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

AB-2016-7

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS471/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICE OF APPEAL

ANNEX A-1

CHINA'S NOTICE OF APPEAL*

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

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1. Pursuant to Article 16.4 and Article 17.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), China hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the Panel Report in *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings involving China* (WT/DS471) ("Panel Report").

2. Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("*Working Procedures*"), China simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

3. For the reasons further elaborated in its submissions to the Appellate Body, China appeals, and requests the Appellate Body to reverse, certain issues of law and legal interpretations developed by the Panel in this dispute. China also requests the Appellate Body to modify certain issues of law and legal interpretations developed by the Panel. China also requests the Appellate Body to complete certain aspects of the analysis and make certain findings.[1]

I Appeal of the Panel's error in interpreting and applying the legal standard under Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* for identifying a relevant pricing pattern and in applying the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*

4. China appeals the Panel's error in interpreting and applying the first of the two pre-conditions under Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* for having recourse to the exceptional weighted average-to-transaction ("W-T") comparison methodology (the "pattern clause"). The pattern clause requires that there be "a pattern of export prices which differ significantly among different purchasers, regions or time periods" (a "relevant pricing pattern"). Specifically, China appeals errors in the manner in which the Panel interpreted and applied the pattern clause in addressing USDOC's use of statistical concepts in determining the existence of a relevant pricing pattern. Because USDOC used statistical tools disconnected from their underlying assumptions and analytical framework for which they were developed, those tools could not satisfy the requirements of the pattern clause.

5. In this regard, China appeals the Panel's rejection of China's arguments regarding two of the four *quantitative* flaws identified by China in the so-called "Nails Test" (namely, the first and the third flaws), which was applied in three challenged determinations.[2]

6. As regards the *first* quantitative flaw identified by China, the Panel erroneously found, in Paragraph 7.67 of the Panel Report, that China had failed to demonstrate that USDOC's application of the so-called "one-standard-deviation" threshold does not succeed in identifying a relevant pricing pattern in those situations in which the export price data are not distributed in a manner

* This notice, dated 18 November 2016, was circulated to Members as document WT/DS471/8.

[1] Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal lists paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of China to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] The findings of the Panel in relation to the three original investigations in which USDOC applied the Nails Test are contained in para. 8.1.a of the Panel Report. The three challenged determinations relate to the original investigations in *Coated Paper*, *OCTG* and *Steel Cylinders*.

that permits the standard deviation tool to render valid conclusions. Consequently, the Panel erroneously found it irrelevant that USDOC did not examine the underlying price distributions.

7. As regards the *third* quantitative flaw identified by China, the Panel erred, in Paragraph 7.84 of the Panel Report, in dismissing China's argument that USDOC's attribution of "significance" to wider price gaps in the "tail" of price distributions compared to price gaps closer to the "mean" amounted to nothing more than confirmation of an inherent characteristic as to the shape of distributions whose existence is implicitly assumed by the test itself, without this ever being confirmed by USDOC.

8. In dismissing China's arguments regarding the first and third quantitative flaws, the Panel also failed to ensure that USDOC's establishment of the facts was proper, and it accepted an evaluation by USDOC of the relevant facts that fell short of being objective and unbiased, contrary to the requirements set out in the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*.

9. Accordingly, China requests that the Appellate Body reverse the Panel's rejection of China's claim under the pattern clause of Article 2.4.2, second sentence, in respect of the *first* quantitative flaw of the Nails Test applied in the three challenged determinations in Paragraphs 7.56-7.67 and 8.1.a.vi of the Panel Report, and in respect of the *third* quantitative flaw of the Nails Test applied in the three challenged determinations in Paragraphs 7.75-7.84 and 8.1.a.vi of the Panel Report.

10. Having reversed the Panel, the Appellate Body should complete the analysis and find that USDOC acted inconsistently with the pattern clause of Article 2.4.2, second sentence of the *Anti-Dumping Agreement* in *OCTG* OI, *Coated Paper* OI, and *Steel Cylinders* OI, by failing to find through an objective and unbiased evaluation of the facts, a pattern of export prices that differ significantly, within the meaning of the pattern clause of Article 2.4.2, second sentence.

II Appeal of the Panel's error in interpreting and applying Article 2.4.2, second sentence, and in applying the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement* as permitting authorities to find relevant pricing patterns on the basis of *average* export prices to purchasers or time periods, instead of *individual* export transaction prices

11. The Panel erred in interpreting the pattern clause in Article 2.4.2, second sentence, when it found that investigating authorities are permitted to find a relevant pricing pattern on the basis of *average* export prices to purchasers or time periods, instead of *individual* export transaction prices. The Panel also erred in its application of this same provision by applying its erroneous interpretation to the facts of the three challenged determinations.

12. The Panel further erred in approving as WTO-consistent a test (applied in the three challenged determinations) that biased the outcome by systematically increasing the likelihood of finding a relevant pricing pattern, contrary to the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement.*

13. Accordingly, China requests that the Appellate Body reverse the Panel's finding in Paragraphs 7.115-7.128 and 8.1.a.ix of the Panel Report that USDOC did not act inconsistently with the pattern clause of Article 2.4.2, second sentence, in the three challenged determinations, by finding a relevant pricing pattern on the basis of average export prices to purchasers or time periods, as opposed to individual export prices.

14. Having reversed the Panel, the Appellate Body should complete the analysis and find that USDOC acted inconsistently with Article 2.4.2, second sentence, by finding a relevant pricing pattern on the basis of purchaser or time period averages, as opposed to individual export transaction prices.

III Appeal of the Panel's error 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"

15. China appeals the Panel's interpretation underlying its finding that USDOC has not acted inconsistently with Article 2.4.2, second sentence, in the three challenged determinations because USDOC wrongly concluded, on the sole basis of numerical (quantitative) differences, that the observed export prices formed relevant pricing patterns.

16. Investigating authorities must consider qualitative factors when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among customers, regions or time periods. The Panel failed to recognize that qualitative factors are objective market factors, such as seasonality or market-driven fluctuations in the costs of production. The Panel further failed to recognize that investigating authorities have an obligation to examine these qualitative factors on their own initiative as part of the applicable legal standard under Article 2.4.2, i.e., regardless whether evidence has been provided by interested parties.

17. China therefore requests that the Appellate Body modify the Panel's interpretation of Article 2.4.2, second sentence, spelt out in Paragraphs 7.105-7.114 of the Panel Report, and find that, although investigating authorities are not required to consider the *subjective* cause of (or the *subjective* reasons for) the observed export price differences, they must consider relevant *objective* market factors (i.e., the relevant *objective* causes of the observed export price differences) when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among customers, regions or time periods.

18. China also requests that the Appellate Body find that the qualitative factors thus to be considered are objective market factors, including, *inter alia*, objective factors such as seasonality or market-driven fluctuations in the costs of production.

19. Finally, China requests that the Appellate Body find that an investigating authority has an obligation to examine these qualitative factors on its own initiative as part of the applicable legal standard under Article 2.4.2, i.e., regardless whether evidence has been provided to the authority by interested parties.

