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

(DS471)

RESPONSES OF THE UNITED STATES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

PUBLIC VERSION

Business Confidential Information (BCI) Has Been Redacted
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on pages 10, 11, & 18

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US – Animals	Panel Report, United States – *Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R and Add.1, adopted 31 August 2015
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US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997

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US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

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Exhibit No.	Description
USA-126	Case Brief of Beijing Tianhai Industry Co., Ltd. (dated March 6, 2012) (excerpted)
USA-127	*Jinan Yipin Corp. Ltd., v. United States*, 526 F.Supp.2d 1347 (Ct. Int'l Trade 2007)
USA-128	5 U.S.C. § 553
USA-129	Low Enriched Uranium from France: Preliminary Results of Antidumping Duty Administrative Review, 71 Fed. Reg. 11,386, 11,389 (Mar. 7, 2006)
USA-130	Cotton Shop Towels from Pakistan: Final Results of Countervailing Duty Administrative Review, 66 Fed. Reg. 42,514 (Aug. 13, 2001)
USA-131	Cotton Shop Towels from Pakistan: Final Results of Countervailing Duty Administrative Review, Issues & Decision Memorandum
USA-132	Webster's Ninth New Collegiate Dictionary, norm.

1 CHINA'S CLAIMS UNDER ARTICLE 2.4.2 OF THE AD AGREEMENT

1.1 China's claims under the "pattern clause" of the second sentence of Article 2.4.2

1.1.2 Alleged failure of the Nails test to identify differences between export prices that were significant in a quantitative, statistical sense

Question 92 (United States): The Panel refers to the following description of the Nails test provided by the USDOC in the Steel Cylinders investigation[1]:

> **The targeted dumping test in Nails from the PRC, as modified in Wood Flooring from the PRC, provide a two-stage analysis to determine whether there is a pattern of EPs or CEPs that differs significantly among purchasers, regions, or periods of time. The first stage addresses the "pattern" requirement; the second stage addresses the "significant difference" requirement. Although the following example refers to a pattern of prices that differ among purchasers, the procedures are the same for analyzing purchaser, regional, or time-period targeted-dumping allegations. (footnotes omitted)**

The USDOC provided a similar description of the Nails test in the Coated Paper and OCTG investigations.[2]

Is the Panel correct in understanding that the purpose of the first stage of the Nails test, which addresses the "pattern" requirement, is to find "a pattern of export prices which differ" among purchasers, regions or time-periods within the meaning of the second sentence of Article 2.4.2, whereas the objective of the second stage, which addresses the "significant difference" requirement, is to find whether the differences identified in the first stage are significant within the meaning of the second sentence of Article 2.4.2?

Response:

1. The Panel's understanding of the *Nails* test is generally correct. However, the U.S. Department of Commerce ("USDOC") uses the *Nails* test as a whole to determine the existence of "a pattern of export prices which differ significantly among different purchasers, regions or time periods."[3] Accordingly, the *Nails* test should be evaluated in a comprehensive rather than fragmented manner.

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[1] *Steel Cylinders* OI, *Final Issues & Decision Memorandum*, (Exhibit CHN-66), p. 22.

[2] *Coated Paper* OI, *Final Issues & Decision Memorandum*, (Exhibit CHN-64), p. 22; *OCTG* OI, *Final Issues & Decision Memorandum*, (Exhibit CHN-77), Comment 2.

[3] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), Art. 2.4.2.

Question 93 (China and the United States): In paragraph 35 of its response to the Panel's question No. 6(a) following the first substantive meeting of the Panel with the parties, China states:

> **[I]n order to be potentially meaningful as an analytical tool, the Nails Test hinges crucially on the assumption that the distribution of the examined export prices was, at the minimum, single-peaked and symmetric around the mean (i.e., that there are approximately as many prices above the mean as there are below it).The "normal distribution" may be considered the prototype of this type of distributions.**

Can both parties please provide a description of the terms: (a) normal distribution and (b) a distribution which is single-peaked and symmetric around the mean?

