grouping of data could or could not support a factual determination, using USDOC's standard deviation test, which is part of the *Nails* test applied by USDOC, that prices to one purchaser (or region or time period) are lower than prices to another purchaser (or region or time period).

83. While China attempts to frame the issue under appeal as a supposedly legal one – namely, whether the pattern clause requires an examination of whether export prices (among different purchasers, regions, or time periods) are "unusually low" or "sufficiently low"[61] – the Panel made no legal or interpretative findings with respect to these different terms, nor are these terms used in the AD Agreement. Indeed, the Panel explicitly declined to discuss the difference, if any, between the phrases "unusually low" and "sufficiently low" export prices, which the Panel noted were used by the parties but which are not terms used in the second sentence of Article 2.4.2 of the AD Agreement.[62]

84. Instead, the Panel "assess[ed] 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

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58 China's Appellant Submission, para. 106.

59 China's Appellant Submission, para. 108.

60 China's Appellant Submission, para. 109.

61 *See, e.g.*, China's Appellant Submission, paras. 108-109.

62 *See* Panel Report, para. 7.61.

pattern were significant, with the meaning of the pattern clause of Article 2.4.2."[63] As the Panel found elsewhere, USDOC used the standard deviation test to establish a "pattern of export prices which differ," while USDOC used the gap test to establish whether those differences were significant.[64] In the discussion highlighted by China, the Panel was making a factual assessment of the operation of the standard deviation test to determine whether, as China had argued, that test was incapable of being used to assess whether prices differ. This was just one part of the Panel's consideration of China's overall argument that USDOC acted inconsistently with the pattern clause of the second sentence of Article 2.4.2.

85. China further contends that the Panel misunderstood China's argument.[65] As China explains:

> China's argument, rather, is more fundamental – pointing out that the Nails Test routinely discerned large quantities of sales below the selected (one-standard-deviation) threshold because the tool used to generate that threshold cannot function as intended in situations in which the distribution of data is not "normal".[66]

This explanation does not help China.

86. First, a supposed failure by the Panel to understand a party's argument does **not** involve an issue of law or legal interpretation under Article 17.6 of the DSU. Rather, this type of complaint involving a panel's finding must be raised under Article 11 of the DSU.

87. Second, China's description of its argument actually highlights the factual premise on which China's argument to the Panel depended, and which the Panel found China failed to establish. As the Panel explained, 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."[67] The nature of the *Nails* test is a factual issue, and China is asking the Appellate Body to review the Panel's weighing and appreciation of evidence related to the *Nails* test and how it operates.

88. China also argues that, when the Panel found "no correlation" between the statistical problem highlighted by China and what USDOC was trying to achieve, "[t]he Panel's reasoning [was] unavailing."[68] Once again, the Panel's weighing and appreciation of the study of statistics, as it was described and characterized by China, and the relevance or irrelevance of certain statistical matters to the analysis actually undertaken by USDOC in the challenged investigations is a factual issue, which falls under Article 11 of the DSU.

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63 Panel Report, para. 7.61 (emphasis added).

64 Panel Report, para. 7.71.

65 *See* China's Appellant Submission, para. 109.

66 China's Appellant Submission, para. 109.

67 Panel Report, para. 7.67.

68 China's Appellant Submission, paras. 110-111.

89. The Appellate Body has addressed previously the question of when a given panel finding involves the weighing and appreciation of facts, on the one hand, and when it constitutes a legal characterization of facts, or the application of law to facts, on the other. The Appellate Body has "recognized the difficulty of distinguishing 'clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact', and has stated that '[i]n most cases … an issue will either be one of application of the law to the facts or an issue of the objective assessment of facts, and not both.'"[69]

90. In *EC – Bananas III*, the Appellate Body found that "the conclusions by the Panel on whether Del Monte is a Mexican company, the ownership and control of companies established in the European Communities that provide wholesale trade services in bananas, the market shares of suppliers of Complaining Parties' origin as compared with suppliers of EC (or ACP) origin, and the nationality of the majority of operators that 'include or directly represent' EC (or ACP) producers, are all factual conclusions."[70] Accordingly, the Appellate Body declined to rule on arguments related to those conclusions in a situation where an appeal had not been advanced under Article 11 of the DSU.[71]

91. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body found that:

> [T]he methodology used by the Panel in determining which production costs and revenues to compare to establish whether there is a gap between upland cotton producers' costs of production and revenues is not an issue of legal interpretation or application under Article 6.3(c) of the *SCM Agreement*. The existence of a revenue gap is not a legally required benchmark under Article 6.3(c). In other words, there is no legal consequence under Article 6.3(c) that necessarily flows from the fact that there is a gap between producers' revenues and costs. Rather, it is merely one of the elements that the Panel considered in determining whether there was "significant price suppression". Thus, the profitability of upland cotton production is a factual matter, the evaluation of which fell to the Panel to determine.[72]

92. Similarly, in *EC – Seal Products*, when Canada and Norway presented overlapping challenges concerning the panel's application of the law to the facts, as well as the Panel's assessment of the facts under Article 11 of the DSU, the Appellate Body was called upon to examine whether certain of the complainants' claims were properly considered as claims of legal application or as claims relating to the panel's objective assessment of the facts within the meaning of Article 11 of the DSU.[73] The complainants argued that the measures challenged in that dispute did not support the measures' intended objective because the measures led to worse

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69 *EC – Seal Products (AB)*, para. 5.232.

70 *EC – Bananas III (AB)*, para. 239.

71 *EC – Bananas III (AB)*, para. 239.

72 *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 420.

73 *See EC – Seal Products (AB)*, paras. 5.234-5.243.

animal welfare outcomes. The Appellate Body "consider[ed] that the premise that the complainants believe is supported by the Panel record is primarily factual in nature, and therefore relates to the Panel's weighing and appreciation of the evidence."[74] The Appellate Body "therefore consider[ed] that these claims of Canada and Norway are more properly addressed under Article 11 of the DSU as challenges to the Panel's objective assessment of the facts."[75]

93. By contrast, in *US – Softwood Lumber V*, the Appellate Body found that "whether an investigating authority has exercised its discretion in an even-handed manner … is a question of law."[76] Likewise, in *China – GOES*, the Appellate Body found that "[a]lthough there are arguably features of the Panel's analysis on appeal that concern facts that were before MOFCOM and before the Panel itself, we understand China's appeal to address the manner in which the Panel examined and applied [provisions of the AD Agreement and the SCM Agreement] to MOFCOM's Final Determination."[77] The Appellate Body considered that, in that case, there was no basis to review whether the panel made an objective assessment of the facts under Article 11 of the DSU.

94. The Panel findings here with respect to the first alleged quantitative flaw, which China seeks to challenge, are like findings that the Appellate Body has previously considered factual findings. Unlike in *Softwood Lumber V* and *China – GOES*, the Panel's findings concerning the first alleged quantitative flaw do not, contrary to China's assertions, go to the question of whether USDOC exercised its discretion in an even-handed manner, or whether USDOC's determination is consistent with the requirements of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement. How the *Nails* test operates is a factual question. Whether the *Nails* test is premised on an assumption that the data is distributed normally is a factual question. Whether the *Nails* test must be premised on an assumption of normal distribution because it uses the standard deviation is a factual question.

95. The Panel never got to the stage of applying the law to the facts to assess whether the particular feature of the *Nails* test challenged by China is or is not consistent with the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement. Rather, as in *US – Upland Cotton (Article 21.5 – Brazil)* and *EC – Seal Products*, the Panel made factual findings related to the nature of the *Nails* test and how it operates that resulted in the Panel concluding that China had failed to establish the factual premise of its legal claim.

96. For the reasons given above, the Appellate Body should find that China's arguments on appeal related to the Panel's findings with respect to the first alleged quantitative flaw concern the Panel's weighing and appreciation of the facts. Since China has not asked the Appellate Body to examine whether the Panel made an objective assessment of the facts under Article 11 of the DSU, the Appellate Body should decline to rule on China's arguments.

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74 *EC – Seal Products (AB)*, para. 5.243.

75 *EC – Seal Products (AB)*, para. 5.243.

76 *US – Softwood Lumber V (AB)*, para. 163.

77 *China – GOES (AB)*, para. 184.

b. The Panel Resolved China's Claim Relating to the Third Alleged Quantitative Flaw on the Basis of Factual Findings

97. The Panel's disposition of China's claim related to the third alleged quantitative flaw was similar to its disposition of China's claim related to the first alleged quantitative flaw. The Panel described China's claim in the following terms:

> China argues that the USDOC acted inconsistently with the pattern clause of Article 2.4.2 in the three challenged investigations by applying … 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. 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.
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> 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".[78]

98. As it did with the first alleged quantitative flaw, the Panel considered that "[t]he issue raised by [the third] alleged flaw is two-fold."[79] The Panel explained:

> 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. . . .[80]

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78 Panel Report, paras. 7.75-7.76 (citations omitted).

79 Panel Report, para. 7.78.

80 Panel Report, para. 7.78.

Thus, the Panel was clear that, if it determined that the factual assumption underlying China's claim was not "factually correct," then the Panel would not proceed to examine whether USDOC acted inconsistently with the pattern clause of Article 2.4.2, *i.e.*, it would not get to the stage of applying the law to the facts.[81]

99. Ultimately, that is what happened; the Panel did not get to the stage of applying the law to the facts. Rather, the Panel found that:

> China [did] not show that even though the export price data were not normally distributed in the three challenged investigations, the distribution still had a tail, and that the alleged target price was located at the tail. 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.[82]

Consequently, the Panel concluded that:

> 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. We 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.

Thus, the Panel explicitly rejected China's claim regarding the third alleged quantitative flaw without having to interpret and apply the pattern clause of Article 2.4.2 because China failed to establish the factual premise underlying its claim. Indeed, China acknowledges this in its appellant submission.[83]

100. Nevertheless, China suggests, as it does with the respect to the first alleged quantitative flaw, that "the Panel developed and applied an erroneous legal standard under Article 2.4.2, second sentence."[84] Once again, China does not ask the Appellate Body to evaluate whether the Panel made an objective assessment of the facts, as required by Article 11 of the DSU. However, China's own arguments yet again reveal that China is attacking the Panel's weighing and appreciation of the facts.

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81 Panel Report, para. 7.78.

82 Panel Report, para. 7.82. *See also id.*, para. 7.83.

83 *See* China's Appellant Submission, para. 78.

84 China's Appellant Submission, para. 106.

101. China argues with respect to the Panel's findings concerning the third alleged quantitative flaw that:

> [T]he Panel's argument on this issue reveals confusion regarding the relationship between the first and third flaws. The Panel observed in Paragraph 7.81 of the Panel Report that China presented evidence in these proceedings showing that in the 3 challenged determinations, the export price data were not actually "normally" distributed. Considering that the export price data in the 3 challenged investigations were not "normally" distributed, the Panel noted that it could not conclude that the AT price was by definition located at the tail of the data distribution. The Panel went on to reason, in Paragraph 7.82 of the Panel Report, that China did not show that even though the export price data were not "normally" distributed in the 3 challenged determinations, the distribution still had a tail, and that the AT price was located at the tail.[85]

102. China is explicitly challenging the Panel's observations concerning facts in evidence and the Panel's reasoning related to its appreciation of those facts. China goes on to argue that "[c]ontrary to the Panel's assertion, the fact that the third quantitative flaw arises only when the price distribution possesses a left-hand tail does not mean that China '[did] not demonstrate that the assumption on which [that flaw] rests is factually correct.'"[86] Without question, China's arguments on appeal go to the Panel's weighing and appreciation of the evidence and the factual conclusions that the Panel drew based on the evidence. These are matters that must be addressed on appeal under Article 11 of the DSU.[87]

103. China also argues that, "even if not 'normally' distributed, the data for some of the CONNUMs did have tails to the left of the mean, a situation that gives rise to China's concern regarding the third flaw."[88] China may suggest that, given that the data for some of the CONNUMs did have tails to the left of the mean, the Panel should have proceeded to the second step of the analysis. However, contrary to China's assertion, the Panel made a factual finding that "China [did] not show that even though the export price data were not normally distributed in the three challenged investigations, the distribution still had a tail, and that the alleged target price was located at the tail."[89] If China wished for the Appellate Body to address that factual finding, China was required to pursue an appeal under Article 11 of the DSU. China failed to do so.

104. Finally, China argues that the Panel erred in rejecting China's argument regarding the third alleged quantitative flaw because, China contends, "in every case, either the first or the

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85 China's Appellant Submission, para. 114.

86 China's Appellant Submission, para. 115.

87 *EC – Seal Products (AB)*, para. 5.232 (citations omitted).

88 China's Appellant Submission, para. 115.

89 Panel Report, para. 7.82. *See also id.*, para. 7.83.

third flaws necessarily occurred – and in some cases, both."[90] China complains that "[t]here is no way to know in which cases which flaw arose, because USDOC declined to test the data to determine if they were distributed in a way that would have enabled the Nails Test applied in the 3 challenged determinations to generate valid conclusions."[91] This argument is unavailing. China had all of the data and could have tested the data itself in order to establish its claims. China did not do so, and the Panel found that China failed to show that the assumption on which the third alleged quantitative flaw rested was factually correct insofar as the three challenged investigations were concerned.[92] Once again, the Panel made a factual finding and China has not challenged that factual finding on appeal under Article 11 of the DSU.

105. For the reasons given above, the Appellate Body should find that China's arguments on appeal related to the Panel's findings with respect to the third alleged quantitative flaw concern the Panel's weighing and appreciation of the facts. Since China has not asked the Appellate Body to examine whether the Panel made an objective assessment of the facts under Article 11 of the DSU, the Appellate Body should decline to rule on China's arguments.

2. The Appellate Body Should Reject China's Request for Review of Legal Findings that the Panel Did Not Make, and for Completion of the Legal Analysis in a Situation where there Are Insufficient Undisputed Facts

106. China requests that the Appellate Body reverse the Panel's findings with respect to the premises described above in section II.C.1 and then complete the analysis by addressing these purportedly legal issues *de novo*.[93] The Appellate Body should reject China's request.

107. As explained, the Panel made no legal findings with regard to China's claims concerning the first and third alleged quantitative flaws that can be appealed. Because the Panel found that China had failed to establish the factual premises of its legal claims, the Panel did not go on to make legal findings with respect to China's claims. Accordingly, there are no legal findings for the Appellate Body to review.

108. Nevertheless, China asks the Appellate Body to reverse the Panel's findings and to complete the analysis. Completion of the analysis would be possible only if there were sufficient undisputed facts on the record to permit the Appellate Body to do so. That is not the case here.

109. Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." This precludes any fact finding by the Appellate Body. Accordingly, "[i]n previous disputes, the Appellate Body has emphasized that it can complete the analysis 'only if the factual findings of the panel, or the undisputed facts in the panel record' provide a sufficient basis for the Appellate Body to do

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90 China's Appellant Submission, para. 116.

91 China's Appellant Submission, para. 116.

92 *See* Panel Report, para. 7.82.

93 *See* China's Appellant Submission, paras. 124-125.

so."[94] The Appellate Body has further explained that it will "complete the analysis" only in cases where the panel has addressed a claim and made a legal interpretation, finding, or conclusion,[95] where there are "sufficient factual findings,"[96] or where there are "sufficient uncontested facts on the record."[97] The Appellate Body has recognized that its ability to complete the analysis is subject to "important limitation" and has adopted a "cautious approach" in the past.[98] In this dispute, contrary to China's assertion, it would not be possible for the Appellate Body to complete the legal analysis.

110. Because the Panel did not proceed to apply the law to the facts, the Panel made no factual findings concerning, *inter alia*, the validity of the assertions China has made about the study of statistics and the implications of statistical methodology for USDOC's examination of the export price data in all three of the challenged investigations. Thus, for example, while the Panel may have observed, with respect to the first alleged quantitative flaw, that "USDOC did not verify whether the export price data in the three challenged investigations were normally distributed or single-peaked and symmetric," the Panel found that that was "irrelevant" given its finding that China failed to show 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."[99] The mere fact of USDOC not verifying the distribution of the data would be insufficient for the Appellate Body to make the findings that China seeks. For China to succeed, China would have to establish, as a factual matter, that its assertions about the study of statistics are correct, but the Panel made no findings in that regard, and the necessary facts are not uncontested.

111. Likewise, with respect to the third alleged quantitative flaw, the Panel found that China failed to 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."[100] Notably, this finding relates only to certain CONNUMs in the challenged investigations and not to others, about which the Panel made no factual findings. Additionally, once again, the Panel made no factual findings concerning China's assertions about statistical methodology.

112. China asserts that representations made in two of the exhibits it submitted to the Panel are uncontested by the United States.[101] China is incorrect. The United States does not agree that

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94 *See, e.g., US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 1250 (citing numerous Appellate Body reports in prior disputes).

95 *EC – Poultry (AB)*, para. 107; *EC – Asbestos (AB)*, paras. 79, 82.

96 *US – Section 211 Appropriations Act (AB)*, para. 343; *EC and certain member States – Large Civil Aircraft (AB)* paras. 735, 1101, 1417; *Australia – Salmon (AB)*, para. 118.

97 *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 157 ("Canada, as the complaining party, must persuade us that there are sufficient uncontested facts on the record to enable us to complete the analysis by stepping into the shoes of the Panel.").

98 *US – Continued Zeroing (AB)*, para. 195 ("We recognise the important limitation on our ability to complete the analysis.").

99 Panel Report, para. 7.67.

100 Panel Report, para. 7.82.

101 *See* China's Appellant Submission, footnote 98 and para. 150.

the representations made or the calculations provided in China's exhibits are correct. China's exhibits are not a source of undisputed facts. Before the Panel, the United States did not contest the representations made in China's exhibits, nor did we take the time to check the accuracy of China's calculations, because all of the arguments and assertions made in China's exhibits were, as the United States explained to the Panel, beside the point. The Panel appears to have agreed with the United States that China's exhibits were beside the point. In any event, the Panel made no factual findings concerning the assertions in China's exhibits.

113. For these reasons, there are insufficient undisputed facts for the Appellate Body to complete the legal analysis, and the Appellate Body should decline China's request.

3. China's Arguments Concerning Statistical Methodology Lack Merit

114. As explained above, the Appellate Body should decline to consider China's arguments concerning the alleged quantitative flaws in the *Nails* test because (i) China was required to appeal the Panel's findings with respect to the first and third alleged quantitative flaws under Article 11 of the DSU, but failed to do so; (ii) the Panel in any event correctly found that China did not establish the factual predicate to support China's legal arguments, (iii) the Panel made no legal findings on these issues from which China might appeal, and (iv) there are insufficient factual findings by the Panel and undisputed facts with which the Appellate Body could complete the analysis.

115. Nonetheless, as the United States demonstrated during the panel proceeding, China's arguments regarding supposed quantitative flaws have no basis in the text of the AD Agreement. Rather, China's arguments amount to nothing more than a baseless request that authorities be required to adopt one specific mode of numerical analysis preferred by China.

116. China has acknowledged during the course of this dispute 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."[102] Despite this acknowledgement, though, China 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. As explained below, such requirements are not supported by the text of the second sentence of Article 2.4.2 of the AD Agreement, nor are they grounded in logic.

a. China's Statistical Arguments Rest on a Flawed Legal Premise Because the Pattern Clause Does Not Require an Investigating Authority To Use the Statistical Probability Analysis China Discusses

117. In the course of its textual analysis of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement, China focuses on the meaning of the word "significantly."[103] China

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[102] China's First Written Submission, para. 154.

[103] China's Appellant Submission, para. 83.

draws on dictionary definitions of the term "significant," including "with regard to statistics."[104] Citing a dictionary entry for the word "significant," China proposes that the term means, among other things, "unlikely to have occurred by chance alone." In its arguments before the Panel, China appeared to reason from this definition that, with respect to the "[q]uantitative dimension of 'significant' price difference," "[t]here must be a high level of confidence that the prices indeed differ in a significant way; or put differently, there must be a low probability that there is no distinct 'pattern' in the data."[105] On the basis of this proposed *ordinary meaning* of the term "significantly," China has mounted an argument that 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."[106] China continues that line of argument on appeal, focusing its attention on what China considers the proper use of "statistics to analyze a data distribution."[107]

118. The legal premise of China's arguments, however, is flawed. The term "significantly" in the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to utilize the particular kind of statistical probability analysis that China discusses when examining export prices to determine whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." China's suggestion that the meaning of the word "significant" in statistics informs the analysis of that term's ordinary meaning as it is used in the second sentence of Article 2.4.2 is misguided.

119. The Appellate Body has warned that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words–be those meanings common or rare, universal or specialized."[108] The definition of "significant" on which China relies would appear to be just such a "specialized" definition. Indeed, in contrast to entries presenting general definitions, the entry to which China draws the Appellate Body's attention is preceded by the word "*Statistics*," which denotes the specialized nature of the definition that follows.[109] Additionally, the entry notes "More fully ***statistically significant***,"[110] suggesting that when the word "significant" is being used in a statistical sense, for clarity it should be modified by the word "statistically." The term "significantly" in the second sentence of Article 2.4.2 is not modified by the word "statistically," or at all, and thus should not be read as conveying this specialized statistical meaning of the word "significant."

120. Furthermore, while the term "statistically" is not used in the second sentence of Article 2.4.2, that term is used elsewhere in the AD Agreement. Article 6.10 of the AD Agreement, for instance, provides that, where it would be impracticable to determine individual margins of

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104 China's Appellant Submission, para. 83.

105 China's First Written Submission, para. 139.

106 China's First Written Submission, para. 219 *et seq.*

107 China's Appellant Submission, para. 89.

108 *US – Gambling (AB)*, para. 164 (citations omitted; emphasis in original).

109 *See* Definition of "significant" from Oxford English Dictionary Online (http://www.oed.com), entry 5, p. 4 (Exhibit CHN-92).

110 Emphasis in original.

dumping for all exporters or producers, the investigating authority may, *inter alia*, limit its examination "by using samples which are *statistically* valid."[111] In addition, footnote 13 of the AD Agreement provides that, when determining industry support in the case of a fragmented industry involving an exceptionally large number of producers, investigating authorities may use "*statistically* valid sampling techniques."[112] The presence of the term "statistically" in these other provisions of the AD Agreement and the absence of that or any similar term in the second sentence of Article 2.4.2 of the AD Agreement is strong contextual support for the conclusion that the term "significantly" in the pattern clause does not mean that an investigating authority is required to utilize the kind of statistical methodology for which China argues.

121. China discusses the context of the pattern clause as well. China suggests that "[t]he nature of Article 2.4.2, second sentence, as an exception in turn means that the two pre-conditions set forth in that Article are to be applied with rigor."[113] The United States agrees. That is why, in applying the *Nails* test in the challenged investigations, USDOC employed a rigorous, multi-step test to undertake a holistic examination of each exporter's 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.

122. 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 of the AD Agreement. Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake the particular kind of statistical probability analysis discussed by China, even if the investigating authority chooses to utilize certain statistical tools. China's arguments in this regard lack merit, among other reasons, because they are founded on a flawed understanding of the pattern clause of the second sentence of Article 2.4.2.

b. China's Statistical Arguments Rest on a Flawed Logical Premise Because USDOC Did Not Employ Statistical Probability Analysis

123. The basic logical premise of China's arguments is equally flawed. China discusses what it considers are the "necessary features of the methodology used to identify a relevant pricing pattern pursuant to Article 2.4.2, second sentence,"[114] and focuses on what is necessary when "using statistics to analyze a data distribution."[115] China suggests that statistics "was developed for the purpose of analyzing distributions of numeric data." That may be true, but it is beside the point. The *Nails* test does not involve the type of statistical analysis discussed by China. USDOC explained that it "is not using the standard deviation measure to make statistical

111 Emphasis added.

112 Emphasis added.

113 China's Appellant Submission, para. 85.

114 China's Appellant Submission, para. 87.

115 China's Appellant Submission, para. 89.

inferences."[116] That is, USDOC did not utilize the type of statistical probability analysis that China discusses.

124. Furthermore, in the challenged investigations, USDOC's approach to examining a "pattern" within the meaning of the "pattern clause" took into account all export sales by each exporter during the period of investigation. Because USDOC based its analysis on all export prices and not a sample of export prices, statistical inferences of the type discussed by China are not relevant to the issues in dispute. China is discussing a particular type of statistical issue, which is involved when calculations are based on sample data selected from a larger population of data. In that situation, the calculations based on that sample (*e.g.*, of the mean) are estimates of the actual values for the population as a whole. Associated with each estimate is a measure of the statistical significance (*i.e.*, reliability) of that estimate with respect to the actual, uncalculated value based on the entire population of data. This statistical significance represents the potential sampling error, or noise, which is present whenever a value (*e.g.*, mean) of a population of data is estimated based on a sample of that data. However, such statistical issues are not involved in the specific type of analysis used by USDOC in the *Nails* test. In particular, USDOC includes all export prices in its analysis, and thus there is no sampling error present in USDOC's analysis, nor related issues of statistical significance. China's statistical criticism of the *Nails* test simply is inapposite.

125. We note that China contends that the *Nails* test is "inherently biased" in favor of finding a relevant pricing pattern.[117] This contention is baseless, and rather ironic. Indeed, immediately following USDOC's first application of the *Nails* test, the *domestic industry* in the United States challenged the test, arguing before the U.S. Court of International Trade ("USCIT") that USDOC used "statistically invalid methodology" and that the test "overlook[s] obvious targeting."[118] In sustaining USDOC's application of the *Nails* test, the USCIT explained that, although the test "may create a standard that *is more difficult to satisfy than domestic industry would have preferred*, the nails test does not violate any statute and is not otherwise arbitrary and capricious."[119] Additionally, despite China's unsubstantiated claim of bias, in a number of instances in which USDOC applied the *Nails* test based on an allegation from domestic parties, USDOC did not find a pattern of export prices which differed significantly, and thus did not consider applying the alternative comparison methodology.[120]

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[116] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); *see also* Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66) ("As we stated before, we do not use the standard deviation measure to make statistical inferences but, rather, use the standard deviation as a relative standard against which to measure differences between the price to the alleged target and non-targeted group. For this purpose, one standard deviation below the average price is sufficient to distinguish the alleged target from the non-targeted group").

[117] China's Appellant Submission, para. 128. *See also* China's First Written Submission, subheading III.D (preceding para. 219).

[118] *Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (Ct. Int'l Trade 2010) (Exhibit USA-3).

[119] *Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (Ct. Int'l Trade 2010) (emphasis added) (Exhibit USA-3).

[120] *See, e.g., Notice of Final Determination of Sales at Less than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 Fed. Reg.

126. Turning to China's substantive statistical arguments, China's appellant submission presents a number of criticisms of USDOC's application of the *Nails* test in the challenged antidumping investigations. China's criticisms are without merit.

127. China first complains that, "[i]n using statistics to analyze a data distribution, an investigating authority cannot apply individual pieces of statistical analysis disconnected from the analytical framework in which they were developed, or in disregard of the assumptions or principles on which they rest."[121] Despite China's argument to the contrary, it does not follow that USDOC's decision to use the mathematical formula for the standard deviation in connection with its application of the *Nails* test means that USDOC was then obligated to undertake the kind of statistical probability analysis that China seeks to impose on Members.

128. That, though, is what China is actually arguing when, for example, China asserts that, "*in statistics* (as in any field of human endeavour), if the assumptions/principles underlying a given tool are not satisfied and its limitations are not recognized, the tool cannot predictably perform as contemplated and the results it generates will likely be random (or arbitrary)."[122] China has argued that an investigating authority cannot "simply take a tool out of context."[123] For China, it appears that the only "context" in which a standard deviation may be used, and the only "proper analysis" that may be applied under the "pattern clause" is a statistical probability analysis. China suggests no alternative.

129. As the United States has explained, however, 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 of the AD Agreement. 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 concepts that may also be used in statistics.

130. China's fixation on statistical probability analysis appears to stem from its basic misunderstanding both of what USDOC did in the challenged investigations and of the meaning of the pattern clause of the second sentence of Article 2.4.2. With respect to what USDOC did in the challenged investigations, China asserts that the United States is "pretending that, in using these tools, the authority is not engaging in a statistical/probabilistic analysis."[124] China further asserts that USDOC was, "as an objective matter, engaging in an inquiry that relies on statistical

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17,422, 17,422 (March 26, 2012) (explaining that the USDOC applied average-to-average comparisons to Electrolux because it did not find pattern of prices that differ significantly among the purchasers, regions or time periods) (Exhibit USA-4); *Certain Stilbenic Brighteners from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 17,027, 17,028 (March 23, 2012) (explaining that the USDOC applied average-to-average comparison methodology because the portion of sales that passed both pattern and gap test was insufficient to establish a pattern of export prices that differ significantly among purchasers, regions or time periods) (Exhibit USA-5).

121 China's Appellant Submission, para. 89.

122 China's Appellant Submission, para. 89.

123 China's Opening Statement at the First Substantive Meeting of the Panel with the Parties (Confidential) (July 14, 2015) ("China's Opening Statement at the First Panel Meeting"), para. 13.

124 China's Appellant Submission, para. 94.

concepts and therefore necessarily depends upon certain assumptions that underlie those concepts."[125] China's assertions are wrong, and they are plainly contradicted by what USDOC said *at the time* it made its determinations. USDOC explained that it "is not using the standard deviation measure to make statistical inferences."[126] In other words, USDOC explained in its determinations that it was not utilizing statistical probability analysis.