20. Accordingly, China requests that the Appellate Body reverse the Panel's rejection in Paragraphs 7.105-7.114 and 8.1.a.viii of the Panel Report of China's claim under Article 2.4.2, second sentence, as regards USDOC's failure to consider relevant qualitative factors prior to finding the existence of a relevant pricing pattern in the three challenged determinations.

IV Appeal of the Panel's interpretation of Article 2.4.2 of the *Anti-Dumping Agreement* as permitting the combination of different comparison methodologies

21. China appeals the Panel's interpretation in the statement in footnote 385 of the Panel Report that "it may be necessary, in order to give full meaning to the second sentence of Article 2.4.2, not to let {…} negative dumping {found outside of a pattern} offset the dumping found within the pattern". This interpretation is erroneous because it is premised on the understanding that an investigating authority may conduct separate comparisons for "pattern transactions" under the W-T comparison methodology and for "non-pattern transaction" under the W-W or T-T comparison methodology, and then combine the two into a single margin of dumping for the exporter and the product as a whole. In *US – Washing Machines*, the Appellate Body recently concluded that Article 2.4.2 does not permit the combining of different comparison methodologies.[3]

22. Accordingly, 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.

V Appeal of the Panel's finding that the AFA Norm is a measure without prospective application and requests to complete the analysis

23. The Panel found that China had not demonstrated the prospective application of the measure defined in paragraph 2.4 of its Report as the "AFA Norm", and therefore concluded that

[3] See Appellate Body Report, *US – Washing Machines*, para. 5.124.

China had not demonstrated that the AFA Norm constitutes a "measure" in the form of a rule or norm of general and prospective application that could be challenged in WTO dispute settlement.

24. In so finding, the Panel erred in its interpretation and application of the term "measure" under Articles 3.3 and 6.2 of the DSU. The Panel erred in articulating the legal standard for establishing that an alleged rule or norm is a "measure" under these provisions, in particular that the alleged rule or norm has prospective application. The Panel also erred in applying the relevant legal standard in concluding that the AFA Norm is not a "measure" in the form of a rule or norm with general and prospective application.

25. Accordingly, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.457-7.479 and 8.1.d.ii of the Panel Report in this regard. If, as requested, the Appellate Body reverses the Panel's findings that the AFA Norm does not have prospective application, then China requests the Appellate Body to complete the analysis and find that:

- the AFA Norm has general and prospective application, and, therefore, is a rule or norm of general and prospective application that may be challenged by China as a "measure" under Articles 3.3 and 6.2 of the DSU; and,

- the AFA Norm is inconsistent with Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*.

VI Conditional appeals in relation to the Panel's exercise of judicial economy with respect to certain claims and conditional requests to complete the analysis

26. The Panel exercised judicial economy with respect to China's claims under Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement* in relation to 30 challenged determinations.[4]

27. If the Appellate Body reverses the Panel's findings under Article 6.10 and/or Article 9.2 in relation to one or more of the 30 challenged determinations in which USDOC determined a margin for the PRC-wide entity,[5] China requests that the Appellate Body take the following action in relation to each challenged determination for which the Panel's findings under Article 6.10 and/or Article 9.2 have been reversed.

28. If the condition described in paragraph 27 above is met, the Panel's exercise of judicial economy:

- is inconsistent with the requirement to make an objective assessment of the matter under Article 11 of the DSU;

- fails to contribute to prompt settlement of the dispute under Article 3.3 of the DSU; and

- frustrates the ability of the parties to find a positive solution to the dispute, contrary to Article 3.7 of the DSU.

[4] The relevant analysis and conclusions of the Panel are contained in paras. 7.480-7.508 and 8.1.d.iii of the Panel Report.

[5] The findings of the Panel in relation to the application of the Single Rate Presumption in certain USDOC determinations are contained in paras. 7.369-7.382, 7.388, and 8.1.c.iii of the Panel Report. These findings pertain to 38 challenged determinations, including eight determinations in which USDOC did not determine a rate for the PRC-wide entity. A list of the 38 determinations subject to findings in relation to the application of the Single Rate Presumption, as well as a list of the 30 challenged determination in which USDOC determined a margin for the PRC-wide entity, are set forth in footnote 956 to para. 7.480 of the Panel Report.

29. Accordingly, if the condition is met, the Appellate Body should, for each such determination:

- reverse the Panel's exercise of judicial economy, reflected in paragraphs 7.486, 7.499 and 8.1.d.iii of the Panel Report, with respect to China's claims under Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7); and,

- complete the analysis of China's claims under Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*.

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ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF CHINA'S APPELLANT'S SUBMISSION

1. This dispute concerns important aspects of the US anti-dumping regime. One aspect involves the use, by the United States Department of Commerce ("USDOC"), of certain practices to address so-called "targeted dumping". The other concerns several elements of USDOC's treatment of China as a non-market economy ("NME") country. Although the Panel rightly upheld many of China's claims, it also dismissed some of them. In so doing, the Panel committed errors of law. In the following, China provides a brief overview of the issues subject to this appeal.

A. Appeal of the Panel's error in interpreting and applying the legal standard under Article 2.4.2, second sentence of the *Anti-Dumping Agreement* for identifying a relevant pricing pattern and in applying the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*

2. Article 2.4.2, second sentence, identifies two pre-conditions for departing from the normal weighted average-to-weighted average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies. *First*, under what the Panel referred to as "the pattern clause", there must be "a pattern of export prices which differ significantly among different purchasers, regions or time periods" (hereinafter referred to as "relevant pricing pattern"). Once a relevant pricing pattern has been identified, an investigating authority must satisfy the *second* pre-condition and explain why the pattern "cannot be taken into account appropriately" through the application of the symmetrical comparison methodologies.

3. China's appeal focuses on the first of these pre-conditions. China appeals the Panel's error in failing to develop and apply a proper legal standard that implements the obligations imposed on investigating authorities when seeking to identify a relevant pricing pattern under Article 2.4.2, second sentence. To the extent that an investigating authority relies on certain tools (whether statistical or otherwise) for the purpose of identifying a relevant pricing pattern, if the assumptions/principles underlying a given tool are not satisfied and its limitations are not recognized, the tool cannot perform as contemplated and the results it generates will likely be random (or arbitrary). Applied to the current appeal, the use of statistical tools disconnected from their underlying assumptions and from the analytical framework for which they were developed results in the inability of those tools to satisfy the pattern clause of Article 2.4.2, second sentence. They do not allow an unbiased and objective evaluation of the facts, in the sense of Article 17.6(i) of the *Anti-Dumping Agreement*.

4. Before the Panel, China advanced four sets of arguments to demonstrate that USDOC used its chosen tools in an arbitrary, biased and non-objective manner and that it therefore failed to find relevant pricing patterns under Article 2.4.2, second sentence, in the 3 challenged determinations.[1] The Panel's rejection of China's position as to two of the flaws was a consequence of fundamental errors in the Panel's analysis.