Response:

2. As an initial matter, the United States observes that China's argument, which is referenced in the question, is premised on the notion that a statistical probability analysis – or China's own version of such an analysis – is the standard against which the *Nails* test is to be measured. We have shown that USDOC makes *no* assumptions (whether implicit or explicit) concerning the distribution of export prices, let alone assume the existence of a particular type of distribution,[4] and we have not suggested that the *Nails* test would meet the requirements for statistical probability analysis as understood by China or even "as generally recognized in the field of statistics."[5] That, of course, is not the standard against which the *Nails* test is to be measured. The question before the Panel, which China appears to misunderstand, is whether USDOC's application of the *Nails* test in the challenged investigations is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. We have shown that it is.[6] China's arguments are not relevant because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

3. That being said, and in an effort to be of assistance to the Panel, we observe that, as a general matter, a "normal distribution" with mean μ and variance $\sigma 2$ is a "bell-shaped" probability density function (pdf) (of a random variable X) with domain $(-\infty,+\infty)$ that is symmetric (*i.e.*, if you draw a vertical line at $X = \mu$ that divides the graph of the pdf in two, the left and right sides are mirror images of each other). The pdf achieves a single maximum at $X = \mu$, is strictly increasing for $X < \mu$ and strictly decreasing for $X > \mu$, with inflection points at $X = \mu \pm \sigma$. A distribution that is "approximately normal," *i.e.*, single-peaked symmetrical, looks

[4] *See* First Written Submission of the United States of America (Confidential) (Corrected Version May 13, 2015) ("U.S. First Written Submission"), paras. 123 and 125, and note 136.

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

[6] *See* U.S. First Written Submission, paras. 84-155.

roughly like the "bell-shaped" pdf described above. The "left-right" symmetry (around the mean, μ) is rough, not perfect, and the pdf's domain is often (but not always) some finite interval [a,b], not $(-\infty,+\infty)$. Still, the pdf achieves a single maximum at $X = \mu$ (although the peak of the pdf may be more pointy, not as round or smooth), and it is increasing for $X < \mu$ and decreasing for $X > \mu$.

Question 94: In paragraph 36 of its second written submission, China states as follows:

> **It emerges from the analysis undertaken by Professor Egger that, across the three challenged determinations, the observed export prices were not generally single-peaked and symmetric around the mean; often a large mass of data points lay below the threshold of a single standard deviation. (footnotes omitted)**

In support of this statement, China cites to the second expert statement by Professor Dr. Peter Egger, (Exhibit CHN-498) (BCI), paragraphs 3-6 and Figures 1-4, and to China's response to the Panel's question No. 6(a) following the first substantive meeting of the Panel with the parties, paragraph 37.

a. To the United States. Can the United States please confirm whether it agrees with this statement by China and the information cited by China in support of this statement? In particular, does the United States agree that, in the three challenged investigations, often a large mass of data points lay below the threshold of a single standard deviation? Please respond in light of the USDOC's following observation in the Steel Cylinders investigation:

> **As from the onset, the use of one standard deviation limits the number of sales that could be considered targeted because no more than 16 percent of all prices would typically be found to be more than one standard deviation below the mean, assuming a normal distribution of prices.[7] (emphasis added)**

Response:

4. As explained in response to question 93, as well as in earlier U.S. submissions, statements, and responses to panel questions, China's arguments related to statistical probability analysis are not relevant to the Panel's review of the challenged determinations because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

5. Additionally, the United States notes that, in the course of the challenged investigations, USDOC did not analyze the distribution of the export price data in the manner in which China

[7] *Steel Cylinders* OI, *Final Issues & Decision Memorandum*, (Exhibit CHN-66), p. 29.

has done for the purpose of this dispute. As we have explained, the *Nails* test is not used to make any statistical inferences, nor does it hinge on a particular type of price distribution or distribution model. Accordingly, the United States is not in a position to confirm or disconfirm whether the actual price distribution was single-peaked and symmetric. That being said, and to be of assistance to the Panel, the United States offers the following observations concerning the application of the *Nails* test in the steel cylinders investigation, in which the quoted statement was made.