131. To be clear, USDOC makes *no* assumptions (whether implicit or explicit) concerning the probability distribution, let alone assume the existence of a particular type of probability distribution.[127] Probability distributions are irrelevant because, as discussed above, USDOC makes *no* statistical inferences when undertaking examinations pursuant to either the pattern or explanation clauses. Indeed, it would be inappropriate to make the kind of statistical inferences implied by China since sampling, sampling error, and probability are not a part of USDOC's analysis. In the challenged investigations, USDOC made no assumptions about the distribution of export prices because the distributions of the export prices are irrelevant to the analysis that USDOC employed. Again, as noted above, USDOC's analysis does not involve sampling and USDOC expressly stated that it is not using standard deviation "to make statistical inferences."[128]

132. Furthermore, the Panel found that China's assertion that USDOC's *Nails* test depended on an assumption of normal distribution is wrong, as a matter of fact, and China has not appealed that factual finding by the Panel under Article 11 of the DSU.[129]

133. The standard deviation and mean[130] are two "statistical" measures used in connection with the *Nails* test that USDOC applied in the challenged investigations.[131] However, USDOC did not use those concepts as part of the type of probability-based statistical test discussed by China. Rather, USDOC used weighted averages and standard deviations as a transparent, predictable, and objective metric to characterize an exporter's pricing behavior in the U.S.

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125 China's Appellant Submission, para. 94.

126 OCTG OI Final I&D Memo, at Comment 2 (Exhibit CHN-77); *see also* Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66) ("As we stated before, we do not use the standard deviation measure to make statistical inferences but, rather, use the standard deviation as a relative standard against which to measure differences between the price to the alleged target and non-targeted group. For this purpose, one standard deviation below the average price is sufficient to distinguish the alleged target from the non-targeted group").

127 To the extent that China assumes that the standard deviation can only be used with the normal statistical probability distribution, China is mistaken. The standard deviation can be used effectively with various types of statistical probability distributions, including the normal probability distribution. However, as we have explained, the *Nails* test is neither concerned with nor intended to analyze statistical probability.

128 China's First Written Submission, para. 69.

129 *See* Panel Report, paras. 7.64, 7.67.

130 "Mean" is a concept that is used in a variety of applications such as mathematics, statistics, etc. China does not challenge the use of mean in the USDOC's analysis.

131 In this context, "statistical" is another term for data, just as the number of people who live in a city (*i.e.*, its population) is a "statistic," or a data point, or a piece of information which characterizes that city. The *Nails* test, and indeed the entire dumping analysis, involves many statistics, including export prices, comparison market prices, production costs, as well as weighted-average normal values and weighted-average export prices. None of these "statistical" measures involve probability or an analysis of statistical significance.

market to determine whether there existed a pattern of export prices which differed significantly among different purchasers, regions or time periods. As USDOC explained:

> The Department considers the price threshold of one standard deviation below the average market price as a reasonable indication of the price difference that may be indicative of targeted dumping, because (1) it is a distinguishing measure relative to the spread or dispersion of prices in the market in question; and (2) it strikes the balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others, and the second being where only prices at the very bottom of price distribution are sufficient to distinguish the alleged target from others. In contrast, the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted sales within the observed price data. Therefore, the Department believes that one standard deviation, rather than two standard deviations, is a better measurement to distinguish potentially targeted prices using this test.[132]

134. In this dispute, China has sought to replace USDOC's balanced approach with one of the extremes noted above by 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 probability analysis, which the AD Agreement does not require.

135. More importantly, the fundamental distinction between USDOC's approach and China's probability-based approach is that USDOC's approach measures systematic pricing while China's approach attempts to identify a rare, abnormal occurrence. The standard deviation test used in connection with the *Nails* test is not aimed at finding statistical outliers with respect to particular sales to a single purchaser, to a single region, or in a single time period, or at making the particular kind of statistical inferences from a sample that China discusses. Rather, USDOC used the standard deviation to determine whether the weighted-average export price to an alleged "target" (be it purchaser, region, or time period) is sufficiently low in relation to the weighted-average export price of all export sales that it may be indicative of a pattern of export prices which differ significantly.

136. China discusses a number of its concerns with the *Nails* test related to, *inter alia*, the "shape of the price distribution" and the need for an "initial evaluation of the data."[133] China's stated concerns, though, all are 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

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132 OCTG OI Final I&D Memo, at Comment 2 (Exhibit CHN-77).

133 *See* China's Appellant Submission, paras. 90-116.

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 described by China. That, of course, is not the standard against which the *Nails* test is to be measured. The relevant question on appeal, which China appears to misunderstand, is whether the first and third alleged quantitative flaws are not inconsistent with the terms of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement. We have shown that they are not inconsistent with the terms of the pattern clause.

137. China expresses concern that the results of the *Nails* test are "random (or arbitrary)."[134] Citing the Appellate Body report in *US – Washing Machines*, China observes that "the Appellate Body has recently held that random price variations cannot be found to constitute a 'pattern' under Article 2.4.2, second sentence."[135] China's reference to *US – Washing Machines* is inapposite. As the Appellate Body explained there:

> [A] pattern cannot merely reflect random price variation. This means that an investigating authority is required to identify a regular series of price variations relating to one or more particular purchasers, or one or more particular regions, or one or more particular time periods to find a pattern. A single "pattern" comprising prices that are found to be significantly different from other prices across different categories would effectively be composed of prices that do not form a regular and intelligible sequence.[136]

The Appellate Body's concern about "random price variation" led it to conclude that "a pattern can only be found in prices which differ significantly either among purchasers, or among regions, or among time periods, not *across* these categories."[137] Thus, the Appellate Body found that the differential pricing methodology examined in that dispute was not consistent with the second sentence of Article 2.4.2 of the AD Agreement because it entailed "aggregating random and unrelated price variations."[138] The Appellate Body's finding in *US – Washing Machines* had nothing to do with the statistical arguments China advances in this dispute.

138. China attempts to support its contention that the *Nails* test leads to "random" results by pointing out that:

> [I]f the shape of the distribution is not "normal" (for example, if it is twin-peaked, or if it has a fat left tail and no right tail), a large proportion of data points will fall below (to the left) of the one-standard-deviation threshold. Or, conversely, if the distribution is

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134 China's Appellant Submission, para. 99.

135 China's Appellant Submission, para. 99.

136 *US – Washing Machines (AB)*, para. 5.25.

137 *US – Washing Machines (AB)*, para. 5.41.

138 *US – Washing Machines (AB)*, para. 5.43.

> shaped with a fat right tail, the opposite would occur – i.e., a small proportion of data points may fall to the left of the threshold and a larger proportion to the right.[139]

Similarly, before the Panel, China suggested that, "[f]or any given CONNUM, whether or not the AT price gap was found wider than the weighted-average NT price gap entirely depended on the underlying nature of the relevant price distributions."[140] Put another way, China appears to suggest that the outcome of the *Nails* test depended on the export price data reported by respondent interested parties. That proposition is self-evident and consistent with a fundamental requirement of the AD Agreement that determinations be based on the evidence.

139. China also appears to assume, incorrectly, that all export prices are *random* variables.[141] However, export prices are not random and the prices are not set by chance. An exporter establishes a pricing behavior based on the company's goals. By applying this pricing behavior, an exporter sets its own prices to achieve such corporate goals and may "target" lower prices to a specific purchaser, region, or time period. USDOC applied the *Nails* test to reveal this "targeting" behavior.

140. For China, the actual evidence in the underlying investigations about which it has pursued "as applied" claims, *i.e.*, the actual export sales data reported by respondent interested parties, does not matter. Indeed, China has failed to support its argument using facts from the administrative records of the three investigations that are the subject of its "as applied" challenges. To the contrary, China explicitly told the Panel that its "argument in this regard is based on an inherent property of price distributions with tails, and does not depend on how the export prices in the three challenged determinations were actually distributed (other than the existence of a tail)."[142] China acknowledged that "there is no specific evidence in the record to which the Panel could usefully refer when examining this aspect of China's argument."[143] China's acknowledgment, however, means that it did not and still cannot meet its burden of showing that the *Nails* test – **as applied in the three challenged investigations** – is somehow inconsistent with Article 2.4.2 of the AD Agreement. That is, under China's theoretical arguments, certain presumed sets of data may yield certain results under certain statistical tests; those hypothetical situations, however, are not pertinent to an examination of a different type of test applied to specific data sets, which China has not shown to exhibit the distributions that China assumes.

141. China suggests that it submitted evidence, "unrefuted by the United States, demonstrating the existence of 'non-normal' distributions among the many CONNUMs in the 3 challenged determinations in this dispute."[144] China asserts that "the flaw identified by China is not merely

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139 China's Appellant Submission, para. 99.

140 China's Responses to Questions from the Panel Following the Second Substantive Meeting with the Parties (Confidential) (December 4, 2015) ("China's Responses to the Second Set of Panel Questions"), para. 48.

141 China's First Written Submission, paras. 243-244.

142 China's Responses to the Second Set of Panel Questions, para. 45.

143 China's Responses to the Second Set of Panel Questions, para. 45.

144 China's Appellant Submission, para. 101.

theoretical; it affected each of the 3 challenged determinations."[145] The United States addressed this evidence before the Panel.[146] As the United States explained, the evidence to which China once again points demonstrates that China's statistical arguments fail when applied to the challenged investigations. In Exhibit CHN-522, China provides a number of graphs that purport to show "the distributions of all 12 CONNUMs across the challenged determinations that either did not pass the Price Gap Test (in *Steel Cylinders* OI) or that would not have passed the Price Gap Test upon correction of the two SAS programming errors (in *OCTG* OI and *Coated Paper* OI)."[147] As China explains, "[a]s can be seen from the graphs … none of the 12 distributions in those CONNUMs even came close to being single-peaked and symmetrical around the mean, let alone to being normally distributed."[148] China does not mention, though, that, in addition, its graphs show that none of those dozen distributions had a left-hand tail. As noted in the preceding paragraph, China stated that its "argument in this regard is based on an inherent property of price distributions with tails, and does not depend on how the export prices in the three challenged determinations were actually distributed (other than the existence of a tail)."[149] So, China has demonstrated that the element on which its statistical argument depends, namely a distribution with a tail, was not present in the case of at least a dozen CONNUMs USDOC examined in the challenged investigations, and possibly more. For that reason, China's statistical argument fails, as China itself has shown.

142. The Panel recognized this, finding that:

> 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. 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.[150]

China still has failed to demonstrate that in the three challenged investigations the alleged target price gap was based on export prices located at the tail of the data distribution.

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145 China's Appellant Submission, para. 101.

146 *See* Comments of the United States on China's Responses to the Panel's Second Set of Questions to the Parties (December 18, 2015), para. 39.

147 China's Responses to the Second Set of Panel Questions, para. 47.

148 China's Responses to the Second Set of Panel Questions, para. 47.

149 China's Responses to the Second Set of Panel Questions, para. 45 (emphasis added).

150 Panel Report, para. 7.81.

143. China reiterates that "the third flaw may or may not arise, because that flaw arises only in situations in which there is a tail to the left of the mean."[151] China argues, though, that "the possibility that the third flaw does not arise in such situations does not mean that USDOC's methodology satisfies the pre-conditions set forth in the second sentence of Article 2.4.2, because the presence of the first flaw means that the methodology cannot function for the purpose for which it was adopted by USDOC – i.e., to determine the existence of a 'pattern'."[152] As demonstrated above, the Panel rejected China's claims with respect to the first and third alleged quantitative flaws because the Panel found that China had failed to establish the factual premises of its claims. We also observe that the Panel did not find that "USDOC's methodology satisfies the pre-conditions set forth in the second sentence of Article 2.4.2."[153] In fact, the Panel found that, in light of the fourth quantitative flaw and the first SAS programming error, USDOC's application of the *Nails* test in the OCTG and coated paper investigations was inconsistent with the pattern clause of Article 2.4.2 of the AD Agreement.[154] The United States has not appealed those findings.

144. In closing, we note that it is clear that China is trying to have it both ways. China argued to the Panel that, "in order to be potentially meaningful as an analytical tool, the Nails test depends on the assumption that the distribution of the examined export prices was, at least, single-peaked and symmetric around the mean."[155] Yet, at the same time, China argued that "whenever USDOC applied the Nails Test to a CONNUM whose density function possessed a left-hand tail, the Price Gap Test did nothing more than confirm an inherent property of distributions with tails … and … it was therefore meaningless as an analytical tool."[156] On appeal, China suggests that, "because a distribution of data must be either 'normal' or not, USDOC's methodology *must, in every instance*, suffer from the first quantitative flaw and/or the third."[157] So, China is arguing both (i) that the *Nails* test could only work for a particular kind of distribution, and (ii) that the *Nails* test could never work for that very same kind of distribution. With its statistical arguments, China obfuscates rather than clarifies the matters at issue.

4. China's Arguments under Article 17.6(i) of the AD Agreement Lack Merit

145. China also argues on appeal that, with respect to the Panel's findings concerning the first and third alleged quantitative flaws, the Panel "failed in its duty under Article 17.6(i) of the *Anti-Dumping Agreement*."[158] China's arguments fail for a number of reasons.

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151 China's Appellant Submission, para. 102.

152 China's Appellant Submission, para. 102.

153 China's Appellant Submission, para. 102.

154 Panel Report, 7.103. Given that the fourth quantitative flaw and the first SAS programming error were not present in the steel cylinders investigation, the Panel rejected China's claims with respect to that proceeding.

155 China's Responses to the Second Set of Panel Questions, para. 47.

156 China's Responses to the Second Set of Panel Questions, para. 44.

157 China's Appellant Submission, para. 105.

158 China's Appellant Submission, para. 123.

146. First, China's invocation of Article 17.6(i) of the AD Agreement is a further indication that China was required to pursue an appeal of the Panel's findings with respect to the first and third alleged quantitative flaws under Article 11 of the DSU.

147. Article 17.6(i) of the AD Agreement imposes the following obligation on WTO dispute settlement panels:

> [I]n 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. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

148. The Appellate Body has explained that "Article 17.6 is identified in Article 1.2 and Appendix 2 of the DSU as one of the 'special or additional rules and procedures' which prevail over the DSU '[t]o the extent that there is a difference' between those provisions and the provisions of the DSU."[159] In *Guatemala – Cement I*, the Appellate Body found:

> In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.[160]

In examining the relationship between Article 17.6(i) of the AD Agreement and Article 11 of the DSU, the Appellate Body has observed that "it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'."[161] Accordingly, the Appellate Body has found that there is "no 'conflict' between Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU."[162]

149. Given the absence of any conflict between the two provisions, Article 17.6(i) of the AD Agreement cannot "prevail" over Article 11 of the DSU.[163] Consequently, any effort by China to attack the objectivity of the Panel's assessment of the facts must at least also proceed under

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159 *US – Hot-Rolled Steel (AB)*, para. 51.

160 *Guatemala – Cement I (AB)*, para. 65.

161 *US – Hot-Rolled Steel (AB)*, para. 55.

162 *US – Hot-Rolled Steel (AB)*, para. 55.

163 *See Guatemala – Cement I (AB)*, para. 65.

Article 11 of the DSU, or it is not properly before the Appellate Body under the DSU.[164] China has not pursued appeals of the Panel's findings with respect to the first and third alleged quantitative flaws under Article 11 of the DSU, so China's appeals of those findings under Article 17.6(i) of the AD Agreement must fail.

150. Second, if the Appellate Body considers China's argument that the Panel failed in its duty under Article 17.6(i) of the AD Agreement, the Appellate Body should reject that argument because China makes no effort to substantiate such a serious claim.

151. The Appellate Body explained in *EC – Tube or Pipe Fittings* that it "will not interfere lightly with [a] panel's exercise of its discretion under Article 17.6(i) of the Anti-Dumping Agreement."[165] The Appellate Body admonished that, to succeed, "[a]n appellant must persuade [the Appellate Body], with sufficiently compelling reasons, that [it] should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts."[166]

152. In *EC – Tube or Pipe Fittings*, the Appellate Body was "satisfied" that the panel there had taken appropriate steps to assure itself of the validity of the evidence before it, *i.e.* the panel had undertaken a sufficient examination and evaluation of the facts.[167] The Appellate Body reasoned that:

> [T]o the extent that Brazil may be understood to be calling into question the value placed by the Panel on the responses given by the European Communities, relative to that accorded to Brazil's own assertions, these allegations can only be regarded as directed at the Panel's appreciation of the evidence. In making such a claim under Article 17.6(i), it is not sufficient for Brazil simply to disagree with the Panel's weighing of the evidence, without substantiating its claim of error by the Panel. As we have recently reiterated, "[i]t is not 'an error, let alone an egregious error', for the Panel to have declined to accord to the evidence the weight" that one of the parties sought to have accorded to it.[168]

Accordingly, the Appellate Body rejected Brazil's claim that the Panel failed to assess whether the establishment of the facts was proper pursuant to Article 17.6(i) of the AD Agreement.[169]

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164 *EC – Seal Products (AB)*, para. 5.232 ("[A]llegations implicating a panel's assessment of the facts and evidence fall under Article 11 of the DSU. By contrast, '[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is … a legal characterization issue' and therefore a legal question." (citations omitted)).

165 *EC – Tube or Pipe Fittings (AB)*, para. 125 (citing *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 169); *see also US – Wheat Gluten (AB)*, para. 151.

166 *EC – Tube or Pipe Fittings (AB)*, para. 125 (citing *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 170).

167 *See EC – Tube or Pipe Fittings (AB)*, para. 127.

168 *EC – Tube or Pipe Fittings (AB)*, para. 128.

169 *See EC – Tube or Pipe Fittings (AB)*, para. 128.

153. Here, China acknowledges that "the Panel's review of USDOC's approach … involved an assessment of USDOC's establishment and evaluation of the facts."[170] China argues that the Panel "had to apply the standard of factual review set forth in Article 17.6(i)."[171] Yet, in contending that the Panel "failed in its duty under Article 17.6(i)," China does nothing to support its claim beyond referring back to the elaboration of its arguments concerning the interpretation and application of Article 2.4.2 of the AD Agreement, which were presented earlier in China's appellant submission.[172] China offers no specific arguments related to the Panel's alleged failure to apply properly the standard of factual review under Article 17.6(i) of the AD Agreement.

154. In one sense, China sets up its arguments related to Article 17.6(i) of the AD Agreement as being consequential or redundant of its substantive arguments related to Article 2.4.2 of the AD Agreement. As discussed above, such an approach is not consistent with the guidance that the Appellate Body has given previously concerning how a party may challenge a panel's application of the standard of review under Article 17.6(i) of the AD Agreement.

155. Furthermore, as with all of its arguments concerning the *Nails* test, when China argues under Article 17.6(i) of the AD Agreement that USDOC did not ensure that its establishment of the facts was proper and the *Nails* test did not operate in an objective and unbiased manner,[173] China means that the *Nails* test did not meet the requirements of statistical probability analysis, as China has articulated them. As explained above, each criticism leveled by China ultimately comes down to a comparison of the *Nails* test to China's proposed statistical probability analysis, but none of China's criticisms establishes that USDOC's application of the *Nails* test in the challenged antidumping investigations is inconsistent with the terms of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement.

156. Additionally, we note that China is incorrect when it asserts that the Panel "approv[ed] the Nails test."[174] As noted above, the Panel found that, in light of the fourth quantitative flaw and the first SAS programming error, USDOC's application of the *Nails* test in the OCTG and coated paper investigations was inconsistent with the pattern clause of Article 2.4.2 of the AD Agreement.[175] The United States has not appealed those findings.

157. Finally, in another sense, under the guise of challenging the Panel's interpretation and application of Article 2.4.2 of the AD Agreement and its application of the standard of review set forth in Article 17.6(i) of the AD Agreement, China is, in reality, challenging the Panel's weighing and appreciation of the evidence. However, China has made no attempt whatsoever to substantiate its allegation that the Panel failed in its duty under Article 17.6(i) of the AD

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[170] China's Appellant Submission, para. 122.

[171] China's Appellant Submission, para. 122.

[172] China's Appellant Submission, para. 123.

[173] *See* China's Appellant Submission, para. 123.

[174] China's Appellant Submission, para. 123.

[175] Panel Report, 7.103. Given that the fourth quantitative flaw and the first SAS programming error were not present in the steel cylinders investigation, the Panel rejected China's claims with respect to that proceeding.

Agreement to make an objective assessment of the facts.[176] There is thus no basis for the Appellate Body to find that China has provided "sufficiently compelling reasons" for the Appellate Body to, pursuant to Article 17.6(i) of the AD Agreement, disturb the Panel's assessment of the facts or interfere with the panel's discretion as the trier of facts.[177]

158. For these reasons, the Appellate Body should reject China's arguments under Article 17.6(i) of the AD Agreement concerning the Panel's findings with respect to the first and third alleged quantitative flaws.

D. The Panel Did Not Err in Rejecting China's Claims Concerning USDOC's Use of Weighted-Average Export Prices in Connection with Its Application of the *Nails* Test in the Challenged Investigations

159. China appeals the Panel's finding that USDOC did not act inconsistently with the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement in the three challenged investigations by finding the relevant pricing pattern on the basis of weighted-average export prices as opposed to individual export price transactions.[178] China argues that the Panel incorrectly interpreted the pattern clause of the second sentence of Article 2.4.2, and also argues that USDOC's use of weighted averages is "inconsistent with the requirement to assess the facts in an objective and unbiased manner as contemplated by Article 17.6(i) of the Anti-Dumping Agreement."[179] As demonstrated below, China's arguments lack merit.

1. The Pattern Clause Does Not Prohibit Investigating Authorities from Using Weighted-Average Export Prices when Determining whether Export Prices Differ among Purchasers, Regions, or Time Periods

160. China argues that a relevant pricing pattern under the second sentence of Article 2.4.2 of the AD Agreement "may only be established based on an examination of individual export prices, and not price averages."[180]

161. As an initial matter, the United States notes a fundamental flaw in China's framing of this issue. The examination of individual export prices, and the examination of weighted averages of export prices, are not mutually exclusive. Rather, individual export prices are the foundation upon which price averages (for particular purchasers, regions, or time periods) are determined. The price averages reflect the individual export prices, and simply are an intermediate step in the numerical analysis. Again, what China really is arguing is that the AD Agreement – without any explicit statement in the text – requires some sort of particular numerical analysis that China favors.

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176 *US – Hot-Rolled Steel (AB)*, para. 55.

177 *EC – Tube or Pipe Fittings (AB)*, para. 125 (citing *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 170).

178 *See* China's Appellant Submission, paras. 126-155.

179 China's Appellant Submission, para. 128.

180 China's Appellant Submission, para. 147.

162. In its appellant submission, China contends that the Panel erred in rejecting three arguments that China presented to the Panel. As explained below, the Panel was correct to reject each of China's three arguments.

a. China's First Argument Concerning Parallelism Lacks Merit

163. China first argues that its proposed interpretation would "ensure[] parallelism between the analysis of preconditions for the use of the [average-to-transaction] comparison methodology, and the structure of that methodology, which by definition focuses on individual export prices."[181] China emphasizes that, given the use of the term "individual export prices" in the "introductory words of the second sentence of Article 2.4.2," it would be "incongruous to interpret this text to permit an investigating authority to overlook the individual prices for the purpose of identifying a relevant pricing pattern."[182]

164. As China notes, "[t]he Panel rejected China's argument, asserting that if the treaty required such parallelism, it would say so."[183] The Panel was correct to reject China's argument, and China's argument on appeal is unavailing.

165. China suggests that:

> In essence, the Panel reasoned that the fact that Article 2.4.2, second sentence, tasks investigating authorities to find a "pattern of export prices" and not a "pattern of individual export prices" leads to the conclusion that Article 2.4.2 does not require that an investigating authority's finding of a pattern be based on an analysis of export prices on an individual, as opposed to a weighted-average, basis.[184]

China complains that the Panel's interpretation "amounts to precisely the type of 'rather mechanistic, a contrario reasoning,' regarding which the Appellate Body has repeatedly expressed concerns in the past."[185] China's contention is baseless. China ignores the Panel's discussion of its reasoning and pretends that it does not exist.

166. As China itself recognizes,[186] the Panel "acknowledge[d] 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."[187] The Panel, though, did not consider that to be the case here, and gave its reasons for taking this view:

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181 China's Appellant Submission, para. 135.

182 China's Appellant Submission, para. 135.

183 China's Appellant Submission, para. 136.

184 China's Appellant Submission, para. 136.

185 China's Appellant Submission, para. 136.

186 China's Appellant Submission, para. 137.

187 Panel Report, para. 7.120.

> [T]he 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 [average-to-transaction] methodology is … concerned with the application of the [average-to-transaction] 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 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 [average-to-transaction] methodology is applied to the pattern that methodology will have to be applied to the individual export transactions which make up the pattern.[188]

Contrary to China's suggestion, the Panel did not simply conclude that the omission of the word "individual" was necessarily dispositive.[189] Rather, the Panel read the second sentence in its entirety and arrived at the correct interpretation on that basis.

167. There are additional reasons, which the Panel does not discuss in connection with China's first argument, that support finding that the Panel's interpretation of the pattern clause is correct. For instance, 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, because it requires the investigating authority to find "a pattern of export prices which differ significantly *among different* purchasers, regions or time periods."[190] Accordingly, 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.[191]

168. A simple example illustrates why China's proposed interpretation is untenable. Suppose the domestic industry had alleged that a specific purchaser has been "targeted." In response to this allegation, the investigating authority might examine whether prices to the alleged "target" (Purchaser A) differ significantly from prices to a "non-targeted" purchaser (Purchaser B) or purchasers (Purchaser C, Purchaser D, etc.). In the simplest case, there is one sales transaction to

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188 Panel Report, para. 7.120.

189 China's Appellant Submission, para. 137.

190 Emphasis added.

191 The Panel relies on this argument in its response to China's third argument, but it also supports the Panel's interpretation of the pattern clause and its rejection of China's first argument. *See* Panel Report, para. 7.123.

each purchaser and there is a single export price for each purchaser. Simply comparing the export prices will reveal the extent to which they differ among purchasers.

169. However, suppose Purchaser A had three export sale transactions, and paid $100 in each transaction, while Purchaser B had three export transactions and paid $95, $100, and $105 for identical merchandise in its three transactions. There is no relevant difference in pricing between the two purchasers. Both paid the same total of $300 for identical merchandise, and both paid the same weighted-average price of $100. There are numerous combinations of the three prices that could produce a weighted-average price of $100. However, distinguishing between the individual prices each paid is unnecessary. As long as both purchasers paid the same weighted-average price of $100, or $300 in total, for the three sales, no purchaser is being targeted and there is no pattern of prices that differ significantly among different purchasers. Using purchaser-specific weighted averages allows the investigating authority to disregard price variation *within* the sales to each purchaser and focus on meaningful price variation *among* (*i.e.*, across) the purchasers.[192]

170. In a typical case, there likely will be multiple individual transactions with various prices for each purchaser, region, or time period. The investigating authority must decide how to compare these multiple sets of individual transaction prices. Article 2.4.2 provides no specific guidance in this regard. Transaction-to-transaction comparisons of export prices would be difficult in practice because it may be unclear which transaction pairs should be compared, and there may be cases involving thousands or hundreds of thousands of transactions. This exponentially increasing difficulty is why the transaction-to-transaction comparison methodology is appropriate only in very limited, specific circumstances which involve a very small number of sales or unique products. Because of the practical difficulties involved, and in order actually to assess the differences in export prices "among different" purchasers, regions, or time periods, USDOC based the *Nails* analysis applied in the challenged investigations on weighted-average export prices to purchasers, regions, or time periods.

171. China's proposed transaction-based variance calculation, on the other hand, would not only be difficult to administer in most cases (if not impossible), but, as we have explained, it also is at odds with the text of the second sentence of Article 2.4.2, which requires an investigating authority to find "a pattern of export prices which differ significantly *among different* purchasers, regions or time periods."[193]

172. China also is incorrect to suggest that the use of weighted averages would lead an investigating authority to "overlook the individual prices."[194] When USDOC undertook analyses pursuant to the "pattern clause" in the challenged antidumping investigations, it took into account all of the export prices for U.S. sales reported by each exporter during the period of investigation. As explained above in section II.B, USDOC applied the *Nails* test in those investigations. The *Nails* test involves calculating a standard deviation of the weighted-average

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192 *See* Panel Report, para. 7.123.

193 Emphasis added.

194 China's Appellant Submission, para. 135.

export prices to each purchaser, region, or time period during the period of investigation based on the variance between each of those weighted-average export prices.[195]

173. The standard deviation measures the extent of the differences within a set of numbers. Calculating the standard deviation enables USDOC to determine what a typical range of weighted-average export prices is for the period of investigation, and whether certain weighted-average export prices are lower than that norm. As just explained, the set of numbers (*i.e.*, the weighted-average export prices) that USDOC considered included all of the individual export prices for U.S. sales during the period of investigation.[196] No individual export prices were "overlook[ed]."[197]

174. China's argument that an investigating authority's analysis of a pattern must focus on individual export transactions, as well as China's unsupported assertion that "[i]ndividual export prices are the only basis upon which a relevant pricing pattern can properly be identified,"[198] appear to stem from China's mistaken belief that the second sentence of Article 2.4.2 requires investigating authorities to apply particular statistical analyses when examining whether a "pattern" exists within the meaning of the pattern clause. We have demonstrated above in section II.C.3 that China is incorrect in this regard.

b. China's Second Argument Concerning the US – Zeroing (Japan) Appellate Body Report Lacks Merit

175. China's second argument concerns its own misunderstanding of a statement in the *US – Zeroing (Japan)* Appellate Body report.[199] China quotes the Appellate Body:

> The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differ[] 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. <u>We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern.</u> …[200]

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195 The sales are weighted by quantity.

196 USDOC calculated the weighted-average export prices and the standard deviation on a model-specific basis, *i.e.*, by "CONNUM." A CONNUM is based upon the product's physical characteristics.

197 China's Appellant Submission, para. 135.

198 China's Appellant Submission, para. 142.

199 *See* China's Appellant Submission, paras. 138-141.