5. *First*, the Panel found that China had not demonstrated that USDOC's application of the Nails Test fails to identify a relevant pricing pattern if the export price observations are not distributed in a specific manner; consequently, it found that the undisputed fact that USDOC did not examine the underlying price distributions was irrelevant. This finding by the Panel is in error. In order for the Nails Test to be capable of producing valid conclusions with respect to the existence of a relevant pricing pattern, USDOC would first have had to examine the underlying price distributions. This is due to the fact that a test involving the concept of "standard deviation" does not allow an authority to draw valid conclusions about a distribution of data unless those data form a "normal" distribution – or at least a single-peaked, symmetrical distribution with tails. Lacking the prerequisite examination, the Nails Test applied in the 3 challenged determinations was necessarily arbitrary, and incapable of identifying a relevant pricing pattern in an objective and unbiased manner.

[1] The 3 challenged determinations are: *OCTG* OI, *Coated Paper* OI and *Steel Cylinders* OI.

6. *Second*, and directly related, the Panel was equally wrong to dismiss China's argument that USDOC's attribution of "significance" to wider price gaps in the "tail" of price distributions compared to price gaps closer to the "mean" amounted to nothing more than confirmation of an inherent characteristic of the type of distributions whose existence was implicitly assumed by the Nails Test applied in the 3 challenged determinations. In other words, USDOC's methodology found *significance* in a definitional feature of the very sort of distribution whose existence was assumed, without the accuracy of this assumption ever being verified by USDOC. As a consequence, USDOC's failure to test the databases to determine if the data were "normally" distributed or had tails to the left of the mean, means that USDOC's conclusions as to the existence of a relevant pricing pattern in every case were random (or arbitrary) and therefore inconsistent with Article 2.4.2, second sentence.

7. Accordingly, the Appellate Body should reverse the Panel's rejection of China's claim under the pattern clause of Article 2.4.2. in respect of the *first* and *third* quantitative flaw of the Nails Test applied in the 3 challenged determinations. Having reversed the Panel, the Appellate Body should complete the analysis and find that USDOC acted inconsistently with Article 2.4.2 in *OCTG* OI, *Coated Paper* OI, and *Steel Cylinders* OI, by failing to find, through an objective and unbiased evaluation of the facts, a pattern of export prices that differ significantly, within the meaning of the pattern clause of Article 2.4.2, second sentence.

B. Appeal of the Panel's error in interpreting and applying Article 2.4.2, second sentence, and in applying the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement* as permitting authorities to find relevant pricing patterns on the basis of *average* export prices to purchasers or time periods, instead of *individual* export transaction prices

8. China appeals the Panel's finding that USDOC did not act inconsistently with the pattern clause of Article 2.4.2, second sentence, in the 3 challenged determinations by finding the relevant pricing pattern on the basis of *average* export prices to purchasers or time periods, as opposed to *individual* export transaction prices. In this regard, China appeals both the Panel's interpretation and its application of the legal standard when reviewing USDOC's determinations in the 3 challenged determinations.

9. The Panel erred in interpreting the pattern clause in Article 2.4.2, second sentence, when it found that investigating authorities are permitted to find a relevant pricing pattern on the basis of purchaser or time period *averages*, instead of *individual* export transaction prices. Contrary to the Panel's findings, the focus of Article 2.4.2 is on the "individual export prices" that may be compared with a weighted-average normal value under the weighted average-to-transaction ("W-T") comparison methodology. A coherent and holistic interpretation of the treaty text compels the conclusion that these "individual export prices" must be examined to determine whether they form a relevant pricing pattern, before an authority may resort to the exceptional W-T comparison methodology authorized in the second sentence of Article 2.4.2.

10. In addition, determining the presence of a relevant pricing pattern based on averages instead of individual export prices is inherently biased towards finding such a pattern, and hence 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*.

11. Accordingly, the Appellate Body should reverse the Panel's finding that USDOC did not act inconsistently with the pattern clause of Article 2.4.2, second sentence, in the 3 challenged determinations by finding the relevant pattern on the basis of purchaser or time period averages as opposed to individual export transaction prices. Consequently, the Appellate Body should complete the analysis and find that USDOC acted inconsistently with Article 2.4.2, second sentence, by finding a relevant pricing pattern on the basis of purchaser or time period averages, as opposed to individual export transaction prices.

C. Appeal of the Panel's error 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"

12. China appeals the Panel's interpretation underlying its finding that USDOC has not acted inconsistently with Article 2.4.2 in the 3 challenged determinations because of USDOC's failure to assess whether the observed export prices differed significantly in a *qualitative* sense.

13. China considers that the Panel's interpretation underlying its finding is in error. Investigating authorities must consider qualitative factors when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among customers, regions or time periods. 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. 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.

14. The Appellate Body should modify the Panel's interpretation of Article 2.4.2, second sentence, and find that, although investigating authorities are not required to consider the *subjective* cause of *(*or the *subjective* reasons for*)* the observed export price differences, they must consider relevant *objective* mar*ket factor*s (i.e., *objective* cau*ses of* the observed export price differences) when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among customers, regions or time periods.

15. The Appellate Body should, therefore, find that the qualitative factors thus to be considered are objective market factors, including, *inter alia*, objective factors such as seasonality and declining costs of production. The Appellate Body should also find that an investigating authority has an obligation to examine these qualitative factors on its own initiative, i.e., regardless whether evidence has been provided to the authority by interested parties.

16. Accordingly, the Appellate Body should reverse the Panel's rejection of China's claim under Article 2.4.2, second sentence, as regards USDOC's failure to consider relevant qualitative factors prior to finding the existence of a relevant pricing pattern in the 3 challenged determinations.

D. Appeal of the Panel's interpretation of Article 2.4.2 of the *Anti-Dumping Agreement* as permitting the combination of different comparison methodologies

17. China appeals the Panel's interpretation in the statement in footnote 385 of the Panel Report that "it may be necessary, in order to give full meaning to the second sentence of Article 2.4.2, not to let {…} negative dumping {found outside of a pattern} offset the dumping found within the pattern". This interpretation is erroneous because it is premised on the understanding that an investigating authority may conduct separate comparisons for "pattern transactions" under the W-T comparison methodology and for "non-pattern transaction" under the W-W or T-T comparison methodology, and then combine the two into a single margin of dumping for the exporter and the product as a whole. In *US – Washing Machines*, the Appellate Body recently concluded that Article 2.4.2 does not permit the combining of different comparison methodologies.

18. Accordingly, 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.

E. Appeal relating to the Panel's finding that the AFA Norm is not a rule or norm of general and prospective application

19. The Panel found that the Adverse Facts Available Norm ("AFA Norm") was a measure attributable to the United States. The Panel also found that China had shown that the AFA Norm has the following precise content:

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

1. The Panel's findings

20. The Panel found that the AFA Norm is a "measure" under WTO law because it has *precise content* in terms of USDOC's regulatory conduct and it is *attributable* to the United States. Thus, the AFA Norm is an act of the United States involving conduct defined with precision.

21. However, the Panel found that this measure does not entail *future* conduct because, it said, there is no "certainty" that USDOC would apply the measure in future cases. On this basis, the Panel found that the AFA Norm has no *prospective* application. Hence, it held that the AFA Norm is not susceptible of challenge in WTO dispute settlement as a "measure" in the form of a rule or norm with general and prospective application.

22. In reaching this conclusion, the Panel erred in its legal characterization of the AFA Norm as a "measure" (interpretation and application) under Articles 3.3 and 6.2 of the DSU. The Panel erred in articulating the legal standard for establishing that an alleged rule or norm is a "measure" under these provisions, in particular that the alleged rule or norm has prospective application; and, it erred in applying the legal standard in concluding that the AFA Norm is not a "measure" in the form of a rule or norm with general and prospective application.