6. In the steel cylinders investigation, USDOC applied the *Nails* test to certain, allegedly targeted sales with reported dates of sale of October, November, and December. Again, USDOC made no assumption regarding the distribution of the reported export prices, and the *Nails* test does not require such assumptions. The percentage of sales that fell more than one standard deviation below the mean is different in each of the three allegedly targeted months. The number of October sales that fell more than one standard deviation below the mean is 93.1 percent, which represents a majority of October sales that were alleged to have been targeted.[8] The number of November sales that fell more than one standard deviation below the mean is 47.7 percent, which represents slightly less than half of all November sales alleged to have been targeted.[9] In contrast, the number of December sales that fell more than one standard deviation below the mean is 30.3 percent, which represents less than a third of December sales alleged to have been targeted.[10] Consequently, USDOC did not consider that the December sales contributed to the pattern.[11]

7. It is not clear precisely what China means when it argues that "often a large mass of data points lay below the threshold of a single standard deviation."[12] Of course, within the context of the results of the *Nails* test in the steel cylinders investigation, as explained in the previous paragraph, there are instances in which the majority of data points fall more than one standard deviation below the mean along with instances where a minority of data points fall more than one standard deviation below the mean. However, the percentages indicated are for the allegedly targeted month, and not for the export sales data as a whole. USDOC did not apply the *Nails* test to nine out of twelve months of the period of investigation. Further, USDOC did not, in applying

[8] *See Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd. ("BTIC")*, dated April 30, 2012, at Attachment 4, p. 138 (p. 341 of the PDF version of Exhibit USA-23) (BCI).

[9] *See Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd. ("BTIC")*, dated April 30, 2012, at Attachment 4, p. 138 (p. 341 of the PDF version of Exhibit USA-23) (BCI).

[10] *See Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd. ("BTIC")*, dated April 30, 2012, at Attachment 4, p. 139 (p. 342 of the PDF version of Exhibit USA-23) (BCI).

[11] *See Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd. ("BTIC")*, dated April 30, 2012, at Attachment 4, p. 139 (p. 342 of the PDF version of Exhibit USA-23) (BCI).

[12] China's Second Written Submission (Confidential) (August 28, 2015) ("China's Second Written Submission"), para. 36.

the *Nails* test, determine the proportion of export prices that fall more than one standard deviation below the mean as a percentage of the total export sales (*i.e.*, the exporter's total export sales for the entire period of investigation).

8. In any event, the possibility that the export price data may not be normally distributed does not negate the usefulness or appropriateness of the application of the *Nails* test. In contrast to the statistical probability analysis that China discusses, the *Nails* test is not contingent upon any particular kind of distribution but is rather applied to the actual export prices during the period of investigation, however such prices may be distributed. The results of the *Nails* test in the steel cylinders investigation indicate a pattern of prices that differ significantly and support the "targeted dumping" finding that USDOC made.

9. We will address the statement made in the final issues and decision memorandum in the steel cylinders investigation, which is referenced in the question, in response to subpart (c) of this question.

b. To China and the United States. Can the parties confirm whether in any of the CONNUMs, examined in the three challenged investigations, more than 16 per cent of all prices were found to be more than 1 standard deviation below the CONNUM-specific mean?

Response:

10. As explained previously, USDOC makes *no* assumptions (whether implicit or explicit) concerning the probability distribution, let alone assume the existence of a particular type of distribution of the export prices,[13] when conducting the *Nails* test. Furthermore, the "pattern clause" of Article 2.4.2 does not require an investigating authority to consider the distribution of export prices when examining whether there exists a pattern of export prices that differ significantly.