200 China's Appellant Submission, para. 138 (quoting *US – Zeroing Japan (AB)*, para. 135 (underlining added by China).

China then simply asserts that, "[a]ccordingly, in order to identify a meaningful pattern, the investigating authority must assess such a pattern by observing the prices of individual export sales transactions."[201] China's assertion does not follow at all from the quoted passage.

176. As the Panel explained:

> 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". 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. 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 [average-to-transaction] methodology is to be applied, rather than how the conditions under the pattern clause of Article 2.4.2 are to be met. We have already stated that when the [average-to-transaction] 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.[202]

China argues that "[t]he Panel erred when it dismissed China's argument,"[203] but the reasons China offers to support its contention lack merit.

177. China suggests that the Panel's interpretation is incongruous with the purpose of the second sentence of Article 2.4.2, which, China posits, "is to authorize the authority to focus on individual export prices when making a comparison with normal value in order to appropriately account for a relevant pricing pattern."[204] China's assertion about the function of the second sentence of Article 2.4.2 is surprising given that the Appellate Body recently considered the function of that provision in *US – Washing Machines* and, in doing so, rejected an argument made by Korea that closely resembles the argument China makes here. Contrary to China's view, the Appellate Body found that "the function of the second sentence of Article 2.4.2 is to allow an investigating authority to identify and address 'targeted dumping'."[205] Korea disagreed that the function of the second sentence of Article 2.4.2 is to "unmask targeted dumping" and asserted, as China does here, that "its purpose 'is simply to allow the authority to undertake the more careful examination of individual export prices that the [average-to-transaction]

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201 China's Appellant Submission, para. 139.

202 Panel Report, para. 7.121.

203 China's Appellant Submission, para. 140.

204 China's Appellant Submission, para. 140.

205 *US – Washing Machines (AB)*, para. 5.107.

comparison method[ology] makes possible."[206] The Appellate Body responded definitively, stating that "[w]e see no textual basis in the second sentence of Article 2.4.2 to conclude, as Korea asserts, that the function of the second sentence is to allow an investigating authority to undertake a more careful and 'granular' examination of individual export prices."[207] The Appellate Body should similarly reject China's contention that the purpose of the second sentence is allow an investigating authority to "focus on individual export prices."[208]

178. China actually suggests that its proposed interpretation is consistent with the Appellate Body report in *US – Washing Machines*, and points to the Appellate Body's observation that "by comprising only the transactions found to differ from other transactions, the pattern focuses on the 'targeted' transactions.'"[209] China takes the quoted sentence out of context. Immediately before making the observation to which China refers, the Appellate Body stated that "an interpretation of the term 'pattern' as comprising only those prices which differ significantly from other prices gives meaning and effect to the second sentence of Article 2.4.2, whose function is to allow investigating authorities to identify and address 'targeted dumping'."[210] In the paragraph following the sentence China quotes, the Appellate Body explained that it:

> agree[s] with the Panel that, under the second sentence of Article 2.4.2, "a sub-set of export transactions is set aside for specific consideration." We further agree with the Panel that, once prices are identified as being different from other prices, "they constitute the relevant 'pattern'" and that, "[a]lthough those prices are identified by reference to other prices pertaining to other purchasers, regions or time periods, those other prices are not part of the relevant 'pattern'."[211]

179. When read in context, it is clear that the sentence China quotes lends no support to China's argument here. We also note that, in the sentence following the sentence quoted by China, the Appellate Body found that its reasoning in *US – Washing Machines* is consistent with the reasoning in the *US – Zeroing (Japan)* Appellate Body report, and it cited the very same paragraph on which China now relies.[212] That is a further indication that China has misunderstood the meaning of the Appellate Body's statement in *US – Zeroing (Japan)*.

180. Finally, we note China's assertion that "the scope of the relevant pricing pattern differs depending on whether it has been determined on the basis of individual export transactions or on price averages," and China's argument that "an investigating authority that relies on averages instead of individual export prices is no longer able to discern a pattern 'focus[ed] on the

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206 *US – Washing Machines (AB)*, para. 5.110.

207 *US – Washing Machines (AB)*, para. 5.110.

208 China's Appellant Submission, para. 140.

209 China's Appellant Submission, para. 141 (quoting *US – Washing Machines (AB)*, para. 5.28).

210 *US – Washing Machines (AB)*, para. 5.28.

211 *US – Washing Machines (AB)*, para. 5.29.

212 *See US – Washing Machines (AB)*, para. 5.28.

'targeted' transactions' as required by the Appellate Body."[213] As just demonstrated, China's reliance on the Appellate Body report in *US – Washing Machines* is misplaced. Additionally, China does not explain what it means for "the scope of the relevant pricing pattern" to differ. In *US – Washing Machines*, the Appellate Body found that:

> [A] "pattern" for the purposes of the second sentence of Article 2.4.2 comprises *all* the export prices to one or more particular purchasers which differ significantly from the export prices to the other purchasers because they are significantly *lower* than those other prices, or *all* the export prices in one or more particular regions which differ significantly from the export prices in the other regions because they are significantly *lower* than those other prices, or *all* the export prices during one or more particular time periods which differ significantly from the export prices during the other time periods because they are significantly *lower* than those other prices.[214]

It is unclear, in light of the Appellate Body's finding in *US – Washing Machines*, how it could be possible that "the scope of the relevant pricing pattern" might differ depending on whether an investigating authority uses weighted-average export prices or individual export prices, and China does nothing to clarify its assertion.

c. China's Third Argument Concerning the Meaning of the Term "Pattern" Lacks Merit

181. China's third argument relates to the meaning of the term "pattern." China made the same argument to the Panel that it now makes to the Appellate Body. The Panel rejected China's argument, reasoning 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

213 China's Appellant Submission, para. 141.

214 *US – Washing Machines (AB)*, para. 5.36.

> 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.[215]

The Panel's logic is sound and its reasoning is grounded in the text of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement. China merely asserts that "[t]he Panel's reasoning is based on a superficial reading of the Article 2.4.2, second sentence,"[216] which plainly it is not.

182. China further contends that "[a]n investigating authority wishing to assess whether the observed price data comprise a 'pattern' among different purchasers, regions or time periods must properly account for the differences within the prices to a given purchaser, region or time period."[217] However, the differences within the prices to a given purchaser, region, or time period are properly accounted for by calculating a weighted-average export price for the given purchaser, region, or time period, which can then be used to determine whether a pattern exists of export prices which differ significantly "among" different purchasers, regions, or time periods.

183. China also argues that the use of weighted-average export prices is problematic because "the analysis of whether a pattern of different prices exists would be reduced from hundreds or even thousands of observations to a mere handful, making it impossible to draw valid conclusions as to the existence of a relevant pricing pattern."[218] China is incorrect. The relevant pattern to be examined, as the Panel agreed, is the pattern of export prices "among" the small number of purchasers. 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.

184. When China argues that the use of weighted averages would make it "impossible to draw valid conclusions,"[219] China once again reveals that it is seeking to impose statistical probability analysis as the standard against which an investigating authority's examination must be measured. China's argument in this regard is not relevant because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the pattern clause of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

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215 Panel Report, para. 7.123.

216 China's Appellant Submission, para. 143.

217 China's Appellant Submission, para. 143.

218 China's Appellant Submission, para. 146.

219 China's Appellant Submission, para. 146.

185. For the reasons given above, the Panel did not err in its interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement when it found that that provision does not preclude an investigating authority from finding a significantly differing pricing pattern on the basis of purchaser or time period averages.[220]

2. China's Arguments under Article 17.6(i) of the AD Agreement Lack Merit

186. As it does with respect to the Panel's findings concerning the first and third alleged quantitative flaws of the *Nails* test, China also advances arguments under Article 17.6(i) of the AD Agreement concerning the Panel's findings related to USDOC's use of weighted-average export prices.[221] China's arguments fail for a number of the same reasons.

187. We discuss in section II.C.4 above the guidance that the Appellate Body has provided concerning Article 17.6(i) of the AD Agreement and the presentation of arguments under that provision on appeal. Once again, the Appellate Body has observed that "it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'."[222] Given the absence of any conflict between Article 17.6(i) of the AD Agreement and Article 11 of the DSU, Article 17.6(i) of the AD Agreement cannot "prevail" over Article 11 of the DSU.[223] Consequently, any effort by China to attack the objectivity of the Panel's assessment of the facts must at least also proceed under Article 11 of the DSU, or it is not properly before the Appellate Body under the DSU.[224] China has not pursued an appeal of the Panel's findings with respect to USDOC's use of weighted-average export prices under Article 11 of the DSU, so China's appeal of those findings under Article 17.6(i) of the AD Agreement must fail.

188. If the Appellate Body considers China's argument under Article 17.6(i) of the AD Agreement and understands China to be arguing that the Panel failed in its duty under Article 17.6(i), the Appellate Body should reject that argument because China makes no effort to substantiate such a serious claim.

189. As explained above, the Appellate Body has admonished that, to succeed, "[a]n appellant must persuade [the Appellate Body], with sufficiently compelling reasons, that [it] should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts."[225] "In making such a claim under Article 17.6(i), it is not sufficient for [a complainant] simply to

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220 *See* Panel Report, para. 7.124.

221 China's Appellant Submission, paras. 148-153.

222 *US – Hot-Rolled Steel (AB)*, para. 55.

223 *See US – Hot-Rolled Steel (AB)*, para. 55; *Guatemala – Cement I (AB)*, para. 65.

224 *EC – Seal Products (AB)*, para. 5.232 ("[A]llegations implicating a panel's assessment of the facts and evidence fall under Article 11 of the DSU. By contrast, '[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is … a legal characterization issue' and therefore a legal question." (citations omitted)).

225 *EC – Tube or Pipe Fittings (AB)*, para. 125 (citing *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 170).

disagree with the Panel's weighing of the evidence, without substantiating its claim of error by the Panel."[226]

190. At most here, China disagrees with the Panel's weighing of the evidence related to China's arguments concerning statistical probability analysis. In reality, when China asserts that "[t]he Panel's evaluation of USDOC's findings was contrary to the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*,"[227] China means that the Panel erred in its interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement. Indeed, China expressly contends that "[the] argument of the Panel is meritless because it depends entirely on the Panel's prior interpretation that investigating authorities enjoy discretion under Article 2.4.2, second sentence, whether to use average prices or individual transaction prices" and the Panel, China asserts, "developed an erroneous legal standard in this regard."[228]

191. China once again sets up its arguments related to Article 17.6(i) of the AD Agreement as being consequential or redundant of its substantive arguments related to Article 2.4.2 of the AD Agreement. As discussed above, such an approach is not consistent with the guidance that the Appellate Body has given previously concerning how a party may challenge a panel's application of the standard of review under Article 17.6(i) of the AD Agreement.

192. Furthermore, as it does with all of its arguments concerning the *Nails* test, when China argues under Article 17.6(i) of the AD Agreement that USDOC's use of weighted-average export prices was "inherently biased,"[229] China means that the *Nails* test did not meet the requirements of statistical probability analysis, as China has articulated them. As explained above, again and again, every criticism leveled by China ultimately comes down to a comparison of the *Nails* test to China's proposed statistical probability analysis, but none of China's criticisms establishes that USDOC's application of the *Nails* test in the challenged antidumping investigations is inconsistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

193. As the Panel explained:

> 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

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226 *EC – Tube or Pipe Fittings (AB)*, para. 128.

227 China's Appellant Submission, para. 153.

228 China's Appellant Submission, para. 152.

229 China's Appellant Submission, para. 149.

> 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 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.

The Panel's reasoning is sound. The assertion that the test applied by USDOC is less favorable to Chinese respondents than a different test proposed by China does not mean that USDOC's test is biased. USDOC's *Nails* test and its use of weighted-average export prices is one permissible approach to the application of the pattern clause of the second sentence of Article 2.4.2, as the Panel found. There may be other permissible approaches, but USDOC was not required to use them.

194. Finally, to the extent that China's arguments are viewed as a challenge to the Panel's weighing and appreciation of the evidence, though that does not appear to be the nature of China's arguments, China has made no attempt whatsoever to substantiate its allegation that the Panel's evaluation was contrary to the requirement of Article 17.6(i) of the AD Agreement that the Panel make an objective assessment of the facts.[230] There is thus no basis for the Appellate Body to find that China has provided "sufficiently compelling reasons" for the Appellate Body to, pursuant to Article 17.6(i) of the AD Agreement, disturb the Panel's assessment of the facts or interfere with the panel's discretion as the trier of facts.[231]

195. For these reasons, the Appellate Body should reject China's arguments under Article 17.6(i) of the AD Agreement concerning the Panel's findings with respect to USDOC's use of weighted-average export prices.

3. The Appellate Body Should Reject China's Request to Complete the Legal Analysis

196. For the reasons given above, the Appellate Body should reject China's arguments under the second sentence of Article 2.4.2 of the AD Agreement and Article 17.6(i) of the AD

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230 *US – Hot-Rolled Steel (AB)*, para. 55.

231 *EC – Tube or Pipe Fittings (AB)*, para. 125 (citing *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 170).

Agreement. Accordingly, it would not be necessary for the Appellate Body to complete the legal analysis of China's claims, as China requests.[232]

197. If, however, the Appellate Body agrees with China's proposed interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement and finds that, in all cases, an investigating authority is prohibited from using weighted-average export prices in conjunction with its numerical analysis, then, in that narrow circumstance, it would appear that the Appellate Body could complete the legal analysis. The Panel found 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"[233] and the United States does not take issue with the Panel's factual finding in this regard.

198. On the other hand, if the Appellate Body finds that the use of weighted averages is not prohibited in all cases, but nevertheless finds that the Panel erred by not continuing its analysis to examine whether USDOC's use of weighted averages in the challenged investigations was, as China has argued, "inherently biased" as a result of the particular analysis that USDOC undertook,[234] then the Appellate Body would need to consider whether there are sufficient undisputed facts to permit it to complete the analysis.[235] There are not.

199. China's argument that USDOC's use of weighted averages was inconsistent with the pattern clause depends on China's assertions about the study of statistics and the implications that the use of weighted averages purportedly has for certain statistical methodologies. The Panel made no factual findings regarding China assertions, and the United States does not agree with them.

200. As noted above in section II.C.2, China suggests that the representations made in two of the exhibits it submitted to the Panel are uncontested by the United States.[236] Again, China is incorrect. The United States does not agree that the representations made or the calculations provided in China's exhibits are correct. China's exhibits are not a source of undisputed facts. Before the Panel, the United States did not contest the representations made in China's exhibits, nor did we take the time to check the accuracy of China's calculations, because all of the arguments and assertions made in China's exhibits were, as the United States explained to the Panel, beside the point. The Panel appears to have agreed with the United States that China's

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232 *See* China's Appellant Submission, para. 155.

233 Panel Report, para. 7.115.

234 *See* China's Appellant Submission, paras. 133-153.

235 *See, e.g., US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 1250 (citing numerous Appellate Body reports in prior disputes); *US – Section 211 Appropriations Act (AB)*, para. 343; *EC and certain member States – Large Civil Aircraft (AB)* paras. 735, 1101, 1417; *Australia – Salmon (AB)*, para. 118; *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 157 ("Canada, as the complaining party, must persuade us that there are sufficient uncontested facts on the record to enable us to complete the analysis by stepping into the shoes of the Panel."); *US – Continued Zeroing (AB)*, para. 195 ("We recognise the important limitation on our ability to complete the analysis.").

236 *See* China's Appellant Submission, footnote 98 and para. 150.

exhibits were beside the point. In any event, the Panel made no factual findings concerning the assertions in China's exhibits.

201. For China to succeed on appeal, the Appellate Body would need to make a variety of factual findings concerning the alleged "bias" purportedly associated with using weighted averages. It is not possible under the DSU for the Appellate Body to make the factual findings that would be necessary to address China's claims.[237]

202. For these reasons, there are insufficient undisputed facts for the Appellate Body to complete the legal analysis, and the Appellate Body should decline China's request.

III. CHINA'S APPEAL CONCERNING THE PANEL'S FINDINGS WITH RESPECT TO QUALITATIVE ISSUES WITH THE NAILS TEST LACKS MERIT

203. China appeals the Panel's interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement concerning the need for an investigating authority to qualitatively assess export price differences when determining the existence of a relevant pattern pursuant to the second sentence of Article 2.4.2.[238] China argues that the Panel "failed to recognize that the qualitative factors to be considered are objective market factors, such as seasonal pricing cycles (seasonality) or market-driven fluctuations in the costs of production," and the Panel "further failed to recognize that investigating authorities have an obligation to examine these qualitative factors on their own initiative, i.e., regardless whether evidence has been provided by interested parties."[239] As demonstrated below, China's arguments lack merit.

A. China Misreads or Misunderstands the Panel's Findings

204. China suggests that "the Panel erred in interpreting and applying Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* as not requiring investigating authorities to consider objective market factors in determining whether relevant pricing differences are 'significant.'"[240] That is not what the Panel found at all. China misreads or misunderstands the panel report.

205. The Panel understood China to have argued that, in addition to assessing the quantitative or numerical differences in export prices, it is necessary for an investigating authority to make a qualitative assessment. By this, China meant that "an investigating authority must also focus on the nature of the differences or the reason why the differences exist."[241] China argued to the Panel that:

> [W]hen quantitative differences in export prices are unconnected with targeted dumping, they are unlikely to be significant within the

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237 *See, e.g., US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 1250 (citing numerous Appellate Body reports in prior disputes).

238 *See* China's Appellant Submission, paras. 156-190.

239 China's Appellant Submission, para. 157.

240 China's Appellant Submission, heading IV, para. 156.

241 Panel Report, para. 7.105.

> meaning of the pattern clause of Article 2.4.2. Therefore, an investigating authority should consider the reasons for the price differences to examine if that is the case in a given investigation.[242]

206. The Panel agreed with China that a quantitative analysis alone may not be sufficient:

> 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.[243]
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> 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.[244]

207. The Panel's finding in this regard closely accords with the Appellate Body's recent finding in *US – Washing Machines*. There, the Appellate Body found that:

> the requirement to identify prices which differ *significantly* means that the investigating authority is required to assess quantitatively and qualitatively the price differences at issue. This assessment may require the investigating authority to consider certain objective market factors, such as circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand.[245]

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242 Panel Report, para. 7.105.

243 Panel Report, para. 7.110.

244 Panel Report, para. 7.111.

245 *US – Washing Machines (AB)*, para. 5.66.

The examples of "objective market factors" highlighted by the Appellate Body in *US – Washing Machines* ("circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand"[246]) are nearly identical to the "circumstances surrounding an investigation" highlighted by the Panel ("the nature of the product under investigation and the relevant industry"[247]).

208. Thus, China simply is incorrect when it suggests that the Panel found that investigating authorities are not required to consider objective market factors in determining whether relevant pricing differences are significant.[248]

209. What the Panel actually found was that China was wrong when it argued that, "to consider whether such differences are qualitatively significant, an investigating authority is required to consider why export prices differ."[249] As the Panel explained:

> [W]hether 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.[250]
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> [T]he 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.[251]

210. These findings also closely accord with the Appellate Body report in *US – Washing Machines*, wherein the Appellate Body found that "an investigating authority is not required to consider the cause of (or reasons for) the price differences to establish the existence of a pattern

246 *US – Washing Machines (AB)*, para. 5.66.

247 Panel Report, para. 7.111.

248 *See* China's Appellant Submission, heading IV, para. 156.

249 Panel Report, para. 7.110.

250 Panel Report, para. 7.108.

251 Panel Report, para. 7.109.

under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement."[252] As the Appellate Body explained:

> The words "significantly" and "pattern" in the second sentence of Article 2.4.2 … do not imply an examination into the cause of (or reasons for) the differences in prices. 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 an additional requirement to ascertain whether the significant differences found to exist are unconnected with "targeted dumping". As the Panel correctly observed, in *US – Large Civil Aircraft (2nd complaint)*, there was no suggestion by the Appellate Body that the qualitative dimension of the significance of lost sales extends to consideration of the cause of (or reasons for) those lost sales. Similarly, the Panel correctly observed that the *US – Upland Cotton* panel did not refer to the underlying cause of (or reasons for) price suppression as being relevant to the potential significance of the degree of price suppression. The text of the second sentence of Article 2.4.2 also does not imply an examination of the motivation for, or intent behind, the differences in prices. We thus see merit in the United States' argument that, under the second sentence of Article 2.4.2, the investigating authority is charged with finding whether a pattern of export prices exists, not whether an exporter or producer has intentionally patterned its export prices to "target" and "mask" dumping.[253]

Like the Appellate Body in *US – Washing Machines*, the Panel here likewise relied on the panel report in *US – Upland Cotton*.[254]

211. Thus, when China argues that the Panel in this dispute erred, China is, in reality, arguing that the Appellate Body erred in *US – Washing Machines*.

B. China Misunderstands the Appellate Body's Findings in *US – Washing Machines*

212. China attempts to reconcile its arguments here with the Appellate Body's findings in *US – Washing Machines* by suggesting that there is "nothing more than a semantic difference between the Appellate Body and China."[255] China misunderstands the Appellate Body's findings.

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252 *US – Washing Machines (AB)*, para. 5.66.

253 *US – Washing Machines (AB)*, para. 5.65.

254 *See* Panel Report, paras. 7.111-7.112.

255 China's Appellant Submission, para. 181.

213. China distinguishes between what it terms the "subjective motivation or intent" of an exporter, on the one hand, and "objective market factors," on the other.[256] China explains that it was not and is not "arguing that the exporter's subjective motivation or intent was to be considered as part of the qualitative assessment under Article 2.4.2, second sentence."[257] Rather, China contends that it is necessary only for an investigating authority to consider "objective factors."[258] China asserts that "the Appellate Body equated the expression 'underlying cause of (or *reasons* for)' with the expression 'motivation for, or intent behind' the observed price differences – which need not be considered in an analysis of qualitative factors underlying pricing patterns."[259] China also asserts that the objective factors China identifies are "the very same 'objective market factors' that the Appellate Body in *US – Washing Machines* identified as relevant to the inquiry."[260] China is wrong on both counts.

214. The Appellate Body did not equate the expression "underlying cause of (or reasons for)" with the expression "motivation for, or intent behind" the observed price differences. On the contrary, the Appellate Body distinguished these two concepts. After finding that "[t]he words 'significantly' and 'pattern' in the second sentence of Article 2.4.2 … do not imply an examination into the cause of (or reasons for) the differences in prices," the Appellate Body then separately found that "[t]he text of the second sentence of Article 2.4.2 also does not imply an examination of the motivation for, or intent behind, the differences in prices."[261] The Appellate Body found both that an investigating authority is not required to "ascertain whether the significant differences found to exist are unconnected to 'targeted dumping'" and also that an investigating authority is not required to find "whether an exporter or producer has intentionally patterned its export prices to 'target' and 'mask' dumping."[262] China's attempt to collapse these two findings reflects a misreading of the Appellate Body report in *US – Washing Machines*.

215. China also misunderstands the "objective market factors" referred to and identified by the Appellate Body in *US – Washing Machines*. Like the Panel did here,[263] the Appellate Body identified as potential "objective market factors" "circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand."[264] Like the Panel found here, these factors all go to "how" export prices differ, not "why" they differ.[265] Indeed, the

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256 *See* China's Appellant Submission, paras. 178-182.

257 China's Appellant Submission, para. 182.

258 China's Appellant Submission, para. 181.

259 China's Appellant Submission, para. 181.

260 China's Appellant Submission, para. 181.

261 *US – Washing Machines (AB)*, para. 5.65 (emphasis added).

262 *US – Washing Machines (AB)*, para. 5.65.

263 *See* Panel Report, para. 7.111.

264 *US – Washing Machines (AB)*, para. 5.66.

265 *See* Panel Report, para. 7.111 ("[I]n 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.").

Appellate Body stated immediately following its identification of these examples that "[t]he investigating authority is, however, not required to consider the cause of (or reasons for) the price differences,"[266] *i.e.*, the investigating authority is not required to consider *why* the prices differ.

216. Yet, in its Appellant Submission, China uses the term "objective market factors" interchangeably with the term "objective reasons."[267] This is not a minor semantic matter. Rather, it is the basis of China's argument. Discussing the purported "object and purpose of the second sentence of Article 2.4.2," China contends that "when considering whether prices differ 'significantly', an investigating authority must verify, by examination of relevant objective market factors, that the observed numerical differences in prices are indeed due to the type of pricing behaviour for which Article 2.4.2, second sentence, provides an exceptional remedy."[268] In other words, in China's view, the investigating authority must examine the "reasons" for the price differences and must determine that "the significant differences found to exist are unconnected with 'targeted dumping'."[269]

217. China's position is completely at odds with the findings of the Appellate Body in *US – Washing Machines*, and is not supported by the text of the pattern clause of Article 2.4.2 of the AD Agreement. Nothing in the text of the pattern clause requires an investigating authority to consider the reasons why export prices differ when seeking to ascertain whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

C. China's Proposed Additional "Objective Market Factors" Actually Are Reasons Underlying Export Price Differences

218. The particular so-called "objective market factors" China discusses in its appellant submission confirm that China is asking the Appellate Body to modify its finding in *US – Washing Machines* to require that an investigating authority examine the reasons underlying export price differences. China discusses "seasonal pricing cycles (seasonality)" and "market-driven fluctuations in the costs of production"[270] and requests that the Appellate Body find that these two issues also are "objective market factors" that an investigating authority must always consider when applying the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement. For a number of reasons, the Appellate Body should deny China's request.

219. First, requiring an investigating authority to consider seasonality or cost fluctuations in connection with an examination of export prices pursuant to the pattern clause would mean requiring the investigating authority to examine "the cause of (or reasons for) the differences in prices."[271] China demonstrates this when it contends that "the quantitative difference between

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266 *US – Washing Machines (AB)*, para. 5.66.

267 China's Appellant Submission, para. 180 (emphasis added).

268 China's Appellant Submission, para. 172 (emphasis added).

269 *US – Washing Machines (AB)*, para. 5.65.

270 China's Appellant Submission, para. 157. *See also id.*, paras. 168-169, 189.

271 *US – Washing Machines (AB)*, para. 5.65.

prices at the peak and the trough of a seasonal price cycle may *not* reveal prices that 'differ significantly' in the sense of Article 2.4.2, if the numerical difference is consistent with the regular seasonal fluctuations,"[272] *i.e.*, if there is another "reason" for the price differences other than "targeted dumping."

220. Likewise, China argues that "[a]nother relevant qualitative dimension that may have to be examined is where the 'industry at issue' is subject to *a secular decline in costs of production* over the course of the relevant time period, which may have a direct impact on the trend (or pattern) in prices for the product at issue."[273] Yet again, this "objective market factor" identified by China aims to assess whether there is a reason for export price differences other than "targeted dumping."

221. Seasonality and cost fluctuations are unlike the "objective market factors" identified by the Appellate Body, namely "circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue."[274] The factors identified by the Appellate Body relate to *how* the export prices differ and whether, under the particular circumstances of the case at hand, the export prices differ "significantly."

222. Consideration of seasonality and cost fluctuations would go to *why* the export prices differ, but would not provide information about *how* the export prices are different, and whether the observed differences are "significant" in a qualitative sense. Accordingly, these issues are not germane to an examination of whether prices differ significantly; nor, as the Panel found here and the Appellate Body found in *US –Washing Machines*, is an investigating authority required to address such issues.[275]

223. Additionally, with respect to the question of what China refers to as "seasonality," we recall that none of the challenged antidumping investigations – which concerned coated paper, steel cylinders, and oil country tubular goods – involved "seasonality," such as might be encountered with an agricultural product. Furthermore, it is to be expected that an investigating authority may need to compare the export price paid during one time period with the export price paid during another time period, particularly if the investigating authority is assessing whether export prices differ significantly *among different time periods*, pursuant to the terms of the second sentence of Article 2.4.2 of the AD Agreement. The second sentence of Article 2.4.2 contemplates that lower-priced export sales may indeed be "targeted" to particular time periods. Regardless of whether an exporter intended to "dump" subject merchandise, it may be the case that "targeted dumping" during one part of the period of investigation would be "masked" by higher-priced sales if the average-to-average comparison methodology were used. This is precisely the kind of situation in which an investigating authority may need to resort to the

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272 China's Appellant Submission, para. 169.

273 China's Appellant Submission, para. 169 (emphasis in original).

274 *US – Washing Machines (AB)*, para. 5.66.

275 *See* Panel Report, para. 7.114; *US – Washing Machines (AB)*, paras. 5.65-5.66.

alternative, average-to-transaction comparison methodology to "unmask targeted dumping," which is being concealed by other higher-priced export sales during other times of the year.

224. Furthermore, with respect to changes in input costs, it must be remembered that raw material input costs are not necessarily determinative of price.[276] Instead, price may be more a reflection of other factors, including market conditions. To the extent prices might change for some reason, USDOC may find this significant because those changes could be indicative of a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

225. Second, while China recognizes that the "objective market factors" that may be relevant must be assessed "on a case-by-case basis,"[277] China nevertheless asks the Appellate Body to find definitively that "seasonality or market-driven fluctuations in the costs of production" are among the "objective market factors" that an investigating authority must consider in all cases.[278]

226. We recall that, in this dispute, China has challenged the application of the *Nails* test in three specific investigations on an "as applied" basis. Yet, there was no evidence in the challenged investigations – which again concerned coated paper, steel cylinders, and oil country tubular goods – that seasonality was an issue of concern to the interested parties or that it was of any relevance at all to USDOC's examination; nor was there evidence to substantiate an argument made by one interested party in the steel cylinders investigation that cost fluctuations should have been taken into account.[279]

227. There may be a variety of issues that could go to the question of *how* export prices differ in a qualitative sense and whether export prices "differ significantly" for the purpose of the second sentence of Article 2.4.2 of the AD Agreement. The Appellate Body in *US – Washing Machines* provided an illustrative list of "objective market factors" that an investigating authority may be required to consider "depending on the case at hand."[280] It is not necessary for the Appellate Body to expand that list, nor would it be appropriate to include in the list the issues of seasonality and cost fluctuations, which go to the question of *why* export prices differ.