23. The Panel's erroneous conclusion appears to be based on a misunderstanding that the Appellate Body requires an elevated legal standard – described by the Panel as "certainty" – to establish the future application of an unwritten rule or norm as compared with the legal standard established for showing the future application of other categories of unwritten measure, such as "ongoing conduct" and "systemic and continued application". The Panel may also have wrongly considered that, in the case of written measures, certainty of future application is required.

24. In China's submission, the Appellate Body's case law shows that the legal standard for proving the future application of a measure is not "certainty", whether the measure is written or unwritten. Indeed, establishing future events with certainty is impossible.

25. In past disputes, the United States has routinely argued that the alleged future application an unwritten measure – such as zeroing or the Single Rate Presumption – is uncertain, because the USDOC always has the discretion to act differently in the future. It argues that complainants are, therefore, speculating about what the USDOC might do in the future and not establishing what it will do.

26. The United States made similar arguments in this dispute – the USDOC has the discretion to vary its use of facts available against NME-wide entities; and, it is not bound to act in the future as it has done in the past, even if the conduct in question "may be predicted to be repeated in the future".[2]

27. In previous disputes, the Appellate Body has rejected any arguments in favor of a legal standard of certainty. Instead, it has consistently found prospective application when the USDOC has resorted to the conduct in question in a consistent, standard, systematic, and invariable way.

28. In this dispute, the Panel took a different path, accepting the United States' arguments.

[2] US First Written Submission, para. 408.

29. Starting with its factual findings, the Panel found that the USDOC has resorted to the conduct under the AFA Norm in an *invariable, consistent, standard and systematic* way. In fact, despite two invitations, the United States was unable to show a *single* instance, stretching over a 12-year period, in which the USDOC did not rely on the AFA Norm, when the trigger condition for its application had been satisfied. The Panel also found that the USDOC resorted to the AFA Norm with a *future-oriented "purpose*", namely, to "induce" respondents to cooperate in providing information and to deter them from non-cooperation. In particular, the AFA Norm encouraged cooperation because, as the Department put it, importers were "knowing of the rule": namely, if they did not cooperate, they would be subject to adverse facts.[3]

30. Remarkably, despite these findings, the Panel found that the AFA Norm does not have future application. The Panel referred to the Appellate Body's findings in *Argentina – Import Measures*, a report issued by the Appellate Body long after the consultations request in this dispute was filed.[4] In the *Argentina* dispute, the Appellate Body *upheld* the panel's findings that an unwritten measure simultaneously fell into two categories: rule or norm, and a measure of systematic and continuing application. However, in *obiter dicta*, the Appellate Body cast doubt on the panel's finding that the measure was a rule or norm, and cautioned panels to be attentive to the differences between a rule or norm and a measure of systematic and continued application. The Appellate Body did not elaborate on those differences.

31. The Panel read the Appellate Body's *obiter* remarks to mean that a *higher* legal standard is required to show future application of a rule or norm than is required for other categories of unwritten measure. The Panel recalled several times the Appellate Body's words that an unwritten rule or norm must display the "*requisite*" or "*necessary level* of security and predictability of continuation into the future typically associated with rules or norms". The critical question is: *what is this "requisite"* or *"necessary level"?* The Panel's answer comes at the very end of its reasoning: the "necessary level" is "certainty" that the AFA Norm will be applied in future.[5] Absent such certainty, the Panel declined to find that the AFA Norm has prospective application.

32. The Panel erred in requiring "certainty" that conduct will continue into the future. Panels and the Appellate Body have consistently rejected such a standard, both with respect to written and unwritten measures. Indeed, a requirement of certainty would be impossible to meet because the future can never be proved with certainty.

2. Future application of written measures need not be certain

33. In US – *Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews* the complainants challenged a written instrument setting forth policy on sunset reviews ("Sunset Policy Bulletin" or "SPB"). A question arose whether the SPB was a measure that could be challenged in WTO dispute settlement.

34. The United States argued that that because "Commerce is entirely free to depart from the SPB at any time, it cannot be concluded that the SPB has "general and prospective application".[6] It said that the SPB was merely "guidance" for the "likely" conduct of future sunset reviews, but "in no way binds Commerce as a 'rule' or norm'".[7]

35. Citing to the unappealed panel report in *US – Steel Plate*,[8] it said that the "'future practice' of a Member simply cannot be regarded as a 'measure' .. because it is purely *speculative*".[9] It referred to future conduct pursuant to the SPB as "as applied" "measures 'that may *possibly* be taken in the future'".[10]

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[3] Panel Report, para. 7.446.
[4] 3 December 2013, WT/DS471/1.
[5] Panel Report, para. 7.476.
[6] US Appellant's Submission, *US – Oil Country Tubular Goods Sunset Reviews*, para. 13.
[7] US Appellant's Submission, *US – Oil Country Tubular Goods Sunset Reviews*, para. 13; US Appellee's Submission, *US – Corrosion-Resistant Steel Sunset Review*, paras. 53 and 59; US response to Panel Question 80, *US – Corrosion-Resistant Steel Sunset Review*, para. 13.
[8] See, e.g., US Appellee's Submission, *US – Corrosion-Resistant Steel Sunset Review*, para. 57.
[9] US response to Panel Question 6, *US – Corrosion-Resistant Steel Sunset Review*, para. 11; US Appellee's Submission, *US – Corrosion-Resistant Steel Sunset Review*, para. 58.
[10] US response to Panel Question 6, *US – Corrosion-Resistant Steel Sunset Review*, para. 11.

36. The panel in *US – Corrosion-Resistant Steel Sunset Review* accepted this argument, concluding that a non-binding instrument could not be challenged, even if it set forth "*guidance*" for future conduct and even if future conduct could be "*predicted*".[11]

37. Nonetheless, the Appellate Body rejected the US argument regarding the need for binding character in both disputes. In *US – Oil Country Tubular Goods Sunset Reviews*, it said that "the SPB has *normative* value, as it provides *administrative guidance* and *creates expectations* among the public and among private actors".[12] It held that the SPB had general and prospective application, even if certainty of future application could, of course, never be assured.

3. Future application of unwritten measures need not be certain

38. Building on these principles, the case law on unwritten measures has developed piecemeal over the past ten years. The first category of unwritten measures was "rules or norms with general and prospective application", which was recognized in *US – Zeroing (EC)*. Since that dispute, unwritten rules or norms have been found in a number of subsequent cases. In making findings about these unwritten measures, panels and the Appellate Body have demanded that complainants meet a high standard; however, they have never required the impossible from complainants, namely, establishing with certainty that conduct will continue into the future.

39. In fact, a review of the cases shows that panels and the Appellate Body have applied a high degree of consistency, both in articulating the legal standard for establishing the existence of rules or norms and in assessing the factual indicators that show that a rule or norm has general and prospective application.

40. The Appellate Body's consistency of approach has contributed to ensuring security and predictability for Members in bringing new disputes.