11. With respect to each of the challenged investigations, USDOC did not, when applying the *Nails* test, determine for each CONNUM the total proportion of sales for which the weighted-average export price was more than one standard deviation below the CONNUM-specific mean. Rather, in applying the standard deviation test, USDOC aggregated, for a given alleged target, the volume of sales for which that alleged target's CONNUM-specific weighted-average export price was more than one standard deviation below the overall CONNUM-specific weighted-average export price in order to determine whether this total met the 33 percent threshold to pass this part of the *Nails* test.

12. The United States is not in a position to confirm or disconfirm whether, in any of the CONNUMS examined in the three challenged investigations, more than 16 percent of all prices were more than one standard deviation below the CONNUM-specific mean. Such information was not developed as part of USDOC's analysis in the three challenged investigations. Furthermore, while such information may be relevant to China's arguments, China's arguments

[13] *See* U.S. First Written Submission, paras. 123 and 125, and note 136.

themselves are not relevant to the Panel's examination because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

c. To the United States. In the United States' view, does the quote from the Steel Cylinders investigation show that the USDOC in that investigation assumed a normal distribution of prices in the application of the Nails test? Can the United States please confirm if the USDOC examined whether or not the data was normally distributed as described in the quote above? Please respond by referring to the relevant parts of the USDOC's record.

Response:

13. No, the quote from the steel cylinders investigation does not show that USDOC assumed a normal distribution of export prices in the application of the *Nails* test. When USDOC wrote in the steel cylinders issues and decision memorandum that "the use of one standard deviation limits the number of sales that could be considered targeted because no more than 16 percent of all prices would typically be found to be more than one standard deviation below the mean, assuming a normal distribution of prices," USDOC was making a general observation about what "typically" would be found when applying a one standard deviation threshold, assuming a normal distribution. USDOC made this observation in response to an argument by a respondent interested party that USDOC should apply a higher, two-standard deviation (or higher) threshold because the one-standard-deviation threshold was, in the view of the respondent interested party, "far too lenient."[14] Specifically, respondent BTIC argued that "[o]ne standard deviation is defined mathematically to capture only 68% of the data points of any data set."[15] BTIC's argument necessarily was premised on an assumption of normal distribution.[16] Accordingly, Commerce referenced this assumption in its response to this specific argument.

14. USDOC did not intend by making this observation to communicate that it was itself making any assumption about the distribution of prices, and USDOC did not, in fact, make any assumption about the distribution of prices. In particular, the reason that USDOC did not make any assumption about the distribution of export prices is because it was not necessary to do so. USDOC was not conducting a statistical probability analysis, making statistical inferences, or establishing confidence intervals. Rather, USDOC was using the one-standard-deviation threshold as a way to objectively and transparently determine whether the average export price to the alleged target was sufficiently low in relation to the average export price for all of the

[14] *Steel Cylinders* OI, Final I&D Memo, at 29 (Exhibit CHN-66).

[15] Case Brief of Beijing Tianhai Industry Co., Ltd. (dated March 6, 2012), p. 37 (Exhibit USA-126).

[16] An assumption of normal distribution is essential to the argument that one standard deviation captures only 68 percent of the data. If actual data were distributed in a manner different from normal distribution, one standard deviation could capture more than 68 percent of the data.

exporter's transactions, such that it may be indicative of a "pattern" within the meaning of the "pattern clause."[17]

15. The United States confirms that USDOC did not examine, in the steel cylinders investigation or in any other proceeding that is at issue in this dispute, whether or not the data were normally distributed, as such an examination was neither necessary nor relevant to the analysis USDOC undertook in applying the *Nails* test.

d. To China and the United States. Can the parties please explain whether a similar observation was made by the USDOC in the Coated Paper and OCTG investigations? Please respond by referring to the relevant parts of the record. Can the United States please confirm whether the USDOC examined whether or not the data were normally distributed in the Coated Paper and OCTG investigations? Please respond by referring to the relevant parts