demonstrate an absence of governmental control over their export activities and fail to cooperate in the anti-dumping investigation to the best of their ability. Moreover, the fact that the 73 anti-dumping determinations put on the record by China covered a wide range of products and companies is a further indicator that the AFA Norm has "general application". For these reasons, based on the findings in the Panel Report and undisputed facts on the Panel record, we find that the AFA Norm has "general application".

5.182. In addition, we consider that the Panel's findings concerning the AFA Norm mean that this norm will continue to be applied in the future by the USDOC. The Panel made statements demonstrating that the AFA Norm has "prospective application", namely, that the AFA Norm was consistently and systematically applied by the USDOC over an extended period of time, and that the AFA Norm implements an underlying policy, provides administrative guidance, and creates expectations among economic operators. For these reasons, based on the findings and statements in the Panel Report and our legal analysis, we find that the AFA Norm has "prospective application".

5.183. In light of the unappealed Panel findings that the AFA Norm is attributable to the United States[513], and that its content corresponds to the description thereof made by China[514], as well as our conclusions above that the AFA Norm has general and prospective application, we find that the AFA Norm is a rule or norm of general and prospective application that may be challenged "as such" in WTO dispute settlement.

5.184. In relation to China's request for us to complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement, we consider that the general reference by China to Annex II, together with the narrative included in its panel request, provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" consistently with the standard of Article 6.2 of the DSU. The Panel, however, made no findings on whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. In particular, the Panel did not explore the process of reasoning and evaluation undertaken by the USDOC prior to selecting "facts available" to replace missing "necessary information". For an evaluation of the conformity of the AFA Norm with Article 6.8 and Annex II, we would need to examine the process of reasoning and evaluation undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information". In deciding whether we are able to complete the analysis, we have taken into consideration the absence of Panel findings and sufficient undisputed facts on the Panel record, as well as the arguments made by the participants on appeal. Under these circumstances, we are unable to evaluate the process undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information" with a view to arriving at an accurate determination. Consequently, we do not accede to China's request for completion of the analysis.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.1 The USDOC's application of the Nails test and its use of the W-T methodology in the three challenged investigations

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

[513] Panel Report, para. 7.456.
[514] Panel Report, para. 7.454.

find that China has not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting China's claim in respect of the first alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

6.3. In relation to third alleged quantitative flaw with the Nails test, the Panel considered that "the third alleged quantitative flaw rests on the assumption that in the three challenged investigations, the alleged target price gap was based on prices located at the tail of the distribution of the export price data and the weighted-average non-target price gap was based on prices located nearer to the peak of that distribution."[515] The Panel was correct in rejecting China's claim on the basis of its finding that China had not shown that this assumption is "factually correct insofar as the three challenged investigations are concerned".[516] Therefore, we find that China has not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting China's claim in respect of the third alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

6.4. We also find that China has not established that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement in relation to both the first and third alleged quantitative flaws with the Nails test.

> a. Consequently, we uphold the Panel's finding, in paragraph 8.1.a.vi of its Report, that "China has not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG*, *Coated Paper* and *Steel Cylinders* investigations" insofar as this finding relates to the first and third alleged quantitative flaws with the Nails test.

6.5. In relation to the qualitative issues with the Nails test, we consider that the Panel did not err in its interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in finding that investigating authorities are not required to examine the reasons for the relevant differences in export prices, or whether those differences are unconnected to "targeted dumping", in order to assess whether export prices differ "significantly". We also consider that, while it did not explicitly refer to "objective market factors", the Panel correctly concluded that an investigating authority should undertake a qualitative analysis of the significance of export price differences. We thus disagree with China's contention that the Panel erred in interpreting and applying the second sentence of Article 2.4.2 because it found that "investigating authorities [are not required] to consider objective market factors in determining whether relevant pricing differences are 'significant'".[517]

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

6.6. In relation to the USDOC's use of averages to establish the existence of a pattern in the three challenged investigations, we consider that the existence of a pattern within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement depends on the price relationship between the "targeted" transactions, on the one hand, and the "non-targeted" transactions, on the other hand. The distinguishing factor that allows for the determination of a pattern is that the prices within the pattern differ significantly from the prices outside it. We also note that the relevant difference is one "among" different purchasers, regions, or time periods. For these reasons, we consider that an investigating authority may rely on individual export transaction prices or average prices in order to find a pattern, provided that this pattern meets the requirements stipulated in the pattern clause. In this case, like the Panel[518], we consider that

[515] Panel Report, para. 7.78.
[516] Panel Report, para. 7.82.
[517] China's appellant's submission, heading IV.
[518] Panel Report, para. 8.1.a.ix.

China has not demonstrated that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by determining the relevant pattern on the basis of average prices. In addition, by not advancing any argument that is separate and different from its arguments concerning the alleged error in the Panel's interpretation of Article 2.4.2, China has not demonstrated that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement. We therefore find that the Panel did not err in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to the three challenged investigations when examining the USDOC's use of purchaser or time period averages under the Nails test. Furthermore, we find that China has not established that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement.