41. As the last decade has passed, the Appellate Body has, from time-to-time, recognized new categories of unwritten measure, always in response to the manner in which complainants have framed claims. The category of "ongoing conduct" was introduced in *US – Continued Zeroing*, and that category was developed in other cases. Most recently, in *Argentina – Import Measures*, the Appellate Body added the category of "systematic and continuing application".

42. The Appellate Body has said that these categories – which do not reflect treaty language – are simply "heuristic device{s}"[13] that facilitate organization of the concept of a "measure", which is treaty language.

43. With the proliferation of these "heuristic" categories, questions naturally arise as to whether there are substantive differences between the categories and, if so, what these substantive differences are.

44. Given that the categories of unwritten measure flow simply from the way complainants have chosen to frame claims, it cannot be assumed that substantive differences do exist. A scheme of unwritten measures that was ultimately developed piecemeal by a handful of complainants, framing different claims, under different agreements, cannot be regarded as possessing the precision of defined treaty-based categories. Indeed, in a scheme driven by a complainant's choices in framing claims, there will likely be *substantive overlaps* between different categories: different complainants may use different labels to describe unwritten measures with shared characteristics.

45. Thus, just as the Appellate Body has cautioned that panels must be attentive to the differences between different categories of unwritten measure, China submits that they should also be attentive to similarities between them.

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[11] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.121, 7.122, 7.125, 7.127, 7.137, and 7.138.

[12] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[13] Appellate Body Report, *US – Continued Zeroing*, para. 179.

4. The Panel erred in requiring certainty of future application

46. The Panel in this dispute entered into this juristic debate about the similarities and differences between categories of unwritten measure. Citing to the Appellate Body's *obiter dictum* in *Argentina – Import Measures*, the Panel sought to create a bright line between the category of rules and norms, on the one hand, and the category of systematic and continuing application, on the other hand. In particular, the Panel seems to have elevated the legal standard for establishing the future application of a rule or norm to "certainty"[14] in order to ensure a difference with the standard to establish the future application of a measure with systematic and continuing application. The Panel stated 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'".[15]

47. Although the Appellate Body has cautioned panels to be attentive to differences between heuristic categories, it has never suggested that the future application of a rule or norm must be established with "certainty".

48. The elevated legal standard applied by the Panel is at odds with the legal standard consistently applied in earlier cases on rules and norms, both written and unwritten. It is also higher than the standard articulated by the Panel itself when addressing the Single Rate Presumption, which it found to be a rule or norm. Further, a legal standard of certainty has been consistently rejected in several previous cases dealing with unwritten measures that entail future conduct.

49. In this appeal, rather than present its arguments on the proper legal standard on a piecemeal basis, China offers a holistic assessment of the different categories of unwritten measures that entail future conduct. China describes the categories that have been substantively addressed in the disputes, highlighting differences and similarities between them. China shows that the legal standard for establishing the prospective application of a rule or norm (or, indeed, any other unwritten measure) does not require "certainty" of future application.

5. The Panel erred in its application of the legal standard

50. In addition to its erroneous articulation of the legal standard, the Panel also erred in its application of the law to the facts. When addressing unwritten measures that entail future conduct, panels and the Appellate Body have consistently relied on very similar factual indicators to conclude that unwritten measures entailed future conduct. In its factual findings, the Panel found that the AFA Norm possessed *all* of the indicia of prospective application that have supported past findings of prospective application. Yet, the Panel nonetheless concluded that the AFA Norm does not have prospective application. In so doing, the Panel erred.

6. Conclusion

51. As a result of these errors, China requests that the Appellate Body reverse the Panel's finding that the AFA Norm does not have prospective application. If the Appellate Body reverses the Panel's finding that the AFA Norm does not have prospective application, then the Appellate Body should complete the analysis and find that the AFA Norm has prospective application. It should also complete the analysis and find that the AFA Norm has *general* application because it applies to an undefined number of economic operators 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. The Appellate Body should conclude, therefore that the AFA Norm is a rule or norm of general and prospective application that may be challenged by China as a "measure" under Articles 3.3 and 6.2 of the DSU.

[14] Panel Report, para. 7.476.

[15] Panel Report, para. 7.457, referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.182.

F. Appeal relating to the inconsistency of the AFA Norm with Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*

52. The Appellate Body should complete the legal analysis and find that the AFA Norm is inconsistent with Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*.

53. The precise content of the AFA Norm is such that *whenever* USDOC deems an NME-wide entity to be non-cooperative, it *systematically* responds in a specific manner. The legal issue, therefore, is whether Article 6.8 and Annex II(7) permit an authority to *systematically* make adverse inferences and select adverse facts whenever it determines that an NME-wide entity is non-cooperative. In China's view, these provisions do not permit an authority to act in such a manner.

54. Article 6.8 and Annex II(7) require an authority to use "special circumspection" in order to select the "best" (i.e., the most fitting and appropriate) information available in the particular circumstances. A process involving "special circumspection" requires critical consideration of *all* facts and circumstances that may be relevant in *each* particular case. This means that a process that *systematically* results in the same outcome whenever a single specific circumstance occurs – as the Panel found was the case with AFA Norm – is not consistent with the requirement of "special circumspection". Systematically responding in the same way whenever a particular circumstance arises, does not involve an active approach to evaluating, reasoning and explaining in light of *all* relevant circumstances which facts are the *best* information available. Thus, when USDOC *systematically* draws an adverse inference and selects adverse facts to determine the margin for an NME-wide entity under the AFA Norm, it fails to accord with the requirements of Article 6.8 and Annex II(7).

55. The WTO-inconsistency of a norm providing for the *systematic* making of adverse inferences and selection of adverse facts, such as the AFA Norm, can be illustrated by the manner in which the AFA Norm causes USDOC to overlook particular circumstances. Circumstances, such as a failure by USDOC to request the necessary information, presumed non-cooperation, and the fact that NME-wide entities are a legal fiction must all be taken into account in the exercise of "special circumspection" under Article 6.8 and Annex II(7). However, these relevant circumstances are not considered when USDOC *systematically* draws adverse inferences and selects adverse facts to determine the rate for the NME-wide entity.

56. Accordingly, the Appellate Body should complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*.

G. Conditional appeal of the Panel's exercise of judicial economy and request to complete the analysis relating to the inconsistency of 30 challenged determinations with Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*

57. China conditionally appeals the Panel's exercise of judicial economy and requests the Appellate Body to complete the analysis of the inconsistency of 30 challenged determinations with Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement.* The Appellate Body need only consider these appeals in relation to any determinations for which the Panel's findings of violation under Articles 6.10 and/or 9.2 are reversed.

58. There is a sufficient basis in the record to complete the analysis of each of these claims in relation to any of the 30 determinations, which represent the challenged determinations in which USDOC determined a margin for the PRC-wide entity.

59. Claim under Article 6.1: USDOC acted inconsistently with Article 6.1 in all 30 determinations, because it failed to give notice to the producers/exporters included within the PRC-wide entity of the information required from them in order to calculate a margin of dumping. USDOC thereby denied the interested parties ample opportunity to present relevant evidence. Facts show that in *none* of the relevant determinations did USDOC give notice of all of the information which it required.

60. The Appellate Body should complete the analysis and find that USDOC failed to act consistently with Article 6.1 of the *Anti-Dumping Agreement*.