228. Third, China's reasoning is unsound. China asserted to the Panel that "quantitative differences that are clearly unconnected with 'targeted dumping' are unlikely to be 'significant[]' in the sense of Article 2.4.2."[281] However, lower-priced export 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. That dumping may still be injurious to the domestic industry,

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276 Moreover, in cases involving nonmarket economy countries, such as China, because of price and cost distortions inherent to non-market economies, normal value may be based on factors of production with surrogate values from market economy countries rather than actual purchase prices paid by a non-market economy producer.

277 China's Appellant Submission, para. 168.

278 China's Appellant Submission, para. 189.

279 *See* Steel Cylinders OI Final I&D Memo, at 32 (Exhibit CHN-66). *See also, infra*, section III.D.

280 *US – Washing Machines (AB)*, para. 5.66.

281 China's First Written Submission, para. 148.

again, regardless of the intention or motivation behind the exporter's pricing behavior. The "reason" for the low export prices – be it seasonality or fluctuating costs – changes nothing.

229. Finally, China refers to Article 2.4 of the AD Agreement, noting that Article 2.4.2 of the AD Agreement is "subject to the provision governing fair comparison in Article 2.4" and that the comparison of normal value and export price "shall be made 'in respect of sales made at as nearly as possible the same time'."[282] China suggests that it "finds support" for its proposed interpretation in the context provided by this language.[283] China is incorrect.

230. Article 2.4 of the AD Agreement provides that "a fair comparison shall be made between the export price and the normal value." In other words, Article 2.4 establishes certain rules for making a comparison between *export price and normal value* under any of three comparison methodologies described in Article 2.4.2 – average-to-average, transaction-to-transaction, and average-to-transaction. However, Article 2.4 does not address how an investigating authority is to determine the existence of a "pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2. Such a determination would not involve comparing export price to normal value. Rather, the inquiry under the second sentence of Article 2.4.2 involves examining only whether *export prices* differ significantly among different purchasers, regions, or time periods.

231. Again, the second sentence of Article 2.4.2 of the AD Agreement expressly contemplates that an investigating authority may need to compare the export prices in *different time periods*. Of course, once the investigating authority determines which of the three comparison methodologies provided in Article 2.4.2 it will use to determine the existence of margins of dumping, the comparison between the export price and normal value, regardless of the comparison methodology used, would "be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time," consistent with the requirements of Article 2.4 of the AD Agreement.[284]

232. Accordingly, Article 2.4 of the AD Agreement provides no contextual support for China's argument that an investigating authority should be required to consider seasonality and fluctuating costs when examining whether export prices differ significantly pursuant to the second sentence of Article 2.4.2 of the AD Agreement.

D. China's Arguments Related to an Investigating Authority's Duty to Investigate Lack Merit

233. China also argues that "an investigating authority has an obligation to examine the objective market factors behind observable export price differences regardless whether evidence

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282 China's Appellant Submission, para. 170.

283 China's Appellant Submission, para. 170.

284 AD Agreement, Art. 2.4.

has been submitted by the interested parties."[285] China's argument lacks merit for at least three reasons.

234. First, as demonstrated above, an investigating authority is not required to consider seasonality and cost fluctuations when examining whether export prices differ significantly pursuant to the second sentence of Article 2.4.2 of the AD Agreement. China is incorrect when it suggests that those issues are among the "objective market factors" that an investigating authority may be required to consider, and USDOC thus was under no obligation to examine those issues at all.

235. Second, China refers to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* and notes that the Appellate Body has found that "investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner."[286] China contends that USDOC was obligated to do more to supplement the administrative records in the challenged investigations.[287] The Appellate Body has found, however, that "the *Anti-Dumping Agreement* assigns a prominent role to interested parties … and contemplates that they will be a primary source of information in all proceedings conducted under that agreement."[288] Indeed, Article 17.5(ii) of the AD Agreement contemplates review by WTO panels based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing member."

236. In the challenged investigations, interested parties had the opportunity to present information that they might have considered relevant. With the exception of BTIC in the steel cylinders investigation, interested parties presented no information whatsoever related to so-called qualitative factors or "objective market factors." In the steel cylinders investigation, USDOC directly addressed the respondent's contention concerning increasing steel prices, including by explaining that "BTIC's argument about increases in the price of steel during the [period of investigation] influencing the targeted dumping analysis is merely an unsupported assumption without the support of record evidence."[289]

237. Third, the implication of China's argument is that, 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.[290] China's proposed interpretation of the pattern clause would read the quantitative dimension out of the term "significantly," necessitating an exclusive focus on China's understanding of the

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285 China's Appellant Submission, para. 183.

286 China's Appellant Submission, para. 185 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 344).

287 *See* China's Appellant Submission, paras. 185-186.

288 *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 199; *see also US – Wheat Gluten (AB)*, paras. 53-54.

289 Steel Cylinders OI Final I&D Memo, at 32 (Exhibit CHN-66).

290 *See, e.g.*, China's Response to Questions from the Panel following the First Substantive Meeting with the Parties and Third Parties (Confidential) (August 4, 2015) ("China's Responses to the First Set of Panel Questions"), paras. 62, 66, 74.

qualitative dimension.[291] The Panel asked China whether it agreed that its interpretation would read the quantitative dimension out of the term "significantly" and, not surprisingly, China denied that its proposed interpretation would have such an effect.[292] More telling than China's denial, though, are China's arguments in support of its position.

238. For example, China contended that "the question whether numerically large or small price differences are or are not 'significant' in a particular market depends fundamentally on qualities or characteristics of the relevant market in which those numerical measurements are made."[293] China further argued that "quantitative differences that are clearly unconnected with targeted dumping cannot be 'significant[]' in the sense of Article 2.4.2"[294] In other words, in China's view, any numerical difference in export prices can be explained away. Export prices can be found to "differ significantly" only if they are found to differ "significantly" in some undefined qualitative sense. 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 interpretation of the pattern clause[295] and the meaning of the term "significant."[296]

239. We recall here that China asserted before the Panel that, "under the US approach, a qualitative assessment can only work to the detriment of a respondent" because it is "uni-directional, in the sense that it may consider either dimension of significance for purposes of affirming that differences are significant; however, it will not consider one of the dimensions of significance if that dimension undermines a finding of significance based on the other dimension."[297] China's assertion is baseless. The Appellate Body's discussion of the term "significant" in *US – Large Civil Aircraft (Second Complaint)* supports the proposition that a difference in export prices that is numerically small may nevertheless be qualitatively important.[298] In the context of price differences, it could likewise be the case that a difference in export prices that is numerically large is not "significant," based on a particularized examination of the facts and circumstances of the case. However, 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, though,

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291 *See* First Written Submission of the United States of America (Confidential) (Corrected Version May 13, 2015) ("U.S. First Written Submission"), para. 69.

292 *See* China's Responses to the Panel's First Set of Questions, paras. 70-77.

293 China's Responses to the Panel's First Set of Questions, para. 73.

294 China's Responses to the Panel's First Set of Questions, para. 77 (emphasis added).

295 *See US – Washing Machines (AB)*, paras. 5.65-5.66.

296 *See US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (Observing, in the context of Article 6.3(c) of the *Agreement on Subsidies and Countervailing Measures* that "an assessment of whether a lost sale is significant can have both quantitative and qualitative dimensions.").

297 China's Responses to the Panel's First Set of Questions, paras. 71-72 (emphasis removed).

298 *See US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.

address *how*, qualitatively, the differences, which were numerically large, were not important or notable.

240. If an interested party presents facts and arguments, or if an investigating authority otherwise becomes aware of evidence during the course of its investigation, that supports the conclusion that differences in export prices that are numerically large nevertheless are qualitatively not important or notable, such that the export prices should be viewed as not differing "significantly," then the investigating authority would be required to take that evidence into account as part of its examination. To the extent that qualitative aspects are relevant in a particular case, USDOC would examine them to discern *how* the export prices differ from each other. This is consistent with the U.S. Statement of Administrative Action, which provides that, "in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[299]

241. As the Appellate Body found in *US – Washing Machines*, the "objective market factors" that an investigating authority may be required to consider will vary "depending on the case at hand."[300] There is no justification to find here, as China requests, that an investigating authority, which has already provided ample opportunity for interested parties to submit relevant argument and information, has an additional duty to seek out information from some unspecified source that may have no relevance whatsoever its examination.

E. China's Criticism of the Panel for Drawing Support from the *US – Washing Machines* Panel Is Baseless

242. Finally, China criticizes the Panel for "dr[awing] support for its reasoning from relevant parts of the panel report in *US – Washing Machines*" that "have since been reversed on appeal."[301] China misreads the Panel report.

243. China contends that "the Panel noted its explicit agreement with the 'finding' by the panel in *US – Washing Machines* 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*'."[302] However, China omits the latter part of the sentence that it quotes, which reads "irrespective of the reasons for those differences."[303] When viewed in context, it is clear that the Panel here was agreeing with the panel in *US – Washing Machines* in respect of that panel's finding that an investigating authority is not required to consider the reasons for export price differences.

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299 Statement of Administrative Action for the Uruguay Round Agreements Act, located in Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. DOC. 103-316(I), 103d Cong. 2d Sess. (September 27, 1994), p. 843 (Exhibit CHN-96).

300 *US – Washing Machines (AB)*, para. 5.66.

301 China's Appellant Submission, para. 161. *See also id.*, para. 176.

302 China's Appellant Submission, para. 161 (emphasis supplied by China).

303 Panel Report, para. 7.113.

244. In full, the Panel here wrote of the panel report in *US – Washing Machines*:

> 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. 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. 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. 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.[304]

245. The Panel's agreement with the *US – Washing Machines* panel, as evidenced by the panel report, is confined to the findings that "are consistent with [the Panel's] interpretation of the pattern clause of Article 2.4.2 in this particular regard,"[305] meaning with regard to the issue that was before this Panel, namely whether an investigating authority is required to consider the reasons for export price differences. Unlike the panel in *US – Washing Machines*, the Panel here never "found that 'a pattern of export prices which differ significantly among purchasers, regions or time periods' can be established 'on the basis of purely quantitative criteria'."[306] That was the specific finding of the *US – Washing Machines* panel that the Appellate Body reversed on appeal.[307]

246. Accordingly, there is no reason for the Appellate Body to reverse or modify the Panel's expression of agreement with the findings of the *US – Washing Machines* panel. To the extent that the Appellate Body shares China's concern about the Panel's statement, the Appellate Body could, as China suggests, "reverse the Panel's finding in the same manner as the Appellate Body overturned the panel's findings in *US – Washing Machines* on the same interpretative issue."[308] That is, the Appellate Body could reverse the Panel only "to the extent that the Panel found that

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304 Panel Report, para. 7.113 (emphasis added).

305 Panel Report, para. 7.113 (emphasis added).

306 *US – Washing Machines (AB)*, para. 5.66.

307 *US – Washing Machines (AB)*, para. 5.66.

308 China's Appellant Submission, para. 158 (emphasis added).

'a pattern of export prices which differ significantly among purchasers, regions or time periods' can be established 'on the basis of purely quantitative criteria'."[309]

247. For the reasons given above, though, the United States respectfully submits that the Appellate Body should not reverse or modify the Panel's findings concerning qualitative issues with the *Nails* test. The Appellate Body also should not make the specific findings that China requests,[310] as they are inconsistent with the proper interpretation of the pattern clause of the second sentence of Article 2.4.2 of the AD Agreement and they do not accord with the findings that the Appellate Body made recently in *US – Washing Machines*.

IV. THE UNITED DOES NOT OBJECT TO CHINA'S APPEAL CONCERNING FOOTNOTE 385 OF THE PANEL REPORT

248. China requests that the Appellate Body "declare the statement made in footnote 385 of the Panel Report to be moot and of no legal effect."[311]

249. China correctly observes that the Panel, in footnote 385, suggests that it is permissible for an investigating authority to combine comparison methodologies for the purposes of establishing dumping and margins of dumping in accordance with the second sentence of Article 2.4.2 of the AD Agreement. The Panel's statement in footnote 385 was based, at least in part, on findings made by the panel in *US – Washing Machines*.[312] China also correctly observes that the Appellate Body found in *US – Washing Machines* that Article 2.4.2 does not permit such combination of comparison methodologies, and the Appellate Body declared moot the *US – Washing Machine* panel findings to which the Panel refers.[313] To be sure, in *US – Washing Machines*, the United States did not support that interpretation of the AD Agreement.[314] Nevertheless, in these specific circumstances, the United States is not requesting that this particular legal issue be revisited in this appeal.

250. Accordingly, the United States does not object to China's request that the Appellate Body declare the statement made in footnote 385 of the panel report to be moot and of no legal effect.

V. CHINA'S APPEALS CONCERNING CERTAIN PANEL FINDINGS WITH RESPECT TO THE ALLEGED AFA NORM LACK MERIT

A. Introduction

251. China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.457 through 7.479 and paragraph 8.1.d.ii of the Panel Report, wherein the Panel found that China

309 *US – Washing Machines (AB)*, para. 5.66.

310 *See* China's Appellant Submission, paras. 188-190.

311 China's Appellant Submission, para. 197 (emphasis in original).

312 *See* China's Appellant Submission, para. 195.

313 *See* China's Appellant Submission, para. 195. *See also US – Washing Machines*, paras. 5.124, 5.130.

314 *See US – Washing Machines (AB)*, Annex B-3, paras. 3-16.

failed to establish that the alleged AFA Norm has general and prospective application.[315] Notably, China considers the error in those 23 paragraphs to be an error in "articulating" the legal standard for establishing that an alleged rule or norm of general and prospective application possesses prospective application. According to China, the Panel's purported misidentification of the correct legal standard resulted in an improper evaluation of whether the alleged AFA Norm is a measure capable of as such challenge under Articles 3.3 and 6.2 of the DSU.[316]

252. Were the Appellate Body to reverse the Panel's findings in this respect, China requests that the Appellate Body complete the legal analysis and find that this alleged unwritten norm of general and prospective application breaches the United States' obligations "as such" under Article 6.8 and Annex II, paragraph 7 of the AD Agreement.[317] Thus, in order to succeed, China, per the terms of its own appeal, must prove, at a minimum:

- that the Panel in fact *committed a legal error* in its articulation of the legal standard for evaluating prospective application of an alleged rule or norm of general and prospective application;[318]
- that after reversing the *entirety* of the Panel's analysis concerning the purported prospective character of the alleged AFA Norm, there are still sufficient *undisputed facts and findings* in the Panel record to complete the analysis concerning both the prospective and general application of the alleged norm; and
- that these facts establish that the alleged AFA Norm would in *every instance*[319] of its application result in a breach of the U.S. obligation under Article 6.8 and Annex II, paragraph 7 of the AD Agreement – the provisions that govern the highly fact-specific determinations of using "facts available" by investigating authorities.

However, China is in fact tasked with demonstrating even more than this. As explained below, after providing a recitation of Panel findings relevant to China's appeal, the United States will present five grounds by which the Appellate Body can and should dismiss China's appeal concerning the Panel's findings with respect to the alleged AFA Norm. Each of these grounds is independently sufficient to reject China's appeal.

253. First, the United States will explain that the Appellate Body should exercise judicial economy with respect to China's appeal concerning the alleged AFA Norm. Exercising judicial economy has the merit of resolving this matter in an efficient manner at a time when the dispute settlement resources of the WTO are particularly constrained, and is warranted here because the

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315 China's Notice of Appeal, para. 25.

316 *Id*. at para. 24.

317 *Id*. at para. 25.

318 As explained below, China's claim of a legal error also falls because China's claim is essentially a complaint against the Panel's assessment of the evidence before it – and should have been brought, if at all, under Article 11 of the DSU.

319 *US – OCTG Sunset Reviews*, para. 172.

alleged AFA Norm as described by China is intrinsically tied to, and entirely dependent upon, the USDOC's treatment of the China-government entity, treatment that was based on the Single Rate Presumption norm. The Panel found the Single Rate Presumption to be "as such" inconsistent with Articles 6.10 and 9.2 of the AD Agreement,[320] findings which the United States has not appealed. In that vein, because the Single Rate Presumption – the basis for determining the entity for which rates may be assigned through the alleged AFA Norm – has been found to be WTO inconsistent, additional findings with respect to the operation of the alleged AFA Norm would not contribute to the positive resolution of this dispute.

254. Second, the United States will demonstrate that the Panel's findings that the evidence on the record falls short of demonstrating that the alleged AFA Norm displays prospective application is legally correct. The Panel faithfully applied the correct legal standard for determining the existence of a rule or norm of general and prospective application, including the relevant standard for determining prospective application. China's grievance ultimately lies not with the articulation of the legal standard by the Panel, but rather, with how the Panel assessed China's evidence against it. Because that is so, China's appeal should have been brought, if at all, under Article 11 of the DSU. China's failure to do so means that its appeal must be denied.

255. Third, the United States will demonstrate that China's claims concerning the alleged AFA Norm are, in any event, outside the terms of reference of this dispute. With respect to this issue, the United States notes that it initially asserted before the Panel that at least two of China's three claims concerning the alleged AFA Norm appeared to be outside the terms of reference for this dispute. China, in response to U.S. arguments, clarified precisely the aspect of its Panel Request that it considered to be the basis for its three claims. The clarification proffered by China confirmed that, in fact, all of China's claims are outside the scope of this dispute. Specifically, the aspect of the Panel Request invoked and relied on by China is impermissibly vague, including because it fails to reference the particular provisions of Annex II that the United States purportedly breached.

256. Fourth, the United States will address the merits of China's claims under the relevant provisions of the AD Agreement. The findings by the Panel are insufficient to complete the analysis. Yet, even if the factual assertions that China made in its appellant submission were somehow found, China's claims would still fail on the merits. While China characterizes the alleged AFA Norm as pertaining to the selection of "adverse facts," the gravamen of China's grievance is really that USDOC utilizes adverse inferences as part of its approach to selecting facts to replace missing information from the China-government entity as a result of constituent producers' and exporters', and thus the China-government entity's non-cooperation. The purported "adverse facts" that China complains of are simply those facts selected in light of the inference made on account of the fact that missing information is the result of non-cooperation. There is nothing to suggest that this, in and of itself, it problematic in any instance – let alone in every instance – which is the burden China must carry in an "as such" challenge. Nothing in the record suggests that USDOC does anything less than examining the entire universe of facts to ensure that it selects reasonable and reliable replacements for the missing information. The relevant provisions of the AD Agreement, including as recently interpreted by the Appellate Body in *US – Carbon Steel*, do not preclude the use of adverse inferences – and common sense

[320] *See e.g.* Panel Report, para 8.1.c.ii.

recognizes that such inferences are often appropriately employed in light of a recalcitrant party's refusal to provide requisite information.

257. Finally, the United States will address whether the Appellate Body can complete the legal analysis as requested by China. In particular, the United States will explain that the lack of factual findings and uncontested facts preclude the legal analysis being completed with respect to whether the alleged AFA Norm has general application. After that, the United States will address that even assuming, *arguendo*, that the alleged AFA Norm is established, the Appellate Body cannot complete the legal analysis with respect to China's "as such" claims under Article 6.8 and paragraph 7 of Annex II of the AD Agreement. This is because there are not uncontroverted facts in the Panel record and the Panel did not make sufficient findings on the operation of the alleged AFA Norm to allow for an "as such" finding. In particular, the Panel did not address the impact or constraints the norm would have on USDOC's ability to exercise special circumspection with respect to the application of facts available to the China-government entity.

B. Relevant Findings of the Panel

258. For the convenience of the Appellate Body, in this section, the United States provides a summary of the key findings made in the panel report that are relevant to addressing China's appeal. In the subsequent sections, the United States will present its substantive defense to China's appeal.

1. The Panel's Findings Concerning the Single Rate Presumption Norm

259. Although the Parties are not appealing the Panel's findings concerning the Single Rate Presumption Norm, the specific findings of the Panel with respect to the Single Rate Presumption Norm are important in evaluating China's appeal, which stems from its failure to prevail on its allegations that a second unwritten measure – the so-called Use of Adverse Facts Available Norm (AFA Norm) – governed Commerce's conduct with respect to Chinese exporters and producers. In particular, the relationship between the Single Rate Presumption Norm and the alleged AFA Norm formed the Panel's basis for exercising judicial economy with respect to certain of China's claims on the alleged AFA Norm.

260. Before the Panel, China successfully challenged the Single Rate Presumption Norm as a norm of general and prospective application. The Panel characterized the Single Rate Presumption Norm as follows:

> [I]n 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, an absence of *de jure* and *de facto* government control over its export activities.[321]

[321] Panel Report, para. 7.311 (footnotes omitted).

261. The Panel found that that Commerce had adopted an unwritten measure (which the Panel labeled the Single Rate Presumption), and that this measure "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."[322]

262. The Panel concluded that the Single Rate Presumption Norm is as such inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.[323] That is, the Panel found 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)."[324] The Panel also concluded that the application of the Single Rate Presumption in 38 challenged determinations was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.[325] The Panel elected to 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.[326]

2. The Panel's Findings Concerning the Alleged AFA Norm

263. Whereas China's challenge to the Single Rate Presumption Norm attacked the basis for establishing NME-wide entities (including the China-government entity), China also challenged the subsidiary issue of how the rate assigned to such entities is determined. China made this subsidiary challenge by contesting the WTO consistency of a second alleged unwritten measure – an alleged AFA Norm – which, like the Single Rate Presumption Norm, was challenged by China as a norm of general and prospective application. In addition to "as applied" claims, China challenged the alleged AFA Norm as being inconsistent with Article 6.8 and paragraph 7 of Annex II of the AD Agreement "as such."[327]

a. The Panel Found that China Did Not Establish the Existence of the Alleged AFA Norm

264. In order to determine whether China had established the existence of the alleged AFA Norm, the Panel considered whether the norm (i) was attributable to the United States; (ii) its precise content; and (iii) whether it had had general and prospective application.[328] This analysis adhered to the Appellate Body's approach in *US – Zeroing (EC)*, and reflects the elements that must be demonstrated in order to prove the existence of an alleged rule or norm of general and prospective application.[329]

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322 Panel Report, para. 7.361.

323 Panel Report, para. 7.367.

324 Panel Report, para. 7.362.

325 Panel Report, para. 7.388.

326 Panel Report, para. 7.388.

327 Panel Report, para. 7.389.

328 Panel Report, para. 7.420.

329 Panel Report, para. 7.419 n.836.

265. First, the Panel found that China had established that the alleged AFA Norm is attributable to the United States because "the USDOC is an organ of the United States Government"[330]

266. Second, with respect to the question of whether China had established the precise content of the alleged AFA Norm, the Panel noted that China had alleged that 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.[331]

The Panel cited China's first opening statement for that proposition. Although not an element of the alleged norm, [332] the application of the alleged AFA Norm was contingent on a "trigger" – USDOC's finding that the NME-wide entity failed to cooperate.[333] The Panel found that China had established the precise content of the norm.[334]

267. Despite this finding, a close review of the panel report shows that the "precise content" found by the panel covered a wide range of different outcomes. Moreover, the Panel did not agree with China's contentions that the application of adverse inferences in selecting from available facts was somehow punitive or in any way improper. First, the Panel arrived at a particular notion of what constitutes an "adverse fact":

> [T]he term "adverse facts" …refer[s] 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.[335]

268. Thus, while the Panel accepted the notion of "adverse facts" in this dispute, the notion is not set forth as punitive. Such facts are facts that, when used, would not result in a situation more favourable than that had the NME-wide entity (*e.g.*, the China-government entity) fully cooperated. Thus, the Panel's findings did not encompass the notion that "adverse facts" used by USDOC could not be a reasonable and reliable replacement for the missing information.[336]

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330 Panel Report, para. 7.456.

331 Panel Report, para. 7.477, citing China's opening statement at the second meeting of the Panel, para. 63. (emphasis original).

332 Panel Report, para. 7.441.

333 Panel Report, para. 7.444.

334 Panel Report, para. 7.455.

335 Panel report, para. 7.453.

336 Indeed, the Panel found it instructive that a municipal court decision found that "[adverse facts available] rates must be *reasonably accurate estimates* of respondents' rates with some built-in increase as a deterrent for non-

269. Second, the Panel explained the precise evidentiary basis upon which its precise content finding rested. Specifically, the Panel's basis was a number of individual anti-dumping determinations placed on the record by China.[337] In assessing these determinations, the Panel found, *inter alia*, that "the USDOC may not have known whether the facts it selected were actually adverse or less favourable than the missing facts." The Panel's findings thus highlighted that the Panel did not conclude that USDOC chose certain facts in order to punish non-cooperation by the China-government entity, or that the determinations' reference to adverse facts resulted in any particular outcome.[338]

270. Finally, the Panel explained that none of the determinations that China put on the record:

> lays down in general terms the full content of the alleged AFA Norm as described by China. 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.[339]

271. The Panel rejected that China's other evidence demonstrated the precise content of the alleged AFA Norm. This evidence consisted of USDOC's Antidumping Manual and three municipal court decisions. In its analysis of the relevant language in the Antidumping Manual,[340] for example, the Panel determined that the precise content of the alleged AFA Norm is not demonstrated because "the use of the modal verb 'may'…suggests that the USDOC has discretion to use adverse facts available,"[341] *i.e.*, "USDOC is permitted to (but not necessarily will) base the NME-wide rate on adverse facts available."[342] According to the Panel, this permissive language deprived "the cited excerpts of the Antidumping Manual [of] normative character," in contrast to the precise content of the alleged norm as described by China.[343] The Panel also found that none of the municipal court decisions demonstrated the precise content of the norm.[344] In particular, one deficiency identified by the Panel was that these decisions did not

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compliance". Panel Report. 7.452 (emphasis added). The Panel did not opine on the nature of the increase or deterrent.

337 Panel Report, paras. 7.443-7.455.

338 Panel Report, para. 7.453.

339 Panel Report, para. 7.471.

340 "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" (emphasis original). Panel Report, para. 7.427.

341 Panel Report, para. 7.431.

342 Panel Report, para. 7.431.

343 Panel Report, para. 7.431.

344 Panel Report, para. 7.442.

refer to what China called the "trigger" of the alleged AFA Norm – USDOC's finding of non-cooperation of the China-government entity.[345]

272. When viewed in totality, the Panel's findings with respect to the precise content of the alleged AFA Norm contain significant internal tensions. For instance, while the Panel found that the Antidumping Manual did not demonstrate the precise content of the alleged AFA Norm because of the presence of permissive language, similarly permissive language was present in each of the anti-dumping determinations on which the Panel relied in finding the precise content of the alleged norm.[346] In addition, while the Panel found that the anti-dumping determinations that China placed on the record show that "USDOC systematically adopted adverse inferences and selected facts that were adverse to the interests of the entity and the exporters within it," the Panel also found that "the USDOC may not have known whether the facts it selected were actually adverse or less favourable than the missing facts."[347] Finally, the Panel found that "corroboration is a constituent part of the selection of facts that are adverse to the NME-wide entity and exporters within it,"[348] and that USDOC's "corroboration exercise [in the cited anti-dumping determinations]…determin[ed] 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."[349] These findings are incompatible with the precise content of the alleged AFA Norm as described by China, *i.e.*, "[a] systematic response to a *single* factor [*i.e.*, non-cooperation] that does not involve an active approach to evaluating, reasoning, and explaining …which facts are the *best* information available."[350]

273. After finding that China had demonstrated the precise content of the alleged AFA Norm, the Panel assessed whether China had demonstrated the prospective application of the alleged AFA Norm, concluding that it had not.[351] In reaching this determination, the Panel considered the same evidence provided by China with respect to the precise content of the norm: specifically, the Antidumping Manual, three municipal court decisions, and the USDOC anti-dumping determinations. In considering this evidence, the Panel contemplated whether the alleged AFA Norm demonstrated "the same level of security and predictability of continuation into the future typically associated with rules or norms."[352] The Panel's analysis in this regard

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345 Panel Report, para. 7.441.

346 "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" (emphasis added). Panel Report, para. 7.445.

347 Panel Report, para. 7.453.

348 Panel Report, para. 7.453.

349 Panel Report, para. 7.453.

350 China's Appellant Submission, para. 483.

351 Panel Report, para. 7.477-7.478.

352 Panel Report, paras. 7.474, 7.457 (quoting *Argentina – Import Measures* (AB), para. 5.182).

recognized "a measure has prospective application if it is intended to apply in 'future situations' after its issuance."[353]

274. Against this standard, the Panel scrutinized the evidence. The Panel determined that the Antidumping Manual does not demonstrate the prospective application of the alleged AFA Norm because "[b]y 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."[354] The Panel considered that "[t]he use of the auxiliary verb 'may'…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."[355] The Panel thus concluded that the relevant language from the Antidumping Manual – that is, a supposed articulation of the alleged AFA Norm cited by China – does not speak to "what approach the USDOC will, or should, adopt with respect to the use of adverse facts available,"[356] and therefore cannot be said to demonstrate the prospective application of the alleged AFA Norm.