> a. Consequently, we uphold the Panel's finding, in paragraph 8.1.a.ix of its Report, that China has not established that the United States acted inconsistently with the second sentence of Article 2.4.2 in the three challenged investigations by determining the existence of a "pattern" on the basis of average prices, instead of individual export transaction prices.

6.7. In relation to the Panel's statements in footnote 385 of the Panel Report, we consider that, as in *US – Washing Machines*, the second sentence of Article 2.4.2 of the Anti-Dumping Agreement allows an investigating authority to establish margins of dumping by applying the W-T methodology only to "pattern transactions" and that Article 2.4.2 does not permit the combining of comparison methodologies.[519] In circumstances where the requirements of the second sentence of Article 2.4.2 are fulfilled, an investigating authority may establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.[520]

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

6.2 The AFA Norm

6.8. We consider that a rule or norm has "general application" to the extent that it affects an unidentified number of economic operators. In addition, a rule or norm has "prospective application" to the extent that it applies in the future. In this respect, in order to demonstrate prospective application, a complainant is not required to show with "certainty" that a given measure will apply in the future. Rather, where prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of other factors: the existence of an underlying policy that is implemented by the rule or norm; the systematic application of the challenged rule or norm; the design, architecture, and structure of the rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future. We find that the Panel erred by requiring "certainty" of future application when examining whether the AFA Norm has "prospective application".

> a. Consequently, we reverse the Panel's findings, in paragraphs 7.479 and 8.1.d.ii of its Report, that China has not demonstrated that the AFA Norm constitutes a norm of general and prospective application.

6.9. In relation to China's request for us to complete the analysis and find that the AFA Norm is a rule or norm of general and prospective application, we consider that the unappealed Panel finding concerning the precise content of the AFA Norm suggests that this norm is a measure of general application because it affects an unidentified number of economic operators. The AFA Norm does not impose any express limitations on economic operators from NME countries that may be included within NME-wide entities subject to the AFA Norm. The connection between the AFA Norm and the Single Rate Presumption also supports the conclusion that the AFA Norm has "general application". This is because the Panel found that the Single Rate Presumption is a measure of

[519] Appellate Body Report, *US – Washing Machines*, para. 5.129.
[520] Appellate Body Report, *US – Washing Machines*, para. 5.130.

general application, and the AFA Norm applies to the same group of economic operators subject to the Single Rate Presumption whenever the economic operators fail to demonstrate an absence of governmental control over their export activities and fail to cooperate in the anti-dumping investigation to the best of their ability. Moreover, the fact that the 73 anti-dumping determinations put on the record by China covered a wide range of products and companies is a further indicator that the AFA Norm has "general application". For these reasons, based on the findings in the Panel Report and undisputed facts on the Panel record, we find that the AFA Norm has "general application".

6.10. In addition, we consider that the Panel's findings concerning the AFA Norm mean that this norm will continue to be applied in the future by the USDOC. The Panel made statements demonstrating that the AFA Norm has "prospective application", namely, that the AFA Norm was consistently and systematically applied by the USDOC over an extended period of time, and that the AFA Norm implements an underlying policy, provides administrative guidance, and creates expectations among economic operators. For these reasons, based on the findings in the Panel Report and our legal analysis, we find that the AFA Norm has "prospective application".

> a. In light of the unappealed Panel findings that the AFA Norm is attributable to the United States[521], and that its content corresponds to the description thereof made by China[522], as well as our conclusions above that the AFA Norm has general and prospective application, we find that the AFA Norm is a rule or norm of general and prospective application that may be challenged "as such" in WTO dispute settlement.

6.11. In relation to China's request for us to complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement, we consider that the general reference by China to Annex II, together with the narrative included in its panel request, provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" consistently with the standard of Article 6.2 of the DSU. The Panel, however, made no findings on whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. In particular, the Panel did not explore the process of reasoning and evaluation undertaken by the USDOC prior to selecting "facts available" to replace missing "necessary information". For an evaluation of the conformity of the AFA Norm with Article 6.8 and Annex II, we would need to examine the process of reasoning and evaluation undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information". In deciding whether we are able to complete the analysis, we have taken into consideration the absence of Panel findings and sufficient undisputed facts on the Panel record, as well as the arguments made by the participants on appeal.

> a. Under these circumstances, we are unable to evaluate the process undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information" with a view to arriving at an accurate determination. Consequently, we do not accede to China's request for completion of the analysis.

6.3 Recommendation

6.12. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, into conformity with those Agreements.

[521] Panel Report, para. 7.456.
[522] Panel Report, para. 7.454.

Signed in the original in Geneva this 11th day of May 2017 by:

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Ujal Singh Bhatia
Presiding Member

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Ricardo Ramírez-Hernández
Member

_____
Shree Baboo Chekitan Servansing
Member

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