61. Claim under Article 6.8 and Annex II(1): USDOC acted inconsistently with Article 6.8 and Annex II(1) in all 30 determinations because it resorted to facts available without having requested the information necessary to calculate a margin for the PRC-wide entity and the producers/exporters included within it. Facts show that, in all 30 determinations, USDOC resorted to facts available in determining the margin for the PRC-wide entity without having specified in detail the information required from producers/exporters included within the PRC-wide entity.

62. The Appellate Body should complete the analysis and find that USDOC failed to act consistently with Article 6.8 and Annex II (1) of the *Anti-Dumping Agreement*.

63. Claim under Article 6.8 and Annex II(7): USDOC violated Article 6.8 and Annex II(7) in all 30 determinations through its selection of facts available from secondary sources in a manner that does not comport with the requirements of these provisions.

64. Facts show that, in 20 of these determinations, USDOC explicitly selected *adverse* facts available to determine the respective margins for the PRC-wide entity (ranging from 25.62 to 249.96 percent) in a manner reflective of the WTO-inconsistent AFA Norm described above; and in so doing failed to exercise the "special circumspection" required. In each of these 20 challenged determinations, USDOC made an explicit finding of non-cooperation, thereby triggering an adverse inference. In doing so, in each case USDOC overlooked particular circumstances which rendered its drawing of adverse inferences unreasonable.

65. In 9 further determinations in the group of 30 determinations, USDOC in substance applied "facts available" when it determined the respective margins (ranging from 58.84 to 247.65 percent) by pulling forward facts available from a previous phase of the proceedings to determine the margin for the PRC-wide entity. In doing so, USDOC undertook a process that involved no exercise of circumspection whatsoever, let alone the high degree of circumspection inherent in the requirement of "special circumspection" under Article 6.8 and Annex II(7).

66. In the remaining determination, USDOC determined the margin of 105.31 percent explicitly on the basis of facts available to. However, it took no steps to exercise special circumspection in selecting information on (i) the composition of the People's Republic of China ("PRC-wide entity") and (ii) the level of dumping by producers/exporters included in the PRC-wide entity, other than the fully cooperating "mandatory respondent", Double Coin, which had a *de minimis* margin.

67. The Appellate Body should complete the analysis and find that USDOC failed to act consistently with Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*.

ANNEX B-2

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION[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 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

[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 2,146 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 21,480 words (including footnotes).

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.

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ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil's main systemic concerns relate to aspects of the Nails Test and the use of "Adverse Facts Available" (AFA). It considers that two aspects of the Nails Test performed by the United States Department of Commerce ("USDOC") fail to be unbiased and objective, as required by the Anti-dumping Agreement. The first aspect is the use of average export prices to calculate the standard deviation during the standard deviation test. The USDOC, in order to calculate the standard deviation, uses the weighted-average export prices instead of the individual export prices of each transaction, which leads to a smaller standard deviation, and, therefore, to a decrease in the threshold of this stage of the Test.

2. The second aspect of the Nails Test that Brazil challenges is the "third quantitative flaw", because, in statistical terms, when prices are normally distributed, the target price gap would expectedly be wider than the weighted-average gap among non-targets. This is an inherent characteristic of this kind of distribution of prices, which may also be observed in other types of price distribution as well.

3. Brazil considers that the legal standard set by the Panel to evaluate the prospective application of the AFA Norm ("certainty") should be seen in light of the Appellate Body's previous jurisprudence, in the sense that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[1].

[1] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 81.

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION[1]

1. Canada's submission demonstrates that the U.S. *Nails Test* does not use a proper quantitative methodology to identify a pattern of export prices which differ significantly and fails to include a qualitative analysis in assessing whether price differences are significant. As a result, the Panel erred in finding that these aspects of the *Nails Test* were consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement.

2. Canada demonstrates that the *Nails Test* fails to properly identify a pattern of prices which differ significantly because it may identify such a pattern even where none exists. To illustrate this, Canada provides an example using the same methodology used in the U.S. Appellee Submission with numbers that reflect minute random price variations. In that example, the USDOC would find that a pattern of prices which differ significantly exists even though there is merely a nominal or marginal difference in the prices.

3. Canada shows that the *Nails Test* also fails to properly identify a pattern of export prices which differ significantly because of flaws caused by the use of weighted average prices in the "standard deviation test", which ensures that the data points will be more concentrated around the mean and results in a smaller standard deviation. This makes it more likely that any set of transactions will satisfy the requirements of the "standard deviation test" even though the individual transactions may not represent a pattern of low prices.

4. Finally, Canada establishes that the USDOC does not perform any qualitative analysis in determining whether export prices differ significantly, contrary to the Appellate Body's finding in *US – Washing Machines*.

[1] Canada's Third-Participant Submission consists of 3553 words. This Executive Summary consists of 318 words.

ANNEX C-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

A. CHINA'S APPEAL ON THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

1. First, with regard to the **USDOC's methodology for identifying a pattern of export prices which differ significantly**, the European Union ("EU") does not consider that the "pattern clause" in the second sentence of Article 2.4.2 imposes a particular type of methodology for identifying "pattern" and the "significance" of the price differences as part of its legal standard. The second sentence of Article 2.4.2 does not require that statistical tools must *necessarily* be used. Hence, the EU does not consider that the Panel has erred in the *interpretation* of the second sentence of Article 2.4.2.

2. To the extent that it can be derived from the "exceptional" nature of the W-T comparison methodology that an investigating authority must apply the W-T methodology with particular circumspect and "rigor", the EU considers that this concerns the Panel's *application* of the second sentence of Article 2.4.2 to the facts of this case. It is thus for China to demonstrate that the Panel erred in its consideration of China's factual arguments pertaining to the lack of rigor in USDOC's application of the "Nails Test" to identify a "pattern" of "significant" price differences. The EU notes that, to the extent that USDOC's use of the "one-standard-deviation" threshold in the "Nails Test" would risk, in certain cases, to "over-identify" the existence of a pattern of prices which differ significantly, this risk may be mitigated by the fact that the Appellate Body found that "zeroing" is not permitted in applying the W-T comparison methodology to all the transactions in the sub-set (purchaser, region, time) constituting the pattern.

3. Article 17.6 of the AD Agreement sets out the standard of review for panels in anti-dumping disputes. A panel must examine whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations. The Appellate Body has stressed that this standard of review is also relevant for determining whether or not a given anti-dumping investigation has been conducted in a WTO-consistent manner. China must persuade the Appellate Body, with sufficiently compelling reasons, that the Appellate Body should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts.

4. Next, with regard to **USDOC's reliance on average export prices** to find relevant pricing patterns, the EU recalls it does not consider that the second sentence of Article 2.4.2 imposes a mandatory method for determining the existence of a "pattern". Yet, this method must meet the required rigor under Article 2.4.2. In practice, and depending on the facts of an investigation, when determining the existence of a "pattern" for the purpose of the second sentence of Article 2.4.2, it may be very difficult for an investigating authority to examine a very large number of individual transaction prices and, inevitably, a practical approach must be found. In light of the large number of individual transactions, such practical approach may indeed involve the examination of average export prices. Furthermore, with respect to China's "parallelism" argument, this would appear to the EU to work in reverse: in the second step, since no zeroing is permitted within the sub-set, that is tantamount to working with a weighted average; suggesting that, from the point of view of "parallelism", there is nothing wrong with also working with averages in the first step (the determination of whether or not there is a pattern).