275. The Panel also determined that the three municipal court decisions cited by China do not "contain language attesting to the general and prospective character of the alleged AFA Norm."[357] The Panel clarified that, although in its analysis of the Single Rate Presumption Norm it found "the court decisions on the record [to] reinforce…the view that the [Single Rate Presumption], as prescribed in the Policy Bulletin No. 05.1 and the Antidumping Manual, had general and prospective application,"[358] "the USCIT excerpts cited in the context of the alleged AFA Norm are of a different nature and … do not exhibit the general and prospective character of the alleged AFA Norm."[359] Accordingly, the Panel did not view the three municipal court decisions presented by China to support China's assertion that the alleged AFA Norm possessed prospective application. [360]

276. Finally, the Panel determined that the anti-dumping determinations to which China cited do not suffice to show that the alleged AFA Norm has prospective application because they do not "demonstrate that the USDOC *will* continue to follow the same course of action in the future."[361] Specifically, the Panel found that the anti-dumping determinations do not provide "any elements that attest to the requisite level of security and predictability,"[362] *i.e.*, the level of

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353 Panel Report, para. 7.457, n. 943 (citing *US – OCTG Sunset Reviews (AB)*, paras. 172, 187). *See US – OCTG (AB)*, para. 187 ("…the SPB…is…intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance").

354 Panel Report, para. 7.461.

355 Panel Report, para. 7.461.

356 Panel Report, para. 7.461.

357 Panel Report, para. 7.464.

358 Panel Report, para. 7.467.

359 Panel Report, para. 7.467.

360 Panel Report, para. 7.467.

361 Panel Report, para. 7.475 (emphasis original) (footnote omitted).

362 Panel Report, para. 7.476.

security and predictability typically associated with rules or norms, and therefore cannot be said to demonstrate the prospective character of the alleged AFA Norm.

277. In making this finding, the Panel expressly recalled the Appellate Body's prior analysis on the appropriate standard for demonstrating that an alleged norm of general and prospective application possesses prospective application, and found that this standard was not met:

> 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."…[F]inding 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.[363]

Notably, the Panel did not find that the evidence offered by China would meet any other lower thresholds than that set by the Appellate Body.

278. In support of its position that the anti-dumping determinations cited by China do not demonstrate the prospective application of the alleged AFA Norm, the Panel carefully drew attention to the fact 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."[364] In this respect, the Panel was mindful of its prior findings that the precise content of the alleged AFA Norm is absent from the Antidumping Manual and the three municipal court decisions cited by China as sample iterations of the alleged norm. The Panel also recognized that "none of the [anti-dumping] determinations on the record lays down in general terms the full content of the alleged AFA Norm as described by China."[365] The Panel observed that, "[b]y contrast, [the Panel's] 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."[366] For the Panel, this distinction mattered precisely because of the legal standard it employed with respect to determining whether an alleged norm of general and prospective application – be it the Single Rate Presumption or the alleged AFA Norm – possesses prospective application.

279. The Panel understood that an alleged norm of general and prospective application could demonstrate prospective application if it evinced "the same level of security and predictability of continuation into the future typically associated with rules or norms."[367] The Panel recognized this "level of security and predictability" to mean that the challenged norm is "intended to apply

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363 Panel Report, para. 7.476.

364 Panel Report, para. 7.477.

365 Panel Report, para. 7.471.

366 Panel Report, n. 945; *see also* n. 930.

367 Panel Report, paras. 7.474, 7.457 (quoting *Argentina – Import Measures (AB)*, para. 5.182).

in 'future situations' after its issuance."[368] For the Panel, the fact that the alleged AFA Norm had never been articulated by USDOC in any of the administrative documents or anti-dumping determinations on the record (or for that matter, by the courts in the judicial decisions on the record) carried significant weight in its determination that the alleged norm is not "intended to apply in 'future situations' after its issuance."[369] Although China challenged the alleged AFA Norm as an *unwritten* norm of general and prospective application, the Panel found the lack of written articulation of the alleged norm to be relevant and probative evidence regarding the prospective character of the alleged norm. Specifically, while the Panel discerned, based on the anti-dumping determinations before the Panel, that "USDOC ha[d] invariably engaged in the same conduct"[370] with respect to those determinations, the Panel could not determine, based on the application of the alleged AFA Norm in each of those determinations alone, that the alleged norm was "intended to apply in 'future situations' after its issuance" (or here, after its application). In short, the Panel's findings reflect a thorough and careful scrutiny of the evidence that adhered to the analysis from prior Appellate Body reports.

280. Because the Panel found that the alleged AFA Norm does not possess prospective application, the Panel did not assess whether the alleged norm possesses general application.[371] However, the Panel recognized that "a measure has general application to the extent that it 'affects an unidentified number of economic operators, including domestic and foreign producers.'"[372]

b. The Panel Did Not Assess The Merits Of China's "As Such" Claim

281. The Panel concluded that, because China did not demonstrate that the alleged AFA Norm constitutes a norm of general and prospective application, "[t]here is…no need to examine whether it falls within [the Panel's] 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."[373]

c. The Panel Exercised Judicial Economy With Respect To China's As Applied Claims

282. 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 Antidumping Agreement, the Panel exercised judicial economy – and accordingly did not make any findings with respect to the consistency of the challenged determinations with the AD Agreement. The United States briefly recounts these findings because the same rationales offered by the Panel with respect to its invocation of judicial economy on China's "as applied" claims likewise would have been relevant had the Panel found the existence of the alleged AFA Norm. Moreover, the United

368 Panel Report, para. 7.457, n. 943 (citing *US – OCTG (AB)*, paras. 172, 187).

369 Panel Report, para. 7.476, n. 943.

370 Panel Report, para. 7.475.

371 Panel Report, para. 7.476.

372 Panel Report, para. 7.457 (citing, *inter alia*, *US – Shirts & Blouses* (AB), p. 13).

373 Panel Report, para. 7.479.

States submits that these rationales should be considered by the Appellate Body in deciding whether to rule on China's appeal with respect to the "as such" claims.

283. Explaining its decision to exercise judicial economy, the Panel recalled its findings with respect to the application of the Single Rate Presumption that, in the 30 anti-dumping determinations at issue, "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 multiple exporters comprising this entity."[374] The Panel further recalled that China's as applied claims with respect to the alleged AFA Norm "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 [same] 30 challenged determinations."[375] The Panel considered that, in light of its findings with respect to the application of the Single Rate Presumption in the 30 challenged determinations, "additional findings regarding the level of and the manner in which the USDOC determined [the] single PRC-wide rate in the[se] same…determinations would [not] be necessary or useful for the positive resolution of the dispute."[376]

284. As is evident from the Panel report, critical to the Panel's exercise of judicial economy was the Panel's determination 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.[377] As the Panel explained:

> 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 the entity for which it is determined.[378]

Relatedly, the Panel observed that:

> [a]ny 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 [the Panel]

374 Panel Report, para. 7.486.

375 Panel Report, para. 7.480.

376 Panel Report, para. 7.486.

377 Panel Report, para. 7.483.

378 Panel Report, para. 7.483 (emphasis original).

> make[s] additional findings on the consistency of the 30 current, WTO-inconsistent determinations with these provisions.[379]

Thus, the Panel recognized the intrinsic links between the Single Rate Presumption Norm and the claims being pursued with respect to the alleged AFA Norm – and that resolution of the former had superseded any need to consider the latter.

285. With these relevant findings recounted, the United States turns to its respective arguments why in light of these findings, China's appeal should be dismissed. The United States begins by addressing why the Appellate Body should exercise judicial economy over China's appeal concerning the alleged AFA Norm.

C. Findings by the Appellate Body on China's Appeal Would Not Contribute to a Positive Resolution of this Dispute

286. The Appellate Body has recognized that it is not required to address any and all appeals brought by a Member.[380] Consistent with DSU Articles 3.4 and 3.7, the Appellate Body – like any panel – can examine whether any findings requested by a Member would assist in "achieving a satisfactory settlement of the matter" and "secur[ing] a positive solution to a dispute" – and decline to issue findings if they do not.

287. To put it plainly, China's appeal concerning the alleged AFA Norm is unnecessary, and accordingly, a poor use of the Parties' and the Appellate Body's resources. Per China, the alleged AFA Norm concerns the application of facts available with respect to the China-government entity that is determined by USDOC on the basis of the Single Rate Presumption norm. But China's successful challenge of the Single Rate Presumption norm before the Panel has resulted in findings that address the existence of precisely that entity – the China-government entity. Specifically, the Panel found that the China-government entity was not established in a WTO consistent manner.[381] Therefore, the very subject for which China argues the application of facts available is WTO inconsistent – the China-government entity – has been found to be inconsistent with U.S. WTO obligations. Thus, the issue of whether facts available are being appropriately applied to the China-government entity determined on the basis of the Single Rate Presumption norm in future proceedings is moot *because the China-government entity determined on the basis of the Single Rate Presumption norm has already been found to be WTO inconsistent*. In light of this situation, the pertinent question is what contribution any finding concerning the application of facts available could have with respect to the positive resolution of this dispute.

288. The United States presents its arguments by first recalling that the DSU provides authority for the Appellate Body to exercise judicial economy and that the Appellate Body has in fact used such authority in prior disputes, under similar circumstances. The United States will then address how the Single Rate Presumption Norm and the alleged AFA Norm are intertwined

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379 Panel Report, para. 7.490.

380 *See e.g., US – Upland Cotton (AB)*, n.6, para. 510.

381 See e.g. Panel Report

to the point that the former is an essential predicate to the latter. Finally, the United States will explain that in light of the unappealed findings made by the Panel that the Single Rate Presumption Norm is inconsistent with U.S. WTO obligations, there is no reason that additional findings concerning the alleged AFA Norm would contribute to a positive resolution of this dispute.

1. The DSU provides the Appellate Body Authority to Decline Making Speculative or Hypothetical findings

289. The DSU does not provide that WTO dispute settlement panels or the Appellate Body must address every and all claims raised by a Member.[382] To the contrary, the DSU recognizes that dispute settlement has specific aims, among them the satisfactory settlement of the matter and the positive resolution of the dispute.[383] Relevant provisions of the DSU on this point include Articles 3.4 and 3.7. DSU Article 3.4 provides:

> Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

DSU Article 3.7 provides in pertinent part that:

> The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.

The applicability of these provisions are not limited to panels.

290. The Appellate Body has previously recognized that these provisions of the DSU apply with respect to its own adjudicative authority, and provide a firm basis to avoid making conjectural findings. The Appellate Body's analysis in *US – Upland Cotton* is particularly instructive in this regard:

> For its part, Article 3.4 of the DSU provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Similarly, Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute".
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> ***
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> With this in mind, we observe that although an interpretation by the Appellate Body, in the abstract, of the meaning of the phrase "world market share" in Article 6.3(d) of the SCM Agreement might offer

382 *See US – Shirts & Blouses (AB)*, p. 19 ("Although a few GATT 1947 and WTO panels did make broader rulings, by considering and deciding issues that were not absolutely necessary to dispose of the particular dispute, there is nothing anywhere in the DSU that requires panels to do so.").

383 *Id.*

> at best some degree of "guidance" on that issue, it would not affect the resolution of this particular dispute. Indeed, irrespective of whether we were to uphold or reverse the Panel's finding on this issue, upon adoption of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation. Thus, although we recognize that there may be cases in which it would be useful for us to review an issue, despite the fact that our ruling would not result in rulings and recommendations by the DSB, we find no compelling reason for doing so in this case.
>
> Accordingly, we believe that an interpretation of the phrase "world market share" in Article 6.3(d) of the SCM Agreement is unnecessary for purposes of resolving this dispute.[384]

291. The United States submits that a key aspect of this analysis is the recognition that simply because a finding might provide "guidance" is insufficient to require that it be made. Rather the more pertinent query is whether the finding would contribute to the resolution of the dispute. In circumstances where it would not, the Appellate Body has effectively exercised judicial economy consistent with the aims of WTO dispute settlement.[385]

2. The Single Rate Presumption Norm and the Alleged AFA Norm Are Inextricably Intertwined

292. The underlying factual underpinnings of the alleged AFA Norm are necessarily predicated on the existence of a China-government entity determined on the basis of the Single Rate Presumption norm. Accordingly, the Panel's findings on the Single Rate Presumption Norm render any additional findings on the alleged AFA Norm unnecessary.

293. In considering the relationship between the Single Rate Presumption Norm and the alleged AFA Norm, the United States begins by providing a comparison of the content of the Single Rate Presumption Norm (the existence of which the Panel found) and the alleged AFA Norm (the existence of which China failed to establish).

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384 *US – Upland Cotton (AB)*, paras. 508, 510-511 (footnotes omitted).

385 *See e.g.*, *Id.*; *US – Gambling (AB)*, para. 337 ("The United States requests us to complete the analysis and find that the Wire Act, the Travel Act, and the IGBA are "necessary", within the meaning of Article XIV(c), to secure compliance with the RICO statute. We found in the previous section of this Report that the Wire Act, the Travel Act, and the IGBA fall under paragraph (a) of Article XIV. As a result, it is not necessary for us to determine whether these measures are also justified under paragraph (c) of Article XIV."); *see also* US – Steel Safeguards, para. 512 ("However, as we have found that the measures applied to those two products are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, and 4.2 of the Agreement on Safeguards, it is, in our view, not necessary, for the purposes of resolving this dispute, to rule on whether, in applying these measures, the United States also acted inconsistently with its obligation under Article 5.1 of the Agreement on Safeguards.").

Single Rate Presumption Norm	[W]e 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, an absence of *de jure* and *de facto* governmental control over its export activities.[386]
Alleged AFA Norm	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 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.[387]

As is immediately evident, both norms concern the NME-entity, here the China-government entity. Whereas the Single Rate Presumption Norm relates specifically to the establishment of the China-government entity, the alleged AFA Norm relates to the level of and the manner in which rates are assigned to the China-government entity.

294. The Panel describes its findings that the Single Rate Presumption Norm is the mechanism by which USDOC determines the existence of the China-government entity as follows:

> [T]he 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. In these circumstances, an investigating authority may calculate a single dumping margin and assign a single duty rate to that entity.

386 Panel Report, para. 7.311 (emphasis added).

387 Panel Report, para. 7.416 (emphasis added).

> 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.[388]

295. The Panel thus recognized that it is through the Single Rate Presumption Norm that the China-government entity is created and assigned a single rate. The Single Rate Presumption is thus the predicate for the entity that is ultimately assigned any rate. China itself recognized this. In its first written submission, China introduces its Article 6.8 and Annex II claims by stating, "[h]aving 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 in."[389] China continues that, "China's claims in this part of its submission relate to the manner in which USDOC determines rates *for such NME-wide entities*, including *all* of the producers/exporters included within those fictional entities."[390] Subsequently, even China's appellant submission reflects the fundamental link between the Single Rate Presumption Norm and the alleged AFA Norm, where China states, "[t]he AFA Norm pertains to the process through which USDOC determines the rate for an NME-wide entity *that is identified by the USDOC through operation of the Single Rate Presumption*."[391]

296. As explained below, it is the existence of the China-government entity established through the Single Rate Presumption Norm that is (1) a condition precedent for triggering the application of the alleged AFA Norm; (2) the subject of the AFA Norm; and (3) integral to the process by which the antidumping (AD) rate assigned to the entity is determined. In other words, absent the China-government entity determined on the basis of the Single Rate Presumption norm, the alleged AFA Norm has no bearing. In the following subsections, the United States will elaborate on the close relationship between the two alleged unwritten measures with respect to the trigger; the subject (that is, the AD rate for the China-government entity); and the process for assigning a particular AD rate.

a. The Trigger

297. The alleged AFA Norm applies when USDOC finds that the China- government entity has been uncooperative. Although, as asserted by China and recognized by the Panel, the finding of non-cooperation is not part of the alleged AFA Norm itself, it is key to understanding the operation of the norm.[392] As observed by the Panel with respect to China's characterization of

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388 Panel Report, para. 7.361 (footnote omitted).

389 China's First Written Submission, para. 389.

390 China's First Written Submission, para. 390.

391 China's Appellate Submission, para. 429.

392 Panel Report, para. 7.423 ("China has made it clear, that the alleged AFA Norm only applies in antidumping 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. Rather, the finding of

the alleged AFA Norm, a finding of non-cooperation acts as the "trigger [which] 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."[393] Accordingly, the very trigger for the alleged AFA Norm is rooted in findings with respect to the exporters and producers which constitute the China-government entity. The very application of the alleged AFA Norm is thus, per China's own characterization, contingent upon the existence and conduct of the China-government entity.

298. In considering this point, it bears emphasis to note that, in light of China's framing of its challenge in this dispute, the trigger for the alleged AFA Norm (*i.e.*, a finding of non-cooperation) is necessarily dependent upon the existence of a China-government entity established through the Single Rate Presumption norm. To that end, the United States notes that China's submissions assert that USDOC's finding of non-cooperation is based on presumptions that are tied to the presumption that exporters in China are under government control (*i.e.*, the Single Rate Presumption).

- USDOC presumes that the entire NME-wide entity failed to cooperate to the best of its ability when at least one of the mandatory respondents is ultimately included within the NME-wide entity because it did not provide requested information.[394]

- USDOC presumes that the entire NME-wide entity failed to cooperate to the best of its ability if it has reason to believe that there are more producers/exporters from the country under investigation than those that responded to the questionnaires issued by USDOC.[395]

- USDOC essentially extends a finding of non-cooperation by one or some producers/exporters, to the NME-wide entity as a whole, including all of the producers/exporters within that fictional entity.[396]

299. China's concept of non-cooperation – its trigger for the alleged AFA Norm – is therefore tied to the notion that there are exporters or producers in the China-government entity that have been wrongly included in that entity by virtue of the Single Rate Presumption – and that the failing of one is imputed to the whole.[397]

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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.") (footnote omitted).

393 Panel Report, para. 7.429.

394 China's First Written Submission, para. 482.

395 China's First Written Submission, para. 485.

396 China's First Written Submission, para. 487.

397 This point is further demonstrated by China's statement that, "China uses the term "presumption" to describe the finding of non-cooperation applied to the fictional NME-wide entity in these circumstances, because many respondents included by USDOC within the fictional NME-wide entity have not in actual fact failed to cooperate when one or more of the presumptions is applied." China's Second Written Submission, para. 354.

300. Given that China has alleged that the trigger of non-cooperation stems from, in part, application of the Single Rate Presumption norm – which has been found to be inconsistent with Articles 6.10 and 9.2 of the AD Agreement – the logical result is that this will no longer be the trigger that China describes if the Single Rate Presumption norm is no longer in force.

b. The Subject

301. The subject of the alleged AFA Norm is the China-government entity established through the Single Rate Presumption norm. As is evident in China's description of the alleged AFA Norm, China's grievance concerns the rate that is selected for the "NME-wide entity and the exporters or producers within it." [398] But as explained above, the China-government entity established through the Single Rate Presumption Norm has been found to be WTO inconsistent.

302. The determination of a rate cannot be divorced from the entity to which that rate is assigned. In that regard, the Panel's findings on exercising judicial economy with respect to China's "as applied" claims on the alleged AFA Norm are instructive:

> [W]e 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. 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. 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.[399]

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[398] Panel report, para. 7.416, citing 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.

[399] Panel Report, para. 7.492 (footnotes omitted).

As the Panel correctly found, because it was determined that the China-government entity was established in a manner inconsistent with WTO obligations, it was not necessary to further determine whether the level of and manner in which rates were assigned to the China-government entity were WTO consistent.

303. Although the Panel's logic was limited in that circumstance to exercising judicial economy on China's "as applied" claims, it applies with equal force to China's "as such" claims. Because the Single Rate Presumption norm was found to be inconsistent "as such," the issue of whether the China-government entity was correctly assigned a rate is moot.[400]

304. The United States notes that, in considering this question, it appears that China seems to acknowledge that the determination of rates under the alleged AFA Norm is tied directly to the Single Rate Presumption norm. For example, in its arguments concerning the alleged AFA Norm in its appellant submission, China notes that USDOC "fails to take account of the fact that the single entity of which producers/exporters in an NME country are rebuttably presumed to form part is a *legal fiction*."[401]

305. In Panel Question 131, the Panel asked China if the Panel was correct "that China's claim regarding the alleged AFA Norm 'as such' challenges the USDOC's use of facts available in determining anti-dumping duty rates for NME-wide entities as identified through the application of the alleged Single Rate Presumption?" China's response was "yes," but with one reservation – that the United States argued that the China government entity might include exporters that were so treated on account of record evidence.[402] Despite that caveat,[403] China acknowledged that "the Panel is correct that, in each of the determinations on the record, the NME-wide entity has been identified through the application of the Single Rate Presumption."[404]

306. China's response is relevant in that it confirms its understanding that the Single Rate Presumption norm is the basis by which the China-government entity subject to the alleged AFA Norm was determined.

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400 Panel Report, paras. 7.367-7.368, 8.1.c.ii ("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 antidumping 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.") (emphasis original) (footnote omitted).

401 China's Appellant Submission, para. 503.

402 *See* China's Response to Panel Question 131, para. 249.

403 The reservation invoked by China is inapplicable because the Panel *rejected* the United States' argument that the Single Rate Presumption Norm was permissible because it might allow for exporters to be joined on the basis of record evidence. Panel report, para. 7.364.

404 *Id.*

c. The Process

307. The last component that highlights the interwoven nature of the Single Rate Presumption norm and the alleged AFA Norm is the matter of "process." Per China, the alleged AFA Norm entails a "process" – which it does not define – that leads to the selection of facts adverse to the interests of the China-government entity. As discussed in section V.F, the notion of "adverse facts" is itself problematic and a mischaracterization of the nature of the facts used by USDOC to fill in informational gaps in the record. But ultimately for our purposes here, it suffices to note that if the Single Rate Presumption is not applied, this would vitiate the purported existing "process" at the heart of the alleged AFA Norm.

308. Indeed, China's own submission takes issue with the purported process under the alleged AFA Norm because:

> the challenged norm leads USDOC to overlook the fact that non-cooperation by some respondents was presumed from non-cooperation by other respondents included within the fictional NME-wide entity, or the fact that necessary information was not sought.[405]

In other words, the "process" at the heart of the alleged AFA Norm is tied to the Single Rate Presumption norm because, according to China, it is based on the notion that the USDOC overlooks the relevant circumstances related to certain producers and exporters in the China-government entity. Specifically, China argues that the USDOC does not contemplate that some interested parties may receive requests for information, while others do not. These circumstances, however, arise from the operation of the Single Rate Presumption, which ties producers and exporters together under the China-government entity. Thus, the operation of the AFA Norm is fully and completely dependent on the Single Rate Presumption norm, which no longer stands.

309. The Panel recognized the intrinsic connection between the Single Rate Presumption and the alleged AFA Norm when exercising judicial economy for China's "as applied" claims with respect to the AFA Norm:

> We recall in our findings with respect to the USDOC's 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. 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-

405 China's Second Written Submission, para. 409.

> dumping duty rate for the PRC-wide entity and the level of these PRC-wide rates in the 30 challenged determinations.[406]

Although the Panel found that the alleged AFA Norm had not been established – and thus did not need to rule on China's "as such" claims – the rationale would have applied with equal force there. When the very basis for the establishment of the China-government entity – *i.e.*, the Single Rate Presumption – is found to be WTO inconsistent, there is no need then to resolve the issue of the rate for that entity.

3. There Are No Reasons Findings on the Alleged AFA Norm Would Contribute to the Positive Resolution of this Dispute

310. Based upon the foregoing, it is clear that the Appellate Body has authority to exercise judicial economy with respect to conjectural findings and that any findings here on the alleged AFA Norm would indeed be conjectural in nature because of the dependence of the alleged AFA Norm on the Single Rate Presumption norm. Because the Single Rate Presumption has been found to be WTO-inconsistent, additional findings on the Alleged AFA Norm are unnecessary in order to positively resolve this dispute. Moreover, any findings on the alleged AFA Norm as such may lead to speculation about the ways in which the United States might implement the findings of the Panel, in tension with the Appellate Body's guidance to avoid such speculation.[407]

311. Moreover, the Panel's reasoning in deciding to apply judicial economy with respect to China's "as applied" claims applies with equal force with respect to China's "as such" claim on appeal. The Panel did not reach this decision based on inherent or self-evident logic alone. It explicitly asked China "in what sense, if at all, would China's findings 'as such' and 'as applied" … contribute to the positive resolution of this dispute."[408]

312. In other words, China had an opportunity to explain why findings would present a positive contribution. The response by China reflects that no such rationale could be articulated. Specifically, China provided the following reasons:

- The measures are distinct;[409]
- That USDOC may maintain a similar practice and it is necessary to ensure that the United States comply with provisions such as Article 6.8, Annex II, et. al;[410] and
- China's rights under the Working Party Report would be impaired if the Panel did not issue findings.[411]

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406 Panel Report, para. 7.480 (internal footnotes omitted).

407 *US – Wheat Gluten (AB)*, para. 185.

408 Panel Question 132.

409 China's Response to Panel question 132, paras. 256-258.

410 *Id*., para. 260.

411 *Id*,, para. 267.

None of these reasons demonstrate what additional contribution would be achieved by findings on the alleged AFA Norm. Indeed, it is inconceivable that additional findings on the alleged AFA Norm would contribute to the positive resolution of this dispute.

313. In closing, the United States would emphasize the following point made by the Panel: the obligation for any measure taken by the United States to comply with Article 6.8, Annex II(7), or any other provision of the AD Agreement flows not from the findings made by the Panel, but because of the substantive provisions themselves.[412] In any proceeding, to assess the consistency of compliance, it is well-established that the measure taken to comply must be consistent with all WTO obligations, not simply those alleged or found to have been breached in the original proceeding.[413] Thus, in light of the relevant findings by the Panel, particularly with respect to the Single Rate Presumption norm, and in recognition of the principles of the DSU, the Appellate Body should exercise judicial economy and dismiss this needless appeal.

D. The Panel Properly Articulated and Applied the Legal Standard for Prospective Application for a Norm of General and Prospective Application

314. In this dispute, China alleged that the alleged AFA Norm constituted an unwritten norm of general and prospective application, and the Panel evaluated it accordingly.[414] As the Panel Report makes clear, the Panel referenced and applied the Appellate Body's prior analysis with respect to the standard for finding unwritten norms of general and prospective application.[415] China's evidence and legal argumentation did not comport with that standard – most notably, China failed to establish the prospective application of the alleged AFA Norm. On appeal, rather than take issue with the framework employed by Panel or identify specific aspects of its evidence that the Panel misconstrued, China incorrectly asserts that the Panel set forth an "impossible" standard (*i.e.*, "certainty") with respect to proving the prospective application of the alleged AFA Norm, a requirement in proving its existence.[416] Further, China fails to acknowledge that the Panel's articulation of the standard for establishing a norm of general and prospective application was exactly the same when it came to the Single Rate Presumption norm – yet it proved perfectly possible to establish that norm. When one examines the text of the Panel Report, as opposed to China's characterization, it is clear that the Panel correctly articulated the relevant legal standard for *the measure that China alleged* – a norm of general and prospective application – and that China's grievance is essentially that the Panel did not find China's evidence to be sufficient to support its allegation.

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412 Panel Report, paras. 7.488-7.490.

413 *EC – Bed Linen (AB) (Article 21.5 – India)*, para. 79. ("Indeed, a complainant in Article 21.5 proceedings may well raise new claims, arguments, and factual circumstances different from those raised in the original proceedings, because a 'measure taken to comply' may be inconsistent with WTO obligations in ways different from the original measure. In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to assess whether a 'measure taken to comply' is fully consistent with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings.").

414 Panel Report, para. 7.415.

415 Panel Report, para. 7.419, 7.473-7.476.

416 Indeed, China uses the word "impossible" no less than 10 times in its Appellant Submission to describe the standard imposed by the Panel. Paras. 24, 32, 204, 212, 219, 252, 367, 373, and 393.

315. To overcome this failing, China's appellant submission examines other types of measures and suggests its burden should be no higher than that required to establish the existence of those measures (*e.g.*, ongoing conduct and conduct amounting to systematic and continuing application). That point is misplaced. China, as master of its complaint, chose to frame the measure at issue as a norm of general and prospective application, and had to prove the existence of such a norm, including by demonstrating prospective application. It did not do so here.

316. In this section, the United States will present its arguments over seven parts. First, the United States recounts the Panel's findings and analysis. Second, the United States summarizes the basis of China's appeal. Third, the United States addresses the appropriate legal standard for establishing the existence norms of general and prospective application, and contrasts this standard with the standards pertaining to other types of unwritten measures. As demonstrated, these standards cannot be interchanged, despite China's argument that they can. Fourth, the United States explains that the Panel correctly identified the legal standard for prospective application with respect to norms of general and prospective application. Fifth, the United States demonstrates that the standard was correctly applied in this dispute. Sixth, the United States addresses that China's claim is essentially a claim against the Panel's assessment of the facts. Accordingly, it needed to be brought on appeal, if at all, under Article 11 of the DSU. Finally, the United States addresses the issue of general application, which was not examined by the Panel, and demonstrates that the alleged AFA Norm does not possess general application

1. Relevant Findings by the Panel

317. The Panel considered whether China's evidence established that the alleged AFA Norm demonstrated "the same level of security and predictability of continuation into the future typically associated with rules or norms."[417] The Panel's analysis in this regard was consistent with the framework set forth in the Appellate Body's findings in *US – OCTG Sunset Reviews*: "a measure has prospective application if it is intended to apply in 'future situations' after its issuance."[418] Thus, the Panel considered that the alleged AFA Norm – challenged as an unwritten norm of general and prospective application – could demonstrate prospective application to the extent that it evinced the same level of security and predictability of continuation into the future that is associated with such norms, that is, to the extent that it was intended to apply in future situations after its articulation or application.

318. The Panel determined that none of China's evidence on prospective application, *i.e.*, (1) excerpts from USDOC's Antidumping Manual, (2) three municipal court decisions, and (3) a collection of anti-dumping determinations, met this legal standard.

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417 Panel Report, paras. 7.474, 7.457 (quoting *Argentina – Import Measures (AB)*, para. 5.182).