5. In order for China to establish a violation of Article 17.6(i), it must demonstrate that, in the particular investigations at stake, USDOC's reliance on average transaction prices would be biased and lack objectivity. If the investigation concerns a very large number of individual transaction prices, inevitably, the EU considers that a practical approach must be found and the use of averages would not be improper, biased or lack objectivity.

6. Further, with regard to China's claim that USDOC should have examined **other objective market factors**, such as seasonality and market-driven decline in costs of production, the EU Notes that the Appellate Body in *US – Washing Machines* has stressed that 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" or "mask" dumping. The underlying cause of the price difference is not relevant to the potential significance of the difference. Issues like the seasonality and the market-driven decline in production costs do not constitute such objective factors that determine the "significance" in a particular context. They do not contribute to establishing whether the price gap is notable relative to other prices in the particular market context. Rather, they only provide alternative possible reasons or causes for the pattern of price differences.

7. Finally, with regard to the **Panel's finding in footnote 385 of its Report**, the EU agrees with China, and the United States, that this statement by the Panel is not entirely accurate in light of the Appellate Body's findings in *US – Washing Machines*. Article 2.4.2 does not permit the combining of comparison methodologies for the purposes of establishing dumping and margins of dumping. Since comparison results of pattern and non-pattern transactions are not combined, it is incorrect to suggest that it "may be necessary … not to let that negative dumping [found outside the pattern] offset the dumping found within the pattern".

B. CHINA'S APPEAL ON THE ALLEGED AFA NORM

8. On the **existence of the alleged AFA norm**, the European Union agrees with the United States that findings might not be necessary to resolve the dispute, as the Panel had already found that the constitution of the single entity, which is the sole addressee of the alleged norm, is inconsistent with WTO law. On substance, the European Union acknowledges that the standard to demonstrate the existence of an unwritten norm is a high one; complainants must provide substantial evidence for the normative character of the unwritten rule they contest.

9. Instead of zooming in and requiring specific evidence on particular characteristics such as prospective application, the evidence should be assessed in a holistic manner. Such a holistic approach should aim at establishing whether the overall picture is one of a measure with normative character (its prospective application will flow from the normative character). In the European Union's understanding, this is the approach the Appellate Body has taken in previous landmark cases such as *US – Zeroing (EC)*.

10. In particular, in previous anti-dumping cases, two main building blocks for the holistic assessment were (i) an invariable conduct over a certain time, which constituted the "footprints in the sand" of the unwritten norm, and (ii) evidence that the conduct reflects a deliberate policy. In the European Union's view, the two building blocks are correlated: the more frequent, the longer and the more uniform the invariable conduct is, the more likely it is that it is driven by an underlying instruction, and the less demanding the adjudicator needs to be as regards the proof of a deliberate policy – and vice-versa.

11. On the **alleged inconsistency with Article 6.8 and Annex II(7) of the Anti-Dumping Agreement**, the European Union would expect the Appellate Body to follow the guiding principles it has set out in previous cases, in particular in *Mexico – Anti-Dumping measures on Rice* and *US – Carbon Steel (India)*. A wholesale approach of automatic application of total adverse facts available, regardless of the specific circumstances of the case and the behaviour of the respondents, applied in a purely punitive objective, would, in the European Union's view, be inconsistent with the principles set out in these cases. The European Union does not take a definitive position on the factual question of whether the United States' practice corresponds to such a wholesale, punitive approach.

ANNEX C-4

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. In this appellate proceeding, Japan will address the following issues related to the interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and the Panel's interpretation regarding the measures susceptible to challenge in WTO dispute settlement proceedings.

2. Japan agrees with the Panel's findings requiring an investigating authority to consider whether differences in export prices are qualitatively significant and that an investigating authority cannot find that certain prices differ significantly purely in numerical terms. The Panel's finding is consistent with the findings of the Appellate Body in *US – Washing Machine* which stated that objective market factors such as circumstances of the nature of the products should be taken into account. The essential reason why a qualitative assessment through consideration of objective market factors, including seasonality and cost fluctuation, is required is that the investigating authority must ensure the comparability of the export prices it is comparing, and the price differences that normally exist in a given market must be captured with evaluations under the *first* sentence of Article 2.4.2.

3. The methodology used to find a "pattern", whether statistical or non-statistical, needs to be as a whole reasonably designed to achieve its purpose. Japan also agrees with the Panel that the investigating authority can use either the individual or average export prices in identifying the pattern, provided that the methodology and its implementation is considered to be reasonable for the specific case at hand.

4. With respect to determination of dumping and the establishment of the margins of dumping, Japan would like to point out that it is possible to interpret the second sentence of Article 2.4.2 as allowing the investigating authority to establish a sufficient level of margins of dumping against dumped imports targeting certain regions, purchasers or time periods, provided that dumping is found to exist on a nation-wide level, in line with Article VI:1 of the GATT 1994.

5. Finally, Japan points out that if the Panel is requiring "certainty" for a measure to be prospective and thus challengeable, such finding does not necessarily accord with the jurisprudence.

ANNEX C-5

EXECUTIVE SUMMARY OF VIET NAM'S THIRD PARTICIPANT'S SUBMISSION

1. In this written submission, Viet Nam will focus on discussing the issue: the USDOC's application of a rate based on adverse inferences to the NME-wide entity, which is established by China as AFA Norm, is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

2. According to the context of Article 6.8, "interested parties" can include only those parties from which necessary information was requested. In *US – "Zeroing" (EC) (21.5)*, the Appellate Body affirmed the understanding that Article 6.8 determinations are not applicable to non-investigated exporters. This conclusion rests upon the ordinary meaning of the phrase "necessary information" which Article 6.8 plainly refers to the information necessary to calculate an anti-dumping margin under Article 2. Only information that impacts the calculation of the anti-dumping margin constitutes necessary information within the meaning of Article 6.8.

3. Further contextual support for the understanding that Article 6.8 applies only to individually calculated anti-dumping margins exists in Article 9.4. The Appellate Body has previously found that the use of adverse facts for purposes of calculating an all-others rate is inconsistent with Article 9.4, further establishing Article 6.8's applicability to only those exporters/producers individually examined. Thus, adverse facts may only be applied in the context of an individual examination.

4. The plain language of Article 6.8 and Annex II of the Anti-Dumping Agreement set forth the conditions that must be satisfied before an authority may apply facts available based on adverse inferences. An authority may apply facts available only where necessary information has been requested from a party individually examined.

5. The USDOC's practice of assigning a rate based on facts available to an NME-wide entity which is not individually investigated and from which no necessary information has been requested is a violation of Article 6.8 and Annex II of the Anti-Dumping Agreement. Issuance of questionnaires to determine if a company is eligible for a separate rate, according to the USDOC's Anti-Dumping Manual, does not qualify as a request for "necessary information" under Article 6.8.