418 Panel Report, para. 7.457, n. 943 (citing *US – OCTG Sunset Reviews* (AB), paras. 172, 187). *See US – OCTG Sunset Reviews* (AB), para. 187 ("…the SPB…is…intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance").

319. First, the Panel determined that the Antidumping Manual does not demonstrate the prospective application of the alleged AFA Norm because it spoke of "a discretionary, permissive authority to the USDOC to select adverse facts available."[419]

320. Second, The Panel determined that the three municipal court decisions cited by China do not demonstrate the prospective application of the alleged AFA Norm because they do not "contain language attesting to the general and prospective character of the alleged AFA Norm."[420] On this point, the Panel noted that the situation was different with respect to the court decisions cited as evidence with respect to the Single Rate Presumption norm. With respect to the Single Rate Presumption norm, the Panel found that the court decisions "reinforced the view that the norm" had general and prospective application.[421] In contrast, the Panel found that the court decisions proffered for 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."[422]

321. Third, and finally, with respect to the specific anti-dumping determinations that China placed on the record, the Panel determined that the prospective application of the alleged AFA Norm is not demonstrated because the determinations do not provide "any elements that attest to the requisite level of security and predictability,"[423] that is, the application of the alleged AFA Norm in the cited determinations does not demonstrate that the alleged norm was intended to apply in future situations after its purported use. On this point, the Panel concluded that the evidence found in the determinations:

> 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.[424]

322. The Panel's finding that the alleged AFA Norm does not possess prospective application was entirely consistent with the standard by which it assessed that the Single Rate Presumption – also challenged as an unwritten norm of general and prospective application – does possess prospective application. The Panel observed 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."[425] The Panel also recognized that none of the "determinations on the record lays down in general terms the full content of the alleged AFA Norm as described by China."[426] "By contrast, [the Panel's] finding that the Single Rate Presumption is a norm of general and prospective application [was] grounded on, *inter alia*, the

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419 Panel Report, para. 7.461.

420 Panel Report, para. 7.464.

421 Panel Report, para. 7.467.

422 Panel Report, para. 7.467.

423 Panel Report, para. 7.476.

424 Panel Report, para. 7.475.

425 Panel Report, para. 7.477.

426 Panel Report, para. 7.471.

description found in general documents such as the Policy Bulletin No. 05.1 and the Antidumping Manual."[427]

323. For the Panel, the distinction in evidence mattered precisely because of the legal standard it employed with respect to determining whether an alleged rule or norm of general and prospective application – be it the Single Rate Presumption or the alleged AFA Norm – actually possessed prospective application. While the Panel found an intent to apply the Single Rate Presumption in the future, after, for example, its articulation in Policy Bulletin No. 05.1 and the Antidumping Manual, the complete lack of similar evidence with respect to the alleged AFA Norm, particularly in the context of anti-dumping determinations in which the alleged norm was purportedly applied, illustrated the absence of evidence that the alleged AFA Norm was intended to be applied in future scenarios. The Panel thus applied a consistent legal standard – by which it was possible to establish a norm of general and prospective application as demonstrated by the Single Rate Presumption – and properly found that the evidence did not establish that the alleged AFA Norm possesses prospective application.

2. China's Appeal

324. China appeals what it perceives as the Panel's articulation of the legal standard for determining whether a challenged unwritten rule or norm of general and prospective application possesses prospective application. Pointing to the one instance in which the Panel employed the word "certainty" with respect to the alleged AFA Norm, China perceives that the Panel found 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," and that "the required degree of security and predictability is 'certainty.'"[428] As addressed below, China never proceeds into articulate what legal standard complainants *are* required to meet in order to demonstrate the prospective application of rules or norms of general and prospective application.

3. The Legal Standard for Norms of General and Prospective Application Cannot be Interchanged with the Standard Applicable to Other Types of Measures.

325. It is undisputed that, before the Panel, China challenged the alleged AFA Norm as an unwritten norm of general and prospective application.[429] This characterization led the Panel to apply the Appellate Body's test in *US – Zeroing (EC)* in order to ascertain whether the alleged norm exists, a threshold finding required in order for the alleged norm to be challenged as such in WTO dispute settlement.[430] Under this test, which the Appellate Body has characterized as a **"high threshold,"**[431] the complainant must show: (a) that the alleged norm or rule is attributable

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427 Panel Report, n. 945; *see also* n. 930.

428 China's Appellant Submission, para. 381 (emphasis original) (citing Panel Report, para. 7.476).

429 China's Consultation Request, para. 20 ("[t]hat the USDOC will apply the Use of Adverse Facts Available is a norm of general and prospective application); China's Panel Request, para. 22. *See also* China's First Written Submission, para. 492.

430 Panel Report, para. 7.478.

431 *US – Zeroing (EC) (AB)*, para. 198 (emphasis added).

to the responding member; (b) its precise content; and (c) that is has general and prospective application.[432] In this regard, it bears emphasis again that that the Appellate Body has explicitly found that when it comes to Members asserting norms of general and prospective application, Panels are expected to examine critically that the evidence does meet the high threshold for establishing such norms:

> Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is not expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.[433]

As discussed at length above, the Panel, after a critical examination, found that, with respect to the alleged AFA Norm, the evidence demonstrates the alleged norm's precise content and attribution to the United States, but does not demonstrate the alleged AFA Norm's prospective application.

326. China's appeal purports not to take issue with Panel's application of the framework set forth in *US – Zeroing (EC)*, but nonetheless claims that the Panel erred in articulating the legal standard.[434] In that respect, China requests the Appellate Body to consider how different types of measures have been established in WTO dispute settlement.[435] China is wrong to do so for two reasons.

327. First, China's characterization of the alleged AFA Norm as a norm of general and prospective application controlled what standard should be employed with respect to determining the existence of the alleged norm. Under the *US – Zeroing (EC)* framework, the appropriate standard for determining the existence of a rule or norm of general and prospective application, the complainant must demonstrate, *inter alia*, that the alleged rule or norm has prospective application.

328. Second, the Appellate Body has made clear that the *US – Zeroing (EC)* framework, and specifically, the requirement to demonstrate prospective application, does not apply when demonstrating the existence of measures characterized as either ongoing conduct or conduct amounting to systematic and continuing application. That is, the Appellate Body has found that the standard for demonstrating the existence of a rule or norm of general and prospective application is distinct from, and not interchangeable with, the standards for demonstrating the existence of measures characterized as ongoing conduct or conduct amounting to systematic and continuing application. Because China challenged the alleged AFA Norm as a norm of general

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[432] *US – Zeroing (EC) (AB)*, para. 198.

[433] *US – Zeroing (AB) (EC)*, para. 198.

[434] China's Appellant Submission, para. 252. The United States disagrees that the Panel employed a standard of "certainty" with respect to determining the prospective application of the alleged AFA Norm. Further discussion on this point will follow below.

[435] *See e.g.*, China's Appellant Submission, paras. 319-369.

and prospective application, it needed to provide evidence that would meet the appropriate standard for determining whether the alleged norm exists, and because the standard for determining whether a rule or norm of general and prospective application exists is distinct from, and not interchangeable with, the respective standards for determining whether ongoing conduct and conduct amounting to systematic and continuing application exist, those latter two standards are not relevant to this dispute.

a. China's Characterization of the Alleged AFA Norm as a Norm of General and Prospective Application Dictated the Legal Standard Employed For Determining the Existence of the Alleged Norm

329. It is undisputed that, before the Panel, China challenged the alleged AFA Norm as a norm of general and prospective application.[436] Equally undisputed is that China did not challenge the alleged AFA Norm as ongoing conduct, conduct amounting to systematic and continuing application, or any other type of unwritten measure. China's decision to characterize the alleged AFA Norm as a norm of general and prospective application thus dictated the appropriate legal standard for purposes of determining the existence of the alleged norm. This is because, as the Appellate Body has stated:

> 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.[437]

The Panel was conscious of this guidance during its examination of whether the alleged AFA Norm exists.[438] Because China challenged the alleged AFA Norm as a norm of general and prospective application, as opposed to any other type of unwritten measure, the Panel appropriately employed the legal standard for determining the existence of an alleged rule or norm of general and prospective application, *i.e.*, the test in *US – Zeroing (EC)*.

b. The Standard for Other Measures Cannot Be Substituted for the Standard Applicable to Norms of General and Prospective Application

330. The Appellate Body has made clear that the legal standard for determining the existence of rules or norms of general and prospective application is distinct from, and not interchangeable with, the respective legal standards for determining the existence of ongoing conduct and conduct amounting to systematic and continuing application. In particular, the Appellate Body has observed that, while the demonstration of prospective application is germane to demonstrating the existence of rules or norms of general and prospective application, the

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436 China's Consultation Request, para. 20 ("[t]hat the USDOC will apply the Use of Adverse Facts Available is a norm of general and prospective application); China's Panel Request, para. 22. *See also* China's First Written Submission, para. 492.

436 Panel Report, para. 7.478.

437 *Argentina – Import Measures (AB)*, para. 5.108.

438 Panel Report, para. 7.478.

demonstration of prospective application is not germane to demonstrating the existence of ongoing conduct or conduct amounting to systematic and continuing application.

331. In *Argentina – Import Measures*, the Appellate Body observed that:

> in every WTO dispute, a complainant must establish that the measure it challenges is attributable to the respondent, as well as the precise content of that challenged measure, to the extent that such content is the object of the claims raised. In *US – Zeroing (EC)*, the *additional features of general and prospective application* were relevant to the *type of measure identified by the complainant*, that is, *…a rule or norm*. Proving the existence of *other measures* that are also challengeable in WTO dispute settlement may require a complainant to demonstrate, in addition to attribution and precise content, *other elements*, depending on the particular characteristics or nature of the measure being challenged.[439]

332. Thus, the Appellate Body considered that, with respect to *every* WTO dispute, the complainant must demonstrate the attribution and precise content of the measure being challenged in order to demonstrate its existence. However, what additional elements are germane to demonstrating the existence of a challenged measure will be contingent on the type of measure alleged by the complaining Member. With respect to rules or norms of general and prospective application, the additional elements of general and prospective application are germane to demonstrating the existence of the measure at issue.

333. However, the Appellate Body has observed that, "rules and norms of general and prospective application are only one category of 'measures' that can be challenged in WTO dispute settlement."[440] With respect to the other types of measures that can be challenged, the Appellate Body has identified additional elements – beyond attribution and precise content – that are necessary in order to demonstrate the existence of the challenged measure. These additional elements are distinct from, and not interchangeable with, the elements of general and prospective application required to demonstrate the existence of rules or norms of general and prospective application.[441]

334. For instance, with respect to *ongoing conduct*, the Appellate Body observed that:

> A complainant that is challenging a measure characterized as 'ongoing conduct' would need to provide evidence of its *repeated application*, and of the *likelihood* that such conduct will continue.[442]

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439 *Argentina – Import Measures (AB)*, para. 5.104 (emphasis added).

440 *Argentina – Import Measures (AB)*, para. 5.103.

441 *Argentina – Import Measures (AB)*, para. 5.107 ("When an unwritten measure that is not a rule or norm is challenged in WTO dispute settlement, a complainant need not demonstrate its existence based on the same criteria that apply when rules or norms of general and prospective application are challenged").

442 *Argentina – Import Measures (AB)*, para. 5.108.

These additional elements – repeated application and likelihood that conduct will continue – are not synonymous with the notion of prospective application required to demonstrate the existence of a rule or norm of general and prospective application. Indeed, the Appellate Body has expressly distinguished these additional elements from the notion of prospective application. As the Appellate Body observed with respect to its decision in *US – Continued Zeroing*:

> [T]he Appellate Body considered that the measure at issue was *ongoing conduct* that consisted of the continued use of the zeroing methodology in successive proceedings by which duties in each of 18 cases were maintained. Therefore, in that dispute, *establishing the measure at issue did not require evidence that it had general and prospective application*, but, rather, evidence of the use of the zeroing methodology, as *ongoing conduct*.[443]

335. With respect to *concerted action or practice* – another type of unwritten measure that might be susceptible to challenge as such – the Appellate Body found in *EC and Certain Member States – Large Civil Aircraft* that:

> As a general proposition, the Appellate Body did not exclude the possibility that *'concerted action or practice'* could be susceptible to challenge in WTO dispute settlement, and considered that a complainant would *not 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.[444]

Thus, the Appellate Body considered that the required elements for demonstrating the existence of a measure characterized as concerted action or practice are different from the notion of prospective application required to demonstrate the existence of a rule or norm of general and prospective application.

336. With respect to *conduct amounting to systematic and continuing application* – yet another type of unwritten measure that might be susceptible to challenge as such – the Appellate Body has also observed critical differences from rules or norms of general and prospective application with respect to demonstrating the existence of the challenged measure. For example, in *Argentina – Import Measures*, the Appellate Body rejected the panel's notion that an alleged measure could demonstrate *prospective application* simply because it could demonstrate *continued application*. In that case, the complainants had challenged the unwritten measure not as a rule or norm of general and prospective application, "but as an unwritten measure that has certain characteristics, including systematic and continued application."[445] The complainants were thus "not…required to demonstrate…that [the challenged measure]…has general and prospective application. Rather, the complainants had to provide evidence and arguments to demonstrate the existence of the measure challenged, and specifically a measure that, as they

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443 *Argentina – Import Measures (AB)*, para. 5.105 (emphasis added).

444 *Argentina – Import Measures (AB)*, para. 5.106 (emphasis added).

445 *Argentina – Import Measures (AB)*, para. 5.138.

contended, is applied systematically and will continue to be applied in the future."[446] The panel had found that the challenged measure had "*systematic application*, as it applies to economic operators in a broad variety of different sectors," and "*present and continued application*, in the sense that it currently applies and it will continue to be applied in the future until the underlying policy ceases to apply."[447] However, despite the fact that the panel could have ended its analysis here, and that "the [p]anel was not required to examine the same criteria formulated [for rules or norms of general and prospective application] by the Appellate Body in *US – Zeroing (EC)*,"[448] the panel went on to issue a separate finding that the challenged measure possessed prospective application. In issuing this finding, though, the panel did not provide additional analysis beyond the analysis on which it had relied when determining that the challenged measure possessed indicia of continued application. The Appellate Body expressly **rejected** this approach and the finding that the challenged measure possessed prospective application:

> [W]e do not wish to be seen as endorsing the [p]anel's additional findings. …[W]e understand the [p]anel, in purporting to find that the…measure has 'prospective application', to have found no more than that the…measure will continue to be applied in the future. Thus, we *do not understand the [p]anel's finding…that the…measure has 'prospective application' as implying anything more than it had already found in its analysis of the element of 'continued application*.' …Moreover, nothing in the [p]anel's reasoning indicates that it considered the…measure to have *the same level of security and predictability of continuation into the future typically associated with rules or norms*."[449]

Thus, the Appellate Body considered that it was inappropriate for the panel to have relied on the same analysis for determining the continued application of the challenged measure in determining the prospective application of the challenged measure, a determination which the panel did not need to reach in the first place because the measure was challenged as conduct amounting to systematic and continuing application.

337. Accordingly, the Appellate Body has considered that – beyond the elements of attribution and precise content – different types of unwritten measures require the demonstration of different additional elements in order to prove the existence of the measure at issue. These different additional elements are not interchangeable. With respect to rules or norms of general and prospective application, a complainant must demonstrate attribution, precise content, and general and prospective application.[450] Accordingly, the additional elements required to prove the existence of ongoing conduct, conduct amounting to systematic and continuing application, and other types of unwritten measures are not pertinent to this dispute.

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446 *Argentina – Import Measures (AB)*, para. 5.139.

447 *Argentina – Import Measures (AB)*, para. 5.146 (emphasis added).

448 *Argentina – Import Measures (AB)*, para. 5.145.

449 *Argentina – Import Measures (AB)*, para. 5.181-5.182 (emphasis added).

450 *US – Zeroing (EC) (AB)*, para. 198.

4. The Panel Correctly Identified The Legal Standard For Determining Whether a Norm Of General And Prospective Application Possesses Prospective Application

338. When it comes to what is pertinent to this dispute – the legal standard applicable to norms of general and prospective application – the Panel properly identified the correct legal standard. The United States demonstrates this by showing that the Panel did not apply a standard of certainty as China asserts and then showing that the standard it applied is the correct standard associated with norms of general and prospective application, as recognized by the Appellate Body in prior disputes.

a. The Panel Did Not Apply a Legal Standard of "Certainty"

339. As noted above, the premise of China's legal error claim regarding the Panel's finding that, based on the evidence before it, the alleged AFA Norm does not possess prospective application, is that the Panel identified the wrong legal standard. Pointing to the one instance in which the Panel employed the word "certainty" with respect to the alleged AFA Norm, China asserts that the Panel considered 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," and that "the required degree of security and predictability is 'certainty.'"[451] However, the United States completely rejects the idea that the Panel relied on a legal standard of "certainty" in determining the prospective application of the alleged AFA Norm.

340. Rather, when attention is paid to the Panel's thorough reasoning, as opposed to its singular use of the word "certainty," it is abundantly clear that the Panel considered that a rule or norm of general and prospective application can demonstrate prospective application to the extent that its articulation or application demonstrates that it is *intended to be applied in the future*.

341. For instance, the Panel observed, with respect to the alleged AFA Norm, which it found, based on the evidence before it, *does not possess prospective application*, 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,"[452] and that the "determinations on the record lays down in general terms the full content of the alleged AFA Norm as described by China."[453] By contrast, the Panel observed, with respect to the Single Rate Presumption, which it found, based on the evidence before it, *does possess prospective application*, that a "description [was] found in general documents such as the Policy Bulletin No. 05.1 and the Antidumping Manual,"[454] and that over 100 USDOC anti-dumping determinations on the record "reproduce[d] the core features of the Single Rate Presumption."[455] These

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451 China's Appellant Submission, para. 381 (emphasis original) (citing Panel Report, para. 7.476).

452 Panel Report, para. 7.477.

453 Panel Report, para. 7.471.

454 Panel Report, n. 945; *see also* n. 930.

455 Panel Report, para. 7.310.

observations were raised by the Panel because they are relevant to the legal standard employed for determining whether the Single Rate Presumption and the alleged AFA Norm – both challenged as unwritten norms of general and prospective application – have prospective application. While the Panel discerned, based on the articulations and applications of the Single Rate Presumption before it, that the Single Rate Presumption was intended to be applied in the future, the same cannot be said with respect to the evidence on the alleged AFA Norm. Particularly, the Panel relied heavily on the lack of articulation of the alleged AFA Norm in the Antidumping Manual and three municipal court decisions cited by China, as well as the lack of articulation of the alleged AFA Norm in the anti-dumping determinations proffered by China in which it was allegedly applied, in determining that the evidence before it did not demonstrate that the alleged norm was intended to be applied in the future. Accordingly, it is clear that the Panel did not rely on a legal standard of "certainty" in determining the prospective application of the alleged AFA Norm.

b. The Panel Identified the Correct Legal Standard for Determining Prospective Application

342. The Panel also identified the correct legal standard with respect to determining whether the alleged AFA Norm – an alleged norm of general and prospective application – possesses prospective application, a requisite element in proving its existence. In examining the evidence offered by China regarding the prospective application of the alleged AFA Norm, the Panel identified that it needed to consider whether the purported articulations and applications of the alleged norm before it demonstrated "the same level of security and predictability of continuation into the future typically associated with rules or norms."[456] The Panel's analysis in this regard was consistent with that articulated by the Appellate Body in *US – OCTG Sunset Reviews*: "a measure has prospective application if it is intended to apply in 'future situations' after its issuance."[457] Thus, in considering whether the alleged AFA Norm could demonstrate prospective application, the Panel considered whether the alleged AFA Norm evinced the same level of security and predictability of continuation into the future typically associated with rules or norms, that is, the Panel considered whether the alleged AFA Norm demonstrated – through its articulation or application – that it was intended to be applied in future situations. This is the correct legal standard for determining the prospective application of rules or norms of general and prospective application.

343. Prior dispute settlement reports on both *written* and *unwritten* rules and norms of general and prospective application support the legal standard identified and applied by the Panel with respect to determining the prospective application of the alleged AFA Norm.

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[456] Panel Report, paras. 7.474, 7.457 (quoting *Argentina – Import Measures (AB)*, para. 5.182).

[457] Panel Report, para. 7.457, n. 943 (citing *US – OCTG Reviews (AB)*, paras. 172, 187). *See US – OCTG Sunset Reviews (AB)*, para. 187 ("…the SPB…is…intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance").

344. In *US – OCTG Sunset Reviews*, which examined a challenged *written* measure, the Sunset Policy Bulletin (SPB),[458] the Appellate Body reviewed the panel's finding that the SPB was a measure subject to WTO dispute settlement.[459] In its analysis, the Appellate Body recalled that "'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement."[460] The Appellate Body held that the panel rightly found the SPB to be subject, as such, to WTO dispute settlement, reasoning, in relevant part, that:

> the SPB…is…intended to have prospective application, as it is *intended to apply* to sunset reviews taking place *after its issuance*.[461]

345. As part of its analysis, the Appellate Body reasoned that "it was appropriate for the [p]anel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in [*US – Corrosion-Resistant Steel Sunset Review*]," which "had before it exactly the same instrument."[462] In that case, the Appellate Body had reversed the panel's finding that the SPB is not a measure challengeable as such under WTO dispute settlement.[463] In doing so, the Appellate Body reasoned:

> we are of the view that the [p]anel's characterization of the Sunset Policy Bulletin was based on a number of deficiencies. … [Among them,] the [p]anel did not consider the extent to which the specific provisions of the Sunset Policy Bulletin are *normative in nature, nor the extent to which USDOC itself treats these provisions as binding*.[464]

Thus, the Appellate Body's finding in *US – OCTG Sunset Reviews* considered that the panel appropriately found that the challenged *written* measure before it possessed the requisite prospective application to be challenged as such in WTO dispute settlement because it was intended to apply after its issuance. The Appellate Body also considered that the panel appropriately relied on the Appellate Body's reasoning in *US – Corrosion-Resistant Steel Sunset Review*, which had examined the same measure. There, the Appellate Body considered that, germane to the question of whether the challenged measure possessed the requisite prospective application necessary to be challenged as such in WTO dispute settlement, was the *responding*

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458 The SPB has been described as forming "part of the overall framework within which 'sunset' reviews of anti-dumping or countervailing duties are conducted in the United States." (*US – Corrosion-Resistant Steel Sunset Review* (AB), para. 73).

459 *US – OCTG Sunset Reviews* (AB), para. 182.

460 *US – OCTG Sunset Reviews* (AB), para. 187 (quoting *US – Corrosion-Resistant Steel Sunset Review* (AB), para. 82).

461 *US – OCTG Sunset Reviews* (AB), para. 187 (emphasis added).

462 *US – OCTG Sunset Reviews* (AB), para. 188.

463 *US – Corrosion-Resistant Steel Sunset Review* (AB), para. 100.

464 *US – Corrosion-Resistant Steel Sunset Review* (AB), para. 99 (emphasis added).

Member's own treatment of the challenged measure as a measure that was *intended to be applied in the future*.

346. In other disputes, panels and the Appellate Body examining challenged *unwritten* rules or norms of general and prospective application have taken a similar approach with respect to determining the prospective application of the measures at issue. Specifically, these cases have distinguished between an *intentional or deliberate policy* on the one hand and *string of cases or mere repetition* on the other. Only in cases where panels or the Appellate Body could discern an *intentional or deliberate policy* – indicative of normative character – were the challenged measures found to possess prospective application.

347. In *US – Zeroing (EC)*, the Appellate Body assessed the European Communities' characterization of the zeroing methodology as a norm of general and prospective application. As mentioned above, the Appellate Body determined that:

> when bringing a challenge against…a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application.[465]

348. In assessing whether the European Communities' evidence met this "high threshold"[466] for demonstrating the existence of the challenged unwritten norm,[467] the Appellate Body considered, *inter alia*, that the United States had not contested that "the USDOC's zeroing methodology reflects a *deliberate policy*'"[468] and also the *characterization* of the Standard Zeroing Procedures in the Antidumping Manual.[469] Based on this and other evidence, the Appellate Body concluded that the evidence "consisted of considerably more than a string of cases, or repeat action."[470] Thus, in arriving at the conclusion that the challenged measure possessed, among other requisite qualities, prospective application, the Appellate Body relied on evidence that the measure constituted a deliberate policy, and also its characterization as such by the responding Member.

349. In *US – Zeroing (Japan)*, the Appellate Body examined whether the evidence before the panel was sufficient to demonstrate that the challenged measure, zeroing, constitutes an unwritten rule or norm of general and prospective application. The Appellate Body concluded that the evidence before the panel "lend[ed] support to the conclusion that a…rule or norm of general and prospective application that provides for disregarding negative comparison results

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465 *US – Zeroing (EC) (AB)US – Zeroing (EC) (AB)*, para. 198.

466 *US – Zeroing (EC) (AB)*, para. 198.

467 The Appellate Body did not separately analyze whether each of the test's elements was satisfied. *US – Zeroing (EC) (AB)*, para. 204.

468 *US – Zeroing (EC) (AB)*, para. 201 (emphasis added).

469 *US – Zeroing (EC) (AB)*, para. 202 (emphasis added).

470 *US – Zeroing (EC) (AB)*, para. 204 (emphasis added).

[*i.e.*, zeroing] exists."[471] In reaching this conclusion, the Appellate Body considered, *inter alia*, that:

> the [p]anel observed that the evidence before it "shows that what is at issue goes *beyond the simple repetition* of the application of a certain methodology to specific cases." According to the [p]anel, *"[t]he manner in which [the] USDOC's use of zeroing has been characterized in statements by [the] USDOC [and] other United States' agencies and courts*…confirms that [the]USDOC's consistent application of zeroing reflects a *deliberate policy*."[472]

Thus, in upholding the panel's decision that zeroing constitutes a rule or norm of general and prospective application, the Appellate Body considered the panel's finding that zeroing reflected a *deliberate policy*, as opposed to a methodology applied only in specific cases, to be highly relevant. The panel's finding that zeroing reflected a deliberate policy hinged on how zeroing had been *characterized in statements by the USDOC and other United States agencies and courts.*

350. In *US – Stainless Steel*, the panel examined the existence of the challenged Model Zeroing Procedures, determining that such a measure exists. With respect to the precise content of the challenged measure, Mexico pointed to various pieces of evidence, including: "(a) the Standard Computer Programme used by the USDOC, (b) the Anti-Dumping Manual, (c) the application of the *Model Zeroing Procedures* in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, (d) further evidence on the consistent application of the *Model Zeroing Procedures* in all investigations previously conducted by the USDOC, and (e) evidence showing continued application of the *Model Zeroing Procedures* in current investigations."[473] The Panel considered, *inter alia*, that "the [Antidumping] Manual shows that the USDOC is expected to use the Standard Computer Programme consistently in its margin calculations in investigations."[474] With respect to general and prospective application, the panel relied on its findings on precise content:

> [i]n our view, the evidence about the precise content of the *Model Zeroing Procedures*, particularly the parts of the Anti-Dumping Manual that we cited…which indicate that the *USDOC had to follow* the Standard Computer Programme *consistently* in investigations, also demonstrates that these Procedures had general and prospective application. This shows that the *Model Zeroing Procedures* went *beyond mere repetition* of a certain methodology to specific cases and had become a *"deliberate policy."*[475]

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471 *US – Zeroing (Japan) (AB)*, para. 86.

472 *US – Zeroing (Japan) (AB)*, para. 85 (emphasis added).

473 *US – Stainless Steel (Mexico)*, para. 7.34.

474 *US – Stainless Steel (Mexico)*, para. 7.36.

475 *US – Stainless Steel (Mexico)*, para. 7.40 (emphasis added).

Thus, the panel considered that the Model Zeroing Procedures demonstrated prospective application because they went beyond mere repetition of conduct and constituted a deliberate policy. Crucial to the panel's finding that the Model Zeroing Procedures constituted a deliberate policy was that the Antidumping Manual *demonstrated* that the Standard Computer Programme (used to calculate dumping margins) was to be *followed in future investigations*.

351. Accordingly, what the disputes that have examined rules or norms of general and prospective application – both written and unwritten – have in common is that, in their determinations of the prospective application of challenged measures, they look to whether the measure in question was intended to apply in the future, including whether the measure reflects a deliberate policy that goes beyond mere repetition of conduct. In answering this inquiry, panels and the Appellate Body have often relied on the responding Member's own characterizations of the measure in question. Thus, the Panel in the present dispute applied the correct legal standard with respect to the determining the prospective application of the alleged AFA Norm.

5. The Panel Correctly Applied the Correct Legal Standard To China's Evidence

352. As discussed above, China argues that the Panel identified the wrong legal standard for demonstrating the prospective application of rules or norms of general and prospective application, *i.e.*, "certainty," and also argues that, had the Panel identified and applied the correct legal standard (which China does not identify), the Panel would have reached a different conclusion regarding the prospective application of the alleged AFA Norm, based on its own factual findings.[476] Moreover, China argues that, with respect to the alleged AFA Norm, the Panel identified and applied a standard "higher than the standard articulated by the Panel itself when addressing the Single Rate Presumption."[477]

353. The previous section demonstrates that the Panel identified the correct legal standard with respect to demonstrating the prospective application of the alleged AFA Norm. In this section, the United States also demonstrates that, based on the evidence before it, the Panel reasonably applied the correct legal standard to the alleged AFA Norm, in a manner consistent with its application to the Single Rate Presumption. In fact, the approach taken by the Panel closely follows another dispute settlement decision which examined challenged measures closely resembling both the Single Rate Presumption and the alleged AFA Norm.

354. As discussed above, the Panel made several relevant factual findings with respect to its determinations that the Single Rate Presumption *does* possess prospective application and that the alleged AFA Norm *does not* possess prospective application. For example, the Panel observed 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."[478] The Panel also observed that none of the determinations before the Panel lays down in general terms the full content of the alleged AFA Norm as described by

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476 China's Appellant Submission, paras. 381, 410.

477 China's Appellant Submission, para. 229.

478 Panel Report, para. 7.477.

China."[479] By contrast, "[the Panel's] finding that the Single Rate Presumption is a norm of general and prospective application [was] grounded on, *inter alia*, the description found in general documents such as the Policy Bulletin No. 05.1 and the Antidumping Manual."[480] The Panel had also examined over 100 USDOC anti-dumping determinations which "reproduce[d] the core features of the Single Rate Presumption."[481] Based on the legal standard employed for determining the prospective application of both the Single Rate Presumption and the alleged AFA Norm – is the challenged measure intended to apply after its articulation or application – the Panel relied heavily on the numerous articulations of the Single Rate Presumption, and complete lack of articulations of the alleged AFA Norm, in determining that the former challenged measure possesses prospective application while latter challenged measure does not.

355. This application of the correct legal standard to these relevant facts closely mirrors the disposition of the panel decision in *US – Shrimp II (Viet Nam)*. In *US – Shrimp II (Viet Nam)*, the panel examined, *inter alia*, two challenged measures. The first, like the Single Rate Presumption in the present case, involved "the application by the USDOC in antidumping proceedings…involving NME countries of a rebuttable presumption that, in such countries, all companies belong to a single, NME-wide entity, and the assignment of a single rate to that entity."[482] The second, like the alleged AFA Norm in the present case,[483] involved "the manner in which the rate assigned to the NME-wide entity is determined, in particular the use of facts available."[484] Like the Panel in the present dispute, the *US – Shrimp II (Viet Nam)* panel found, based on the evidence before it, that the measure akin to the Single Rate Presumption was a rule or norm of general and prospective application but that the measure akin to the alleged AFA Norm was not.

356. With respect to its examination of the measure akin to the Single Rate Presumption, the panel observed that, although "Viet Nam challenge[d] the NME-wide entity rate 'practice' or 'policy' as an *unwritten* rule or norm,"[485] "*[w]ritten* documents referred to by Viet Nam as describing the NME-wide entity rate practice – the Antidumping Manual and Policy Bulletin 05.1 – are to be used as *relevant evidence in assessing the existence* of the alleged measure."[486] This is because, in the panel's view, the burden of establishing the existence of a rule or norm of general and prospective application "will be *more easily discharged* when the measure at issue is *set forth in a legislative act* than in situations where the existence of the alleged measure is *not*

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479 Panel Report, para. 7.471.

480 Panel Report, n. 945; *see also* n. 930.

481 Panel Report, para. 7.310.

482 *US – Shrimp II (Viet Nam)*, para. 7.100.

483 As China notes in its Appellant Submission, the difference between the alleged AFA Norm and the measure challenged in *US – Shrimp II (Viet Nam)* is that "in *US – Shrimp II (Viet Nam)*, Viet Nam alleged that adverse facts were always applied to the NME-wide entity, irrespective of any determination that the entity had failed to cooperate. In this dispute, China alleged…that USDOC applies adverse facts whenever it finds that an NME-wide entity has not cooperated." China's Appellant Submission, n. 282.

484 *US – Shrimp II (Viet Nam)*, para. 7.100.

485 *US – Shrimp II (Viet Nam)*, para. 7.98 (emphasis added).

486 *US – Shrimp II (Viet Nam)*, para. 7.98 (emphasis added).

expressed in a written document."[487] In its examination of the written documents on the record, the panel found that both the Antidumping Manual and Policy Bulletin No. 05.1 "provide relevant and probative evidence of the general and prospective character of the alleged measure."[488] With respect to the Antidumping Manual, the panel observed:

> Chapter 10 of the Antidumping Manual uses the terms "practice" or "methodology" when referring to the treatment of NMEs in anti-dumping proceedings. Moreover, on its face, the Antidumping Manual appears to describe a generally applicable practice. Nothing in Chapter 10 suggests that there may be circumstances or situations in which the USDOC would not "start with a rebuttable presumption that all companies within a NME country" belong to a single, NME-wide entity and would not assign a single rate to that entity.[489]

357. With respect to Policy Bulletin No. 05.1, the panel similarly observed:

> [t]he language used in Policy Bulletin 05.1 conveys that the "*practice*" or "*policy*" (both terms are used) whereby the USDOC presumes that all NME exporters belong to a single, NME-wide entity and apply a single rate to that entity is applied in all anti-dumping investigations involving NMEs. There is no mention of instances in which the USDOC would not use that presumption and would not apply the single rate.[490]

For the panel, the language in these two written documents contributed greatly to finding that the measure akin to the Single Rate Presumption possessed general and prospective application.[491]

358. However, with respect to its examination of the measure akin to the alleged AFA Norm, the panel could not conclude, based on the evidence before it, that the challenged measure possessed general and prospective application.[492] The Panel observed:

> Chapter 10 of the Antidumping Manual, referred to by Viet Nam, explains that the NME-wide 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 anti-dumping questionnaire."[493]

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487 *US – Shrimp II (Viet Nam)*, para. 7.97 (emphasis added).

488 *US – Shrimp II (Viet Nam)*, para. 7.115 (emphasis added).

489 *US – Shrimp II (Viet Nam)*, para. 7.105.

490 *US – Shrimp II (Viet Nam)*, para. 7.112 (emphasis added).

491 *US – Shrimp II (Viet Nam)*, para. 7.115.

492 *US – Shrimp II (Viet Nam)*, para. 7.130.

493 *US – Shrimp II (Viet Nam)*, para. 7.125 (italics original).

The panel took this, in conjunction with Viet Nam's lack of reference to other NME investigations where NME-wide rates were determined using facts available, to mean that:

> while the evidence on the record does suggest that the USDOC *often determines* the rate for the NME-wide entity based on facts available, it does not establish that the USDOC…*systematically bases that rate on facts available*.[494]

359. Therefore, with respect to the measure akin to the alleged AFA Norm, the panel determined that "Viet Nam…failed to establish the existence of any practice amounting to a rule or norm of general and prospective application."[495] This finding hinged on the Panel's interpretation of how the responding Member had itself characterized the measure at issue.

360. The Panel identified the correct legal standard for determining the prospective application of rules or norms of general and prospective application, and applied this standard to the alleged AFA Norm in a manner that was reasonable based on the record evidence. The approach of the Panel closely mirrors the approach adopted by the panel in *US – Shrimp II (Viet Nam)*.

361. The Panel considered that the alleged AFA Norm could demonstrate prospective application to the extent that it evinced – through its articulation and/or application – that it was intended to be applied in future situations. The Panel found that none of China's evidence – that is, supposed articulations and applications of the alleged AFA Norm – evinced that the alleged norm was intended to be applied in future situations. Crucial to the Panel's findings in this regard was that none of the evidence presented for the alleged AFA Norm articulated the alleged norm. As a result, the anti-dumping determinations on the record could only speak to USDOC's case-specific determinations in those prior proceedings, not to USDOC's perspective with respect to unknown future proceedings. Not the Antidumping Manual,[496] not the three municipal court decisions cited by China,[497] nor the anti-dumping determinations[498] placed before the Panel set forth any reason to believe the alleged AFA had prospective application.

362. In comparison to the evidence on the Single Rate Presumption, which the Panel found contained multiple sources articulating the prospective nature of the challenged measure,[499] the lack of similar articulation of the alleged AFA Norm in any of the evidence advanced by China was key to the Panel's finding that the alleged norm does not possess prospective application.[500] While the Panel comfortably determined, based on the anti-dumping determinations before it, that "USDOC ha[d] invariably engaged in the same conduct"[501] with respect to those

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494 *US – Shrimp II (Viet Nam)*, para. 7.130 (emphasis added).

495 *US – Shrimp II (Viet Nam)*, para. 7.130.

496 Panel Report, para. 7.461.

497 Panel Report, para. 7.467.

498 Panel Report, para. 7.475.

499 Panel Report, para. 7.337.

500 Panel Report, para. 7.477.

501 Panel Report, para. 7.475.

determinations, the Panel could not determine, based on the application of the alleged AFA Norm in each of those determinations alone, that the alleged norm was intended to apply in future situations after its individual applications.

363. This conclusion is consistent with the analysis applied in other WTO disputes. In *US – Steel Plate (India)*, for example, the panel found that:

> [a] *practice is a repeated pattern of similar responses to a set of circumstances* – that is, it is the *past decisions* of the [investigating authority],[502]

and:

> [t]hat a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, *does not…transform it into a measure* [capable of challenge in dispute settlement].[503]

364. Accordingly, while the Panel discerned what was USDOC's approach in the different anti-dumping determinations, this alone was insufficient to conclude that USDOC will continue to follow the same course of action in the future.[504] USDOC's prior applications of the alleged AFA Norm were simply insufficient to demonstrate that the alleged norm was intended to be applied in future scenarios.

6. China's Appeal Should Have Been Brought, if at all, under Article 11 of the DSU

365. Where an appellant has attempted to make arguments against a panel's "factual conclusions" during the course of an appeal, the Appellate Body has declined to rule on such arguments.[505] As the Appellate Body has found:

> The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review.[506]

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502 *US – Steel Plate*, para. 7.22 (emphasis added).

503 *US – Steel Plate*, para. 7.22 (emphasis added).

504 China also seem to argues that application of the alleged AFA Norm demonstrates a "future oriented 'purpose.' China's Appellant Submission, para. 258. This is simply a quarrel with how the Panel weighed and appreciated the evidence, which as discussed below, must be brought before the Appellate Body under Article 11 of the DSU.

505 *See EC – Bananas III (AB)*, para. 239; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 420.

506 *Korea – Alcoholic Beverages*, para. 161.

366. If an appellant wishes to request that the Appellate Body review a panel's "assessment of the facts of the case," it must do so pursuant to Article 11 of the DSU.[507] As the Appellate Body explained in *EC – Seal Products*, "allegations implicating a panel's assessment of the facts and evidence fall under Article 11 of the DSU. By contrast, '[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is … a legal characterization issue' and therefore a legal question."[508]

367. Here, China asserts that it does not take issue with the weighing of the Panel's evidence, but that is precisely what its appeal seeks.[509] As explained above, the Panel correctly identified the legal standard that was articulated by the Appellate Body in prior disputes. What China is essentially challenging is the Panel's assessment of the evidence: the USDOC determinations in various antidumping proceedings.

368. In particular, in paragraph 400 of its appellant submission, China introduces the notion of "factual indicators." These indicators, per China, include the following:

- "significance has been attributed to *invariable* and *consistent* regulatory conduct"
- statements highlighting that the conduct is "standard" or "normal", or constitutes a "practice", or "systematic" approach, or a "rule" are also important indicators of prospective application;
- If past conduct is guidance for future conduct, and creates expectations of future conduct, it is reasonable to expect that the conduct will continue
- when conduct reflects a policy or, more generally, is designed to achieve a particular regulatory purpose, such as influencing the future behavior of economic operators (e.g., to cooperate), this indicates prospective application.[510]

These indicators thus appear to be suggested inferences that might be applicable with respect to the USDOC determinations.[511]

369. China asserts the Appellate Body can use these indicators with respect to the USDOC determinations that were assessed by the Panel to draw different conclusions – that the determinations establish the alleged AFA Norm's prospective application.[512] However, re-characterizing and reweighing the significance of evidence, even with the use of "factual

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507 *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 385; *see also id.*, paras. 420, 424.

508 *EC – Seal Products (AB)*, para. 5.232 (citations omitted).

509 China's Appellant Submission, para. 398.

510 China's Appellant Submission, para. 400.

511 *See US – Upland Cotton (Article 21.5 – Brazil)*, para. 385 ("However, we consider that many of the United States' claims against the Panel's evaluation of the elements supporting its finding of significant price suppression are primarily directed at the Panel's appreciation and weighing of the evidence, and the inferences that the Panel drew from the evidence, both of which fall within its authority that is recognized under Article 11 of the DSU.").

512 China's Appellant Submission, paras. 401-407.

indicators," is calling into question the assessment of evidence – and thus falls under Article 11 of the DSU.[513]

370. Accordingly, the Appellate Body should find that China's arguments on appeal related to the Panel's findings with respect to the prospective application of the norm concern the Panel's weighing and appreciation of the Panel's factual. Since China has not asked the Appellate Body to examine whether the Panel made an objective assessment of the facts under Article 11 of the DSU, the Appellate Body should decline to rule on China's arguments.

7. General Application of The Alleged AFA Norm

371. If the Appellate Body upholds the Panel's finding that the alleged AFA Norm does not possess prospective application, it need not examine whether the alleged norm possesses general application. To the extent that the Appellate Body finds that the alleged AFA Norm does possess prospective application, it should, per section V.G.2 not complete the legal analysis because there are insufficient factual findings to make such a determination. Nonetheless, the United States briefly recounts some of the relevant legal constraints that would preclude in any event a finding that alleged AFA Norm possesses general application.

a. Relevant Findings By The Panel

372. In light of its finding that the alleged AFA Norm does not possess prospective application, the Panel did not assess whether the alleged norm possesses general application.[514] However, the Panel recognized that "a measure has general application to the extent that if 'affects an unidentified number of economic operators, including domestic and foreign producers.'"[515]

b. China's Appeal

373. In its Appellant Submission, China identifies the standard for determining the general application of a rule or norm of general and prospective application as whether the rule or norm applies to broad classes of economic operators, goods, and/or legal situations.[516]

374. According to China, the alleged AFA Norm possesses general application because "the AFA Norm applies in *all* investigations and reviews that involve imports of a product under consideration from a country deemed, at that time, to be a non-market economy."[517] Accordingly, the alleged AFA Norm does not "relate to *specific* economic operators, but rather

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513 *EC – Sardines (AB)*, para. 299 ("we will not intervene solely because we might have reached a different factual finding from the one the panel reached; we will intervene only if we are "satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence".").

514 Panel Report, para. 7.476.

515 Panel Report, para. 7.457 (citing, *inter alia, US – Underwear* (AB), p. 13).

516 China's Appellant Submission, para. 287.

517 China's Appellant Submission, para. 431 (emphasis original).

to the general class of economic operators that the USDOC could potentially include, in a given anti-dumping proceeding, within an NME-wide entity producing the relevant product."[518]

c. The Alleged AFA Norm Does Not Possess General Application

375. In *US – Underwear*, the panel addressed the legal standard for determining general application. The panel found:

> If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application.[519]

376. In *EC – Poultry*, the Appellate body also applied this standard with respect to the measure being challenged. In the dispute, Brazil challenged what it characterized as "generally applicable rules of the European Communities relating to imports of frozen poultry meat" that allegedly prevented Brazilian traders from knowing whether a particular shipment would be subject to the rules governing in-quota trade or to rules relating to out-of-quota trade.[520] The Appellate Body found that the challenged measure did not possess general application. The Appellate Body found:

> Although it is true, as Brazil contends, that any measure of general application will always have to be applied in specific cases, nevertheless, *the particular treatment accorded to each individual shipment cannot be considered a measure "of general application*[.]"…We agree with the Panel that "conversely, licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application' within the meaning of Article X."[521]

377. The alleged AFA Norm does not possess general application. This is because no evidence or findings demonstrate that it affects an *unidentified number* of economic operators. Rather, as was the case with respect to the challenged measure in *EC – Poultry*, all that can be said about the alleged AFA Norm as characterized by China is that it constitutes particular treatment accorded to the China-government entity in an antidumping proceeding involving uncooperative exporters or producers that are part of the China-government entity. Specifically, as the Panel found, there is no pronouncement with respect to in what cases and to which participants the alleged AFA Norm applies. Thus, to the extent that USDOC does apply adverse inferences to the China-government entity in a given proceeding, this is done pursuant to case-

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518 China's Appellant Submission, para. 432 (emphasis original).

519 *US – Underwear*, para. 7.65. The Appellate Body upheld the finding. *US – Underwear (AB)*, p. 13.

520 *EC – Poultry (AB)*, para. 114.

521 *EC – Poultry (AB)*, para. 113 (emphasis added).

specific determinations based on the relevant facts and circumstances, and not pursuant to a deliberate policy targeting a broad base of economic operators. Because the challenged application of adverse inferences by USDOC merely reflects the particularized treatment of the China-government entity in a given proceeding, often in direct response to the conduct of exporters or producers within that entity and *in that proceeding*, it cannot be said to affect an *unidentified number* of economic operators. Therefore, the alleged AFA Norm does not possess general application.

378. In short, this Panel when considering the prospective application of the alleged AFA Norm identified the correct legal standard and faithfully and correctly applied it. To the extent the Appellate Body considers this question of general application, neither the findings nor the evidence would meet the standard for meeting such.

E. China's Claims Concerning the Alleged AFA Norm Are Outside the Dispute's Terms of Reference

379. As the United States explained in its submissions to the Panel, China's claims in this dispute concerning the alleged AFA Norm are outside the terms of reference for this dispute. The Panel failed to address this jurisdictional issue, and instead – as discussed above –resolved the "as such" claims on the basis that China failed to establish the alleged AFA Norm had prospective application.[522] Nonetheless, this fundamental jurisdictional issue remains, and provides another reason why China's appeal with respect to the alleged AFA Norm must be rejected.

380. During the course of the dispute before the Panel, the Parties contested the precise scope of China's claims concerning the alleged AFA Norm in the context of whether they were made in accordance with Article 6.2 of the DSU. In response to U.S. arguments, China, in its own words, proffered that the following constituted its claim:

> China set forth a claim in relation to this measure; specifically that it is "inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement". It is beyond dispute that China properly included this claim in its Panel Request.[523]

This articulation of a claim is deficient with respect to the requirements of DSU Article 6.2. It fails to identify the particular paragraphs in Annex II of the AD Agreement that the United States has breached and the precise grounds for why the United States has breached the unidentified provisions.

381. The United States presents its points on this issue as follows. First, the United States briefly recounts the relevant background concerning this issue. Second, the United States recounts the relevant legal standard under DSU Article 6.2 for identifying claims in a Panel

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522 Panel Report, para. 7.479.

523 China's Second Written Submission, para. 323.

Request. Third, the United States explains why the Appellate Body should dismiss China's claim pursuant to DSU Article 6.2, and hence China's appeal.

1. History of the Terms of Reference Issue Before the Panel

382. The United States raised in its first written submission a terms of reference issue with respect to China's claims concerns the alleged AFA Norm.[524] China subsequently identified what it considered to be its claim:

> The measures include "the Use of Adverse Facts Available", which China challenges as a rule or norm of general and prospective application, as such. China set forth a claim in relation to this measure; specifically that it is "inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement".[525]

On this point, the United States notes that China referenced paragraphs 26 of its Panel Request. Paragraph 26 of China's paragraph, as China duly recounted, states:

> China considers that these measures are inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement, because, inter alia, in using adverse facts available, the United States fails to use the best information available and special circumspection when basing its findings on information from secondary sources.[526]

383. At the second Panel meeting, the United States explained that if this was the case, then all of China's claims were too vague to stand under Article 6.2 of the DSU.[527] The Panel asked China through question 134 to comment on the United States' assertion. As discussed below, China failed to rebut that its panel request failed to meet the Article 6.2 standard for placing an alleged AFA Norm within the panel's terms of reference.

2. The Legal Standard Under Article 6.2 of the DSU

384. Article 6.2 of the DSU sets forth the obligations with respect to the sufficiency of panel requests. DSU Article 6.2 provides in relevant part:

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524 U.S. First Written Submission, para. 493-502.

525 China's Second Written Submission, para. 323.

526 China's Panel Request, para. 26. China also in that discussion stated that it identified its measure in paragraph 24 of its Panel Request. Paragraph 24 provides "24.For purposes of this request, the measures at issue include the Use of Adverse Facts Available, as such, and the instruments listed in paragraph 23 above, as such.") The instruments listed above in paragraph 23 are Section 776(b) of the Tariff Act of 1930 and Regulations set forth in 19 CFR § 351.308, which China has not challenged in this dispute. Indeed, China has explicitly stated it is not challenging the statute in its appellant submission. See China Appellant Submission, note 454 ("China does not, in these proceedings, challenge Section 776(b) of the Tariff Act of 1930.").

527 U.S. Second Opening Statement, para. 57.

> 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....

The Appellate Body has observed that Article 6.2 has "two distinct requirements," namely:

> (a) Identification of the specific measures at issue; and
>
> (b) The provision of a brief summary of the legal basis of the complaint.[528]

These elements comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under Article 7.1 of the DSU.[529] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[530]

385. The Appellate Body has clarified that, at a minimum, a complaining party must clearly identify the specific provision of the covered agreement alleged to have been breached by the responding party. In *Korea – Dairy*, the Appellate Body explained that:

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[531]

In *China – Raw Materials*, the Appellate Body further found that to:

> the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[532]

A "complaining Member should therefore be particularly vigilant in preparing its panel request, especially when numerous measures are challenged under several different treaty provisions."[533]

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528 *Australia – Apples (AB)*, para. 416.

529 *Id.*

530 *Id.*

531 *Korea – Dairy (AB)*, para. 124.

532 *China – Raw Materials (AB)*, para. 220 (citing *Korea – Dairy (AB)*), para. 124. *See also EC – Fasteners (China) (AB)*, para. 598.

533 *Id.*

386. The Appellate Body has also recognized that a deficient panel request cannot be cured subsequently in the course of the proceedings:

> [A] party's submissions during panel proceedings cannot cure a defect in a panel request. We consider this principle paramount in the assessment of a panel's jurisdiction. Although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing.[534]

Thus, a complaining Member cannot subsequently argue that in the course of a dispute, the defending Member ultimately came to understand the intended challenge.

3. The Appellate Body Should Dismiss China's Claims Concerning the Alleged AFA Norm

387. The issue before the Appellate Body is whether paragraph 26 of China's Panel Request comports with Article 6.2 of the DSU. That paragraph only provides the following:

> China considers that these measures are inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement, because, inter alia, in using adverse facts available, the United States fails to use the best information available and special circumspection when basing its findings on information from secondary sources.

Accordingly, on its face, China's claim does not identify precise provisions, but an entire portion of the AD Agreement: namely, all of Annex II, which contains seven paragraphs, many of which contain multiple obligations in themselves. Thus, the failure to identify the particular provisions of the AD Agreement means that the claim presented in China's panel request is deficient and must fall.

388. As noted above, the Panel in Question 174 asked China to respond to this jurisdictional issue. China's response appears to make three points; none of them are persuasive.

389. First, China asserts that the United States' request was "belated."[535] That is not true. As explained above, the United States raised concerns with whether China's claims were within the terms of reference of the dispute in its first written submission. In any event, jurisdiction can be challenged at any time, including on appeal:

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534 *EC and certain member States – Large Civil Aircraft*, para. 642.

535 China's Response to Panel Question 174, para. 273.

> The Appellate Body has found that parties are required to raise procedural objections "promptly", but also that matters going to the jurisdiction of a panel are "fundamental" and can therefore be raised at any stage in a proceeding, including on appeal. If a claim is not within a panel's terms of reference, the panel does not have the jurisdiction to hear the claim. Moreover, a party's failure to raise a timely jurisdictional objection cannot operate to cure such a jurisdictional defect. We therefore find that the European Union's failure to raise its terms of reference claim promptly before the Panel does not bar it from bringing this challenge on appeal."[536]

Thus, there are no impairments, legal or factual, that would impede consideration of whether China's claims were properly identified in its Panel Request, even at this stage.

390. Second, China defended the relevant portion of the Panel Request it invoked by noting that its Panel Request "explicitly connects the measure at issue (the Use of Adverse Facts Available norm) with the legal basis for its claim (Article 6.8 and Annex II)."[537] Despite China's assertion, the text of the relevant portion of the Panel Request is more telling. As noted by the United States, Annex II of the AD Agreement includes multiple paragraphs with multiple obligations. While it may be the case that in some instances a Member's panel request may be sufficient by simply invoking the relevant treaty provision – such as when the provision at issue contains a discrete obligation – it can never be the case that a Member can simply cite a broad, multi-part section of a treaty.[538] But that is precisely what China's Panel Request does.

391. Third, China argued that its Panel Request goes farther than required by the DSU by previewing arguments. To that end, China cites that the references in its Panel Request that USDOC "fails to use the best information available and special circumspection when basing its findings on information from secondary sources."[539] Providing defending Members notice of potential arguments may be a commendable practice, but it is unrelated to the requirement of DSU Article 6.2 to identify claims. Here though, the United States disagrees that the "preview" offered by China is of any assistance or can compensate for the deficient identification of the claim. Specifically, the United States notes that this is the case because China utilizes the term "inter alia." That phrase is not an identification, but an open-ended threat that additional unreferenced issues may arise – and it is not a door by which additional claims can be brought into a dispute. On this point, the Appellate Body's analysis in *India – Patents* is instructive:

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536 *EC – Fasteners (AB)*, para. 561 (footnotes omitted); *see also Canada – Aircraft*, para. 9.15 ("In our view, there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report."

537 China's Response to Panel Question 174 at para. 275.

538 *See US-OCTG Sunset Reviews (AB)*, paras. 172-173 (The United States notes that the Appellate Body has found that with respect to "as such" claim, the Panel request should unambiguously state the legal basis for the allegation why the measure is not consistent with the Member's WTO obligations).

539 China's Response to Panel Question 174 at para. 276.

> With respect to Article 63, the convenient phrase, 'including but not necessarily limited to', is simply not adequate 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' as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what Article of the TRIPS Agreement does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel."[540]

392. Finally, China argued that the United States fully understood China's claim and that United States was conflating China's arguments with its claims.[541] The fact that the United States raised a term of reference argument in its first written submission contradicts that assertion. Fundamentally though, neither the Appellate Body nor a Panel is required to discern the subjective intent of a defending – or complaining – Member. In any event, as explained above, the Appellate Body has already rejected the notion that a Party can cure defects in a panel request through its subsequent submissions. The Panel and the Appellate Body simply need to examine the Panel Request – and determine if it sufficiently identifies the claim.[542] Here, it does not because the Panel Request does not identify the relevant treaty provisions and the basis of complaint that constitutes the claims presented in China's submissions before the Panel, and now at the Appellate Body. Accordingly, the Appellate Body should dismiss China's appeal.

F. China's Arguments That the Alleged AFA Norm Is Inconsistent With the AD Agreement is Without Merit and Should be Dismissed

393. The issue before the Appellate Body, if China overcomes all of the prior concerns, is whether the alleged AFA Norm is consistent with Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Paragraph 7 provides:

> 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

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540 *India – Patents (AB)*, para. 90.

541 China's Response to Panel Question 174 at para. 276.

542 *US – Carbon Steel (AB)*, para. 127 ("As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submission of the parties during the panel proceedings.")

> situation could lead to a result which is less favourable to the party than if the party did cooperate.

394. As it had before the Panel, China is asserting that the United States breached this provision because USDOC does not abide by the requirement to exercise "special circumspection." China has three principal arguments with respect to the "special circumspection" requirement:

(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 'best';

(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; 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.[543]

395. With respect to the claim made under part (a), China, in its appellant submission, asserts that the reason USDOC breaches paragraph 7 of Annex II is because it did not properly consider any other circumstance other than non-cooperation before applying an adverse inference and then purportedly adverse facts.[544] As China puts it, "a process that systematically results in the same outcome whenever a single specific circumstances occurs" breaches paragraph 7 of Annex II.[545]

396. First, China's claims under part (a) are premised on the notion that USDOC failed to exercise special circumspection because it arrived at the "same outcome" in every instance – which for China is "adverse facts."[546] That premise is incorrect because it presumes first, that "adverse facts" are indeed actually "adverse," and second, that the facts employed are not accurate and reliable under the circumstances. The Panel's findings do not indicate that "adverse facts," are anything other than the result of an adverse inference and logically recognize that a non-cooperative party should not be placed in the same position as a cooperative party.[547]

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543 China's Appellant Submission, para. 479 citing Panel Report, para. 7.399.

544 China's Appellant Submission, para. 487.

545 China's Appellant Submission, para. 483.

546 *See* China's Appellant Submission, Section VII.D.1.

547 See China's Appellant Submission, para. 7.4539 ("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.").

397. Second, what China is really challenging is not the *application* of facts available, but the *resort* to facts available. Yet, the resort to facts available (*i.e.*, the decision to apply facts available), including the finding of non-cooperation, is not part of the alleged AFA Norm. Thus, China cannot have it both ways. It cannot assert on the one hand that non-cooperation—which China considers the "trigger" to the application of the alleged AFA Norm--is not an element of the alleged AFA Norm but then assert on the other hand that the Panel – and now the Appellate Body – should make a finding tied to that non-cooperation.

398. The point China asserts under part (b) is that USDOC failed to exercise special circumspection because it may not have taken into account that it did not request information from certain exporters or producers in the China government entity, despite applying adverse inferences to the China-government entity in the case of non-cooperation by certain other exporters or producers. China's reasoning for why the United States breached its obligations under the claim made in part (c) is that USDOC did not consider that the China-government entity is a "fictional entity."[548]

399. The answer to these claims is straightforward and singular: they fail to recognize that the obligation under paragraph 7 applies to the China-government entity, and not the individual exporters and producers within that entity. The relevant question is thus whether USDOC took into account the relevant circumstances related to the China-government entity. As China appears to implicitly recognize, the issue of whether producers and exporters within the China-government entity merit individual rates is properly addressed under Articles 6.10 and 9.2 of the AD Agreement. However, for purposes of examining the United States' "special circumspection" obligation under Annex II(7), because USDOC determined a rate for the China-government entity, once a constituent member of the entity was deemed to be non-cooperative, there was no need to further examine the procedural circumstances of other constituent members. Indeed, the logic China suggests would be akin to saying that it is not fair to consider a person uncooperative because his right hand is helpful, but his left hand is recalcitrant. The person as a whole is reasonably inferred as uncooperative. Similarly, when certain constituent members of the China-government entity failed to cooperate in some respects, USDOC was not precluded from considering that the China-government entity itself was non-cooperative. Since all of China's claims are predicated on the misplaced notion that the circumstances of the entity's constituent members are unrelated to the entity itself, China's claims must fail.