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ANNEX D

PROCEDURAL RULING

ANNEX D-1

PROCEDURAL RULING OF 22 NOVEMBER 2016

1 BACKGROUND

1.1. On Friday, 18 November 2016, China notified the Dispute Settlement Body and filed a Notice of Appeal with the Appellate Body Secretariat with respect to the Panel Report in *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China* (WT/DS471/R).

1.2. On Saturday, 19 November 2016, the United States requested the Division hearing this appeal to extend the time-limit for filing the other appellant's submission, and as a consequence the time-limits for filing appellee's and third participants' submissions pursuant to Rule 16(2) of the Working Procedures for Appellate Review (Working Procedures).

1.3. In its request, the United States notes the unavailability of staff during this week, the complexity of this dispute, the large number of issues raised on appeal, and the fact that China submitted a lengthy appellant's submission well ahead of the end of the 60-day period to appeal the Panel Report. The United States contends that China would suffer no prejudice from the modification requested by the United States. The United States also observes that, in light of the timeline for completion of appeals and the workload challenges faced by the WTO dispute settlement system, Members should carefully consider potential appeals, including the scope of an other appeal. The United States submits that, in these "exceptional circumstances", it would be significantly impeded in its ability to respond to China's appeal and to determine whether and to what extent to file an other appeal. To the United States, the strict adherence to the time-periods set out in the Working Procedures would result in "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures.

1.4. On Monday, 21 November 2016, the Chair of the Appellate Body, Mr Thomas R. Graham, invited China and the third participants to comment on the United States' request by 12 noon on Tuesday, 22 November 2016. China and the European Union submitted comments.

1.5. China objects to the United States' request for additional time for filing its Notice of Other Appeal and other appellant's submission. To China, the United States has had ample time to prepare an appeal because the Panel Report did not change significantly since the Interim Panel Report. In addition, China observes that the United States has been on notice since 11 November 2016 that an appeal by China was imminent because, by that date, China had not inscribed the adoption of the Panel Report on the agenda of the DSB meeting to be held on 23 November 2016. China also notes that the United States requested an extension of both the filing date of the United States' other appeal and the filing date of the United States' appellee's submission by an equivalent number of days, without adding equivalent time for China to prepare its appellee's submission. To China, this lack of even-handedness is unwarranted and unfair. Turning to the time-limits to file appellee's submissions and third participants' submissions, although China opposes any one-sided extension, China would be willing to consider an even-handed extension on condition that this extension is without prejudice to China's interests.

1.6. The European Union submits that, to the greatest extent possible, the time-periods provided for in the DSU and the Working Procedures should be respected. The European Union notes, however, that in case of conflict it is neither the quality of reports nor the due process rights of Members that should be compromised; rather, the time-limits should be appropriately adjusted. The European Union agrees with the United States that the length of China's appeal, the number of findings requested, and the complexity of issues are relevant factors to be taken into account when considering a request for extension. The European Union also agrees with the United States that the relatively limited adjustments requested by the United States should not significantly prejudice China, given the overall timeline of the dispute.

2 THE UNITED STATES' REQUEST TO EXTEND TIME-LIMITS FOR FILING DOCUMENTS

2.1. Rule 16(2) of the Working Procedures provides as follows:

> In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

2.2. The request by the United States concerns the time-limits for filing: (i) the Notice of Other Appeal and other appellant's submission (if any) by the United States; (ii) the appellee's submission(s); and (iii) the third participant's submissions. The Division examines each of these time-periods below.

2.3. With respect to the request for extending the date for filing of a possible Notice of Other Appeal and other appellant's submission by the United States, the Division notes the complexity and size of this dispute. Indeed, the record of the panel proceedings is large, and includes several hundreds of exhibits submitted by China and the United States. In addition, the Division observes that China filed its appeal on 18 November 2016, around one month after its circulation. At the same time, the Division notes China's arguments that the United States has had sufficient time to prepare its appeal and that the scope of China's appeal should not have a bearing on the date by when an other appeal is to be filed.

2.4. With respect to the filing of the United States' appellee's submission, the Division notes that, in addition to the considerations above, China submitted a long appellant's submission. In the Division's view, the size of an appeal is of relevance when examining a request to extend time-limits for filing appellee's submissions. In addition, as observed by China, the Division agrees that any extension of the time-limit for filing appellee's submissions should be even-handed for both participants.

2.5. With respect to third participant's submissions, in addition to the considerations above, the Division notes that the third parties obtained access to the final Report of the Panel only after that Report was circulated to Members in all three official languages, that is, on 19 October 2016. In contrast, the final Panel Report was issued to the parties several months earlier, once it was completed and sent to translation. China's initiation of its appeal triggers the time-period under Rule 24(1) of the Working Procedures for third participants to file written submissions within 21 days. Within that period, third parties must review the appellant's, other appellant's, and appellee's submissions and prepare their submissions in response to the Panel Report and these other submissions. The Division notes that in particular the time-period between receipt of participants' appellee's submissions and the due date for filing third participants' submissions is short under the Working Procedures. The Division is also mindful that, if it were to extend the time-period for filing submissions in this appeal pursuant to the United States' request, the third participant's submissions would be due around the period of end-of-year closure for the WTO and several missions to the WTO.

2.6. In the Division's view, the particular circumstances of this case may affect the ability of the United States to effectively exercise its right to file an other appeal, as well as the ability of the United States and China to prepare appellee's submissions, and the ability of third participants to comment on the participants' submissions and prepare their third participants' submissions if they have to be filed within the time-periods set out in the Working Procedures. Accordingly, the Division considers that strict adherence to the time-period set out in Rules 22(1), 23(1), 23(3), 23(4), 24(1), and 24(2) of the Working Procedures would result in a manifest unfairness in the particular circumstances of the case at hand.

2.7. In the light of the above considerations, the Division extends, pursuant to Rule 16(2) of the Working Procedures, the time-period for the United States to file its Notice of Other Appeal and

other appellant's submission by five days to Monday, 28 November 2016. With respect to the filing date of appellee's submissions, under Rule 23(4) of the Working Procedures, China would have 13 days to respond to an other appeal by the United States. The Division therefore extends this time-period also by five days. At the same time, the Division recalls the length of China's appellant's submission. The Division also notes that under Rule 24 of the Working Procedures all appellees' submissions are to be filed on the same day. Thus, the Division extends the date for filing the appellee's submissions to Friday, 16 December 2016. As a consequence of these decisions to extend the filing dates for the participants' submissions, and in light of the Division's earlier considerations that third participants should be given the opportunity to exercise their right to review these submissions and prepare their own submissions, it is also necessary to modify the date for filing third participant's submissions under Rule 24 of the Working Schedule. Thus, the Division extends the time-period for third participants to file their submissions to Monday, 9 January 2017.

Modified Dates for the Submission of Documents

Process	Rule	Date
Notice of Other Appeal	Rules 16 and 23(1)	Monday, 28 November 2016
Other appellant's submission	Rules 16 and 23(3)	Monday, 28 November 2016
Appellees' submissions	Rules 16, 22 and 23(4)	Friday, 16 December 2016
Third participants' submissions	Rules 16 and 24(1)	Monday, 9 January 2017
Third participants' notifications	Rules 16 and 24(2)	Monday, 9 January 2017

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