1. USDOC Appropriately Considers the Relevant Facts and Circumstances in Assigning a Rate to the China-Government Entity

400. China asserts USDOC breaches U.S. obligations under Article 6.8 and Annex II(7) because USDOC "*systematically* proceeded to make … [an adverse] inference in every case, leading to the selection of adverse facts."[549] In particular, China asserts "a process that systematically results in the same outcome whenever a single specific circumstance occurs – as

[548] For the sake clarity, the United States is referencing parts (b) and (c) referenced immediately above. In its appellant submission, it appears China presents them under subheadings that have the order reversed.

[549] China Appellant Submission, para. 487 (underlined added; italics original).

the Panel found was the case with the AFA Norm – is not consistent with the requirement of 'special circumspection'." [550]

a. USDOC Does Not Reach the Same Outcome for the China-Government Entity in Every Proceeding Entity

401. As the United States noted, the first deficiency with China's argument is that it incorrectly asserts that the same outcome occurs in every antidumping proceeding where the China-government entity is found to be uncooperative. China asserts that the Panel found this was the case, but provides no citation to where in the Panel Report this finding resides. Indeed, this is because such a finding was never made.

402. The outcome that China asserts occurs across cases where the China-government entity is found to be uncooperative is the selection of allegedly adverse facts through the use of adverse inferences. China seems to imply that adverse facts are punitive or at least uniform in nature.[551] That is not correct. The Panel did find that "USDOC ascribed a particular meaning to the term 'adverse facts,'" but not that the use of adverse facts was commensurate with punishing the China-government entity for noncooperation.[552] Instead, the Panel found that "adverse facts" were "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."[553]

403. The Panel did not elaborate on the nature of the deterrent. Suffice it to say, a deterrent for non-cooperation does not need to be punitive or preclude a reasonably accurate estimate of the interested party's rate. Thus, the Panel's finding does not provide that USDOC is laboring under conditions that prevent it from selecting facts that constitute reasonable and reliable replacements for the missing information. Indeed, that such a situation is permissible is reflected in the plain text of paragraph 7 of Annex II of the AD Agreement, which explicitly states "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."[554]

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550 China Appellant Submission, para. 483.

551 *See* China Appellant Submission, paras. 473, 478, 494n. 515.

552 Panel Report, para. 7.453.

553 Panel Report, para. 7.453.

554 The United States notes that other WTO Members have likewise affirmed that it is perfect reasonable to utilize inferences that may not allow a non-cooperative party to benefit from its actions. For example, consider two of the third-parties views expressed in *US – Carbon Steel (AB) (India).* Canada, para. 2.347: "In Canada's view, the choice of unfavourable facts may be justified where an interested party is aware of the evidence on the record and where it withholds necessary information. This is because it may be inferred that, if it had more favourable information, the interested party could have provided it to the investigating authority in its own best interest. … In Canada's view, a reasonable and objective investigating authority may find that a party should not benefit from a lack of cooperation and use facts on the record in a way that is not favourable to that party." EU, para. 2.385: ("Thus, the more uncooperative a party, the more attenuated and extensive the inferences that it may be reasonable to draw. Although an inference drawn from a fact or the procedural context may be "adverse" to an interested party, it is impossible to know so, since such inferences are drawn where information representing the real situation of the interested party is missing.").

404. Indeed, a failure to take into account non-cooperation would lead an investigating authority to ignore a highly pertinent fact and thus perhaps reach a less accurate outcome. Indeed, the panel in *EC – DRAMS* recognized as much in considering Article 12.7 of the SCM Agreement, the parallel provision to Article 6.8 of the AD Agreement:

> The fact that the SCM Agreement does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same. Article 12.7 of the SCM Agreement is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority. *If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the SCM Agreement meaningless and inutile*.[555]

405. Indeed, even in the context of WTO dispute settlement, the Appellate Body has correctly recognized that panels can apply adverse inferences when a Member refuses to turn over information in its possession:

> To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs a fortiori also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.[556]

The use of such a tool does not mean, however, that the "same outcome" is reached in every proceeding. That is because USDOC considers other relevant facts and circumstances at play in every distinct proceeding, when ultimately selecting from among the facts available. In this Panel Report, however, there is nothing to suggest that USDOC is constrained from considering such circumstances in applying adverse inferences and selecting facts that may not necessarily reward the non-cooperation.

406. Moreover, in considering China's claim, it is important to recognize that China brings an "as such" challenge. It must prove necessarily that in each and every case there will be WTO inconsistent conduct. No one can reasonably state that in any particular case – let alone every

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555 *EC – DRAMS*, para. 7.61 (emphasis added).

556 *Canada – Aircraft (AB)*, paras. 202-203.

case – that an investigating authority that applied an adverse inference when selecting among the facts available was necessarily precluded from finding an accurate replacement for the missing information.

407. Finally, the United States would like to eliminate some confusion about the term "adverse facts," particularly in light of how it has been used in other disputes. In *US – Carbon Steel (AB) (India)*, the Appellate Body made the following finding:

> In this regard, we recall our finding that, as part of the process of reasoning and evaluating which "facts available" constitute reasonable replacements for the missing "necessary information", an investigating authority may use inferences. Further, as part of the process of reasoning and evaluating which "facts available" constitute reasonable replacements, the procedural circumstances in which information is missing, including the non-cooperation of an interested party, may be taken into account. We note, however, that the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7. Further, as we have considered above, procedural circumstances and any resulting inferences may not alone form the basis of a determination. Rather, determinations pursuant to Article 12.7 must be made on the basis of "facts" that reasonably replace the "necessary information" that is missing.[557]

The Appellate Body spoke of the term "adverse facts" in the context of punishing non-cooperation. In contrast, the Panel has utilized the expression in this dispute to mean "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".[558] This is a significant difference. The latter permits scenarios where the inferences used to select the rate for a non-cooperative party leads to the selection of information that is reasonable and accurate. This is because employing an adverse inference is merely one part of a determination that includes, *inter alia*, consideration of other relevant facts and circumstances that are probative to the determination of a reasonable and accurate rate."

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557 *US – Carbon Steel (AB) (India)*, para. 4.468.

558 Panel Report, para. 7.453. The Panel simultaneously recognized that, "the USDOC may not have known whether the facts it selected were actually adverse or less favourable than the missing facts." Panel Report, para. 7.453. The United States believes it might helpful to provide some time line as to when the term "adverse facts" made its way into his dispute. China filed its Panel Request on February 13, 2014. In its Panel Request, China described USDOC's problematic conduct as follows: When the USDOC considers that a producer or exporter has failed to cooperate by not acting to the best of its ability, it uses inferences that are "adverse to the interests of that party in selecting from among the facts otherwise available". China refers to the USDOC's approach as the "Use of Adverse Facts Available". China Panel Request, para. 21. Thus, the term is not found in the Panel Request. On December 8, 2014, the Appellate Body circulated its report in *US – Carbon Steel (India)*. Following that report, China submitted its first written submission, which for the first time introduced that its grievance concerned not simply adverse inferences, but "adverse facts."

408. Further, the United States observes that when a party refuses to provide its own information, it is not possible for the investigating authority to know whether the information it selects is in reality favorable or adverse to the interests of the uncooperative party from the limited information available on the case record. In other words, the precise information is an "unknown fact." However, 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 the term "adverse inference" or "adverse fact" in this context does not mean the application is punitive, but instead simply reflects the selection of information from the available information that takes into account the party's failure or refusal to provide the necessary information, provided that selection comports with the legal standard discussed above. In sum, there is no finding in the Panel Report, nor any uncontroverted fact, that suggests that the selection of a purportedly "adverse fact" with respect to the alleged AFA Norm is necessarily anything other than a reasonable and reliable replacement for the missing information. Thus, USDOC is not prevented from exercising special circumspection when it comes to the selection of available facts.[559]

b. China's Claim Concerns the Resort to Facts Available, Which is Not Part of the Norm

409. As China put it, China's complaint about "*proceeding*" to make an adverse inference and selecting adverse facts is really a complaint about the resort to facts available, not its application. But USDOC's finding of noncooperation – the "trigger" for the alleged AFA Norm – is not part of the alleged norm.[560] Per China, the alleged AFA Norm concerns the application of facts available after the "trigger" of noncooperation has been found.[561]

410. Moreover, China does not explain why the special circumspection requirement extends to the resort to facts available. The text of paragraph 7 states that when USDOC bases its findings for the China-government entity "on information from a secondary source… [it] should do so with special circumspection."[562] The text of the provision does not provide that the resort to facts available needs to be carried out with special circumspection. The finding of noncooperation is not based on a secondary source, but hinges on the actual noncooperation of the party itself. With respect to the resort to facts available, other provisions in the AD Agreement concern that issue.[563] Accordingly, China's claim further fails because it concerns the resort to facts available rather than its application.

2. The Alleged AFA Norm Does Not Lead USDOC to Overlook Any Particular Circumstances

411. While the arguments in in section VII.D.2 of China's appellant submission are presented under three subheadings, they are all essentially the same argument: USDOC did not account for

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559 China Panel Request, para. 21.

560 Panel Report, para. 7.429.

561 *Id*.

562 AD Agreement, Annex II(7).

563 *See e.g.*, AD Agreement Annex II(1).

the different situations of companies within the China-government entity when employing adverse inferences and adopting "adverse facts." For example, China asserts that the "systematic drawing of adverse inferences and the selection of adverse facts means that USDOC fails to have regard to the markedly different situations of producer/exporters included in the fictional entity."[564] China also asserts, under a different subheading, that USDOC does not consider all of the circumstances related to the fictional entity (*i.e.*, that the entity can be deemed uncooperative when constituent members within the entity have not been uncooperative).[565] Finally, China asserts under its last subheading that USDOC does not take into account that the China-government entity is a legal fiction.[566] These are all effectively arguments of the same cloth – complaints about the establishment of the China-wide entity on the basis of the Single Rate Presumption norm and how the constituent members within the China-government entity are treated – and the reasons they must fail is the same: USDOC's actions with respect to paragraph 7 of Annex II applies to the China-government entity, not its constituent members.

412. As reflected in its arguments, China notes that the situations of individual companies within the China-government entity are different and that the entity is "fictional." But as China itself states, those issues are resolved under provisions such as Article 6.10 and 9.2, which provide that independent exporters must obtain individual rates.[567] Within the context of analyzing USDOC's conduct under Article 6.8 and Annex II(7), however, the analysis must hinge on the treatment of the China-government entity. Once the analysis is appropriately focused on the treatment of the China-government entity, China's claims clearly fail.

- Where the investigating authority established the China-government entity on the basis of the Single Rate Presumption norm, it no longer treats the components of the China-government entity disparately.[568]

- Additionally, contrary to China's contention that the investigating authority was required to recognize the different situations of the producers/exporters that comprised the China-government entity,[569] in determining the rate to apply to the uncooperative China-government entity, the investigating authority does not consider, for example, the information provided by just one producer/exporter of the China-government entity, but rather, it must consider the information provided by all companies within the China-government entity subject to the particular investigation or review at issue. Likewise, 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. Nothing in Article 6.8 prohibits this determination.

564 China's Appellant Submission, para. 493.

565 China's Appellant Submission, paras. 498-502.

566 China's Appellant Submission, paras. 503-506.

567 China's Appellant Submission, paras. 492-496; 500-501.

568 China's Appellant Submission, para. 505.

569 China's Appellant Submission, para. 491.

- The fact that some components of the China-government entity might have provided information or been cooperative – but other did, or were, not – does not change the fact that the entity itself was non-cooperative.[570]

In other words, once the investigating authority determined the existence of the China government entity, its obligations under Article 6.8 and Annex II(7) flow to that entity. Thus, the obligation of special circumspection must be applied with respect to the entity.

413. On this point, it is important to recognize that USDOC, once it has established the existence of the China-government entity, needs complete information for the entity writ large in order to determine an accurate dumping margin. If information is missing from constituent members, the entity's rate cannot be developed, except through facts available.

414. China's complaint is not with the facts available rate assigned to the entity, but that it believes components within that entity are independent exporters and should be assigned a separate rate.[571] These are the circumstances that China claims USDOC does not account for. However, to make provision for these circumstances as China suggests would result in an irrational situation that would undermine the effectiveness of antidumping measures. Specifically, as soon as one company within the China-government entity did not provide necessary information, all companies that did provide information would be extracted from the China-government entity and obtain individual duties, *even though they are part of the entity*. This in turn creates a risk that sales could be selectively channeled. Thus, the correct discipline to ensure that individual exporters are properly afforded individual rates is found within Articles 6.10 and 9.2 – not Article 6.8 and paragraph 7 of Annex

415. China has made a conditional appeal concerning the Panel's "as applied" claims with respect to the alleged AFA Norm.[572] The condition for the appeal is if the United States files its own appeal regarding the Panel's findings concerning the breach of Articles 6.10 and 9.2 of the AD Agreement. The United States will not be appealing the Panel's findings regarding Article 6.10 and 9.2 of the AD Agreement. Accordingly, the condition is not met and China's conditional appeal can be dismissed.

G. The Appellate Body Should Not Complete the Legal Analysis

416. The preceding section demonstrated why China's arguments fail on the merits. They also confirm another key failing to China's appeal: the absence of necessary factual findings and uncontested facts to complete the legal analysis.

417. China has requested that the Appellate Body complete the legal analysis with respect to two matters. First, in Section VI.D of its appellant submission, China requests that the Appellate Body complete the legal analysis to find that the alleged AFA Norm has general application. Second, in Section VII, China asserts that the Panel should complete the legal analysis to find

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570 China's Appellant Submission, para. 493, 498.

571 China's Appellant Submission, para. 500.

572 China's Appellant Submission, para. 511.

that the United States breached Article 6.8 and Annex II(7) of the AD Agreement "as such" on account of the alleged AFA Norm. China's requests should be denied.

418. As the United States will elaborate below, China's assertions concerning the existence of necessary factual findings or uncontested facts are unsupported and fundamentally flawed. In particular, what China claims to be factual findings or undisputed facts are nothing more than China's self-serving characterizations of certain evidence, or simply summaries of China's unsupported arguments to the Panel. The absence of the pertinent findings and uncontested facts precludes completion of the legal analysis.

419. The United States will present its arguments as to why the Appellate Body should not complete the analysis in three sections. First, the United States recounts the legal standard for the Appellate Body to complete the legal analysis. Second, the United States will address why the Appellate Body should not complete the legal analysis with respect to finding that the alleged AFA Norm has general application. Finally, the United States will address the lack of factual findings permit and uncontested facts that preclude completing the legal analysis with respect to China's claims under Article 6.8 and Annex II(7).

420. However, before doing so, the United States makes two general observations regarding China's requests for the Appellate Body to complete the legal analysis. First, China asserts that "[c]ompletion of the analysis is appropriate to facilitate the prompt settlement of the dispute as a failure to complete the analysis of China's claim would leave crucial aspects of the dispute open."[573] That is not so. As explained in section V.C of this submission, China's claims under the alleged AFA Norm are predicated on the Single Rate Presumption Norm, and thus any additional findings made by the Appellate Body with respect to the alleged AFA Norm would not contribute to positive resolution of this dispute. In this regard it is telling that China proffers in its section requesting the Appellate Body to complete the analysis that it is grievance rests with "conduct that is geared toward assigning adverse facts available to all *producers/exporters grouped into the single entity*."[574] As the United States has discussed, the Panel report has already made findings regarding the ability of the United States to group Chinese producers and exporters into a single entity on the basis of the Single Rate Presumption Norm.[575] Thus China's request to complete the analysis is not about contributing to the positive resolution of this dispute, but simply securing *ex ante* guidance on a situation not relevant to this dispute.

421. Second, as referenced above, China often attempts to substitute the extensive briefing in this dispute for uncontested factual findings. For example, China notes that the Panel asked 5 questions about Article 6.8 and Annex II(7) and the matter was discussed at both panel meetings.[576] Whether the Panel posed questions or heard arguments is not relevant to the issue of completing the analysis; whether the Panel issued findings in response to those questions and arguments is. Here, the Panel did not. What China is asking for is the Appellate Body to answer

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573 China's Appellate Submission, para. 446.

574 *Id*. (emphasis added).

575 *See e.g.*, Panel Report, para. 7.388.

576 China's Appellate Submission, para. 446.

factual questions that the Panel left unresolved – and thus not respect the "distinction between the respective roles of the Appellate Body and panels."[577]

1. The Legal Standard for Completing the Analysis Requires That the Panel Have Made the Requisite Findings

422. Article 17.13 of the DSU states that the "Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel." The Appellate Body has found that in certain appeals, if it has reversed a panel's finding pursuant to Article 17.13 of the DSU, it "may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties."[578] In order to "complete the legal analysis," however, the Appellate Body has stated that:

> that the Appellate Body will be in a position to complete the legal analysis if it has before it sufficient factual findings of the panel or undisputed facts on the panel record.[579]

423. In other words, if there are insufficient factual findings of a panel or the relevant facts are disputed, then the Appellate Body should not complete the legal analysis. These are not the only constraints though. The Appellate Body has recognized that completing the analysis require a complete context where the Panel has in fact engaged in an examination of the pertinent issues:

> In several previous disputes, the Appellate Body examined an issue 'not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties'. However, the Appellate Body has declined to complete the legal analysis where 'the factual findings of the panel and the undisputed facts in the panel record' did not provide a sufficient basis for the legal analysis by the Appellate Body. Moreover, as Article 17.6 of the DSU limits appeals to 'issues of law covered in the panel report and legal interpretations developed by the panel', the Appellate Body has also previously declined to complete the legal analysis of a panel in circumstances where that would involve addressing claims 'which the panel had not examined at all'. In addition, the Appellate Body has indicated that it may complete the analysis only if the provision that a panel has not examined is 'closely related' to a provision that the panel has examined, and that the two are 'part of a logical continuum'."[580]

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577 *EC – Fasteners (AB)*, para. 441, *quoting US – Wheat Gluten (AB)*, para. 151.

578 *Australia – Salmon (AB)*, para. 117.

579 *EC – Selected Customs Matters (AB)*, para. 278; *Australia – Salmon (AB)*, para. 118; *Canada – Autos (AB)*, para. 145 ("In *Australia — Salmon*, we stated that where we have reversed a finding of a panel, we should attempt to complete a panel's legal analysis 'to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record'.").

580 *EC — Export Subsidies on Sugar*, para. 337; *see also EC and certain member States – Large Civil Aircraft*, para. 1140 ("We note that the Appellate Body has exercised restraint in deciding whether to complete the legal analysis in past disputes. The Appellate Body has emphasized that it can complete the analysis only if the factual findings by the panel, or the undisputed facts on the panel record, provide a sufficient basis for the Appellate Body to do so. Where this has not been the case, the Appellate Body has declined to complete the analysis."); see also *see Canada – Continued Suspension (AB)*, para. 735 ("Given the numerous flaws that we identified in the

Here, the extensive briefing by the Parties and the questions posed to the Parties that are invoked by the China as a basis to complete the analysis only validates that the issues were contested extensively – and thus militate against any attempt to complete the legal analysis. As demonstrated below, key facts necessary to address the issue of whether the United States breached its obligations under Article 6.8 and Annex II(7) of the AD Agreement are simply missing.

2. The Lack of Necessary Findings and Uncontested Facts Preclude Completing the Legal Analysis with Respect to Finding the Alleged AFA Norm has General Application

424. As explained in section V.D.7, a measure that has general application is not limited to particular companies, but affects an unidentified number of economic operators.[581] In order to complete the legal analysis, therefore, China needs to point to findings or uncontested facts that demonstrate that application of the alleged AFA Norm is not constrained to only particular actors, but economic operators that fulfill certain objective conditions.

425. China's appellant submission does not alleged that there are any uncontested facts that allow the Appellate Body to complete the analysis. This is not surprising. Both China and the United States vigorously contested the significance and meaning of the evidence proffered by China.[582] Instead, China purports that are particular findings in the Panel Report that could allow the Appellate Body to characterize the alleged AFA Norm as possessing general application. The United States addresses each purported finding invoked by China and demonstrates why China's characterization of that finding is incomplete, incorrect, or unsupported – and thus not a basis by which the Appellate Body can complete the legal analysis.

426. First, China argues that undisputed facts establish that "the AFA Norm pertains to the process through which USDOC determines the rate for an NME-wide entity that is identified by the USDOC through operation of the Single Rate Presumption."[583] This statement, however, is a legal characterization, and is supported neither by Panel findings nor by undisputed facts. The United States in particular asks the Appellate Body to compare China's assertion with the actual findings made by the Panel. Paragraph 7.480 of the Panel Report, which is invoked by China as the basis for statement simply notes that the Panel recalls that it had made findings with respect to the Single Rate Presumption:

> 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. We recall that in our findings with respect to the USDOC's application of the Single

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Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis."); *US – Hot-Rolled Steel (AB)*, para. 180; *EC – Asbestos (AB)*, para. 78.

581 *US – Underwear*, para. 7.65. The Appellate Body upheld the finding. *US – Underwear (AB)*, p. 13.

582 *See e.g.*, U.S. Second Written Submission, Section IV.

583 China's Appellant Submission, para. 429.

> 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. 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. 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.

There is nothing in that paragraph that relates to the general application of the alleged AFA Norm. In particular, t the Panel finding quoted above recounts its prior findings with respect to the Single Rate Presumption Norm, the nature of China's "as applied" claims (rather than "as such"), and what the Panel believes to be the relevant issue with respect to resolving China's "as applied" claims with respect to the Single Rate Presumption Norm. As noted, China must show the finding that could allow for a conclusion to be drawn with respect to which actors the alleged AFA Norm is applicable.

427. Second, China makes a statement asserting that the Appellate Body can complete the analysis is that the Panel found that the Single Rate Presumption norm includes within "within the NME-wide entity all producers/exporters of a product under consideration in anti-dumping proceedings from a country that the United States considers to be a non-market economy."[584] China goes on to note that the Panel held that the AFA Norm applies whenever USDOC finds that the NME-wide entity failed to cooperate.

428. As an initial matter, China incorrectly assumes that a finding with respect to the Single Rate Presumption Norm's application would automatically carry over the alleged AFA Norm. That of course is not the case – as illustrated by the Panel's finding that the alleged AFA Norm lacks prospective application. Just as China needed to prove separately that the alleged AFA Norm had prospective application, it also needed to establish that it had general application. Again, it is instructive to examine the precise Panel finding invoked by China.

> 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

[584] China's Appellant Submission, para. 430.

> *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. 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.[585]

Thus this finding, like the prior invoked by China, is limited to the Single Rate Presumption Norm, and not the alleged AFA Norm, including anything that would relate to its general application.

429. Third, China asserts that the AFA Norm "applies in all investigations and reviews that involve imports of a product under consideration from a country deemed, at that time, to be a non-market economy.[586] That is a point that is disputed between the parties. The Panel finding that China cites for that proposition is imply a footnote in the Panel Report[587] citing particular antidumping proceedings – not anything again relating to the alleged norm's general application. Indeed, that the finding is not related to anything from which a conclusion can be drawn with respect to general application can be discerned from the paragraph from which the footnote originates:

> 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]).[588]

The Panel finding simply notes that per China, the norm is only applicable upon a finding of non-cooperation and thus the universe of relevant USDOC determinations that are appropriate for examination are constrained to that subset. There is no finding, whatsoever, that the alleged AFA Norm applies to "all investigations and reviews."[589]

430. The last three statements[590] China makes as a basis through which the Appellate Body can complete the legal analysis are simply conclusory statements about how antidumping

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585 Panel report, para. 7.361.

586 China's Appellant Submission, para. 431.

587 Panel Report, footnote 875.

588 *Id.*

589 China Appellant Submission, para. 431.

590 China's Appellant Submission, paras. 431-433.

proceedings *can* apply to undefined groups and goods. China does not try to cite anything from the Panel Report to source those assertions. Critically though, the key point is that the question is not that antidumping measures *can* have general application, but whether the alleged AFA Norm itself possess general application. China cites no finding or uncontested fact by which the Appellate Body can decide that question.

431. In sum, each of the purported "findings" that China invokes as allowing the Appellate Body to complete the legal analysis have been mischaracterized, do not exist in the Panel Report, or are conclusory statements made by China. Findings that address the scope of application of the alleged AFA Norm to economic operators are necessary to complete the legal analysis and they have not been made. Accordingly, it is not possible to complete the legal analysis with respect to whether the alleged AFA Norm has general application.

3. Findings Necessary to Complete the Analysis with Respect to Article 6.8 and Annex II(7) Are Also Missing

432. As demonstrated above in the preceding section concerning the merits of China's claims, the Panel failed to make findings that are critical for assessing the consistency of the alleged AFA Norm with Article 6.8 and paragraph 7 of Annex II of the AD Agreement. As an initial matter, an investigating authority's use of facts available is highly contingent on particular circumstances in a given case. On this point, the Appellate Body's analysis in *US – Carbon Steel (India)* is instructive:

> we note that the extent of the evaluation of the "facts available" that is required, and the form it may take, depend on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation. Similarly, whereas the explanation and analysis provided in a published report must be sufficient to allow a panel to assess whether the "facts available" employed by the investigating authority are reasonable replacements for the missing "necessary information", their nature and extent will necessarily vary from determination to determination.[591]

It is in this light that it important to understand the precise factual findings that are missing in this dispute.

433. First, although the Panel found that the content of the alleged norm provided that USDOC utilized "adverse facts," the notion of what those adverse facts encompass is undecided.[592] The Panel did not find that the adverse fact selected by USDOC was punitive or the highest rate available.[593] The limited finding that the Panel made was that "adverse facts" are "those facts that would lead to a result that was not more favourable than that where the NME-

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591 *US – Carbon Steel (AB) (India)*, para. 4.421.

592 Panel Report, para. 7.453.

593 Panel Report, n. 940.

wide entity had cooperated fully, and that operated as a deterrent for non-cooperation."[594] Thus, all we know is that fact selected may lead to a result that is less favorable than if the Party did cooperate. That scenario is of course explicitly recognized under paragraph 7 of Annex II.

434. Second, the Panel made no findings as to the nature of the adverse inference and how it interplayed with other circumstances before USDOC. Investigating authorities are of course allowed to take into account non-cooperation when selecting information to replace missing facts:

> knowledge of a non-cooperating party of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those "facts available" on which to base a determination and in explaining the selection of facts.[595]

That USDOC takes that non-cooperation into account through why China dubs an "adverse inference" in the alleged AFA Norm does not mean that USDOC does not take into account other circumstances to ensure the ultimate fact selected is reasonable and accurate to replace the missing information.

435. In light of these broad unknowns, made particularly so in light of the recognition that facts available determinations are driven by particular circumstances, there is no basis by which to draw a legal conclusion and complete the legal analysis. China appears to try to overcome this deficiency through two means.

436. First, in arguing why the alleged AFA Norm purportedly breached U.S. obligations under the AD Agreement, China references what the Panel recorded China as having asserted before the Panel – or simply making sweeping unsupported assertions.[596] For example, China asserts that the alleged AFA Norm will require the selection of adverse facts on the procedural circumstance of presumed non-cooperation alone.[597] A panel's recitation of what a Party alleged is not a finding that the allegation was in fact correct, simply that it was made. The argument China made is not reflected as having been found by the Panel anywhere in its report.[598] Indeed, what the Panel did find, as reflected above, had substantial ambiguities. Thus, what China asserted – but was left undecided by the Panel – is therefore not a basis to complete the legal analysis.

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[594] Panel Report, para. 7.453.

[595] *US – Carbon Steel (AB) (India)*, para. 4.426.

[596] China Appellant Submission, para. 479, citing Panel Report, para. 7.399. The United States notes that it disagrees what China characterizes as arguments (although it acknowledges that both sides have been less consistent in the appropriate terminology).

[597] *Id.*

[598] China repeats that assertion in paragraph 487 of its appellant submission ("it did not consider any ***other*** circumstance before undertaking a process beginning with an adverse inference then proceeding to select adverse facts from secondary sources to fill the gap in the record.") (emphasis original). But China cannot cite to the Panel record or any uncontested fact in making that sweeping claim.

437. Second, China references particular exhibits such as USDOC determinations that China put before the Panel. Notably, China does not point to any findings on the Panel assessing the significance of these exhibits.[599] Thus, again there are no findings by which to complete the legal analysis. In short, China's misplaced efforts cannot overcome the fact that the requisite findings to complete the analysis are missing.

438. For these reasons, the Appellate Body should not complete the legal analysis and should not find that the alleged AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II of the

VI. CHINA'S CONDITIONAL APPEAL SHOULD BE DISMISSED

439. China has made a conditional appeal concerning the Panel's "as applied" claims with respect to the alleged AFA Norm.[600] The condition for the appeal is if the United States files its own appeal regarding the Panel's findings concerning the breach of Articles 6.10 and 9.2 of the AD Agreement. The United States did not appeal the Panel's findings regarding Article 6.10 and 9.2 of the AD Agreement. Accordingly, the condition is not met and China's conditional appeal can be dismissed.

VII. CONCLUSION

440. For the foregoing reasons, with the exception of China's appeal concerning footnote 385 of the panel report, to which the United States does not object, the United States respectfully requests that the Appellate Body reject China's claims on appeal and uphold the Panel's findings.

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599 *See* China Appellant Submission, para. 492, n. 511, 512, 513, para. 499, n. 519.

600 China's Appellant Submission, para. 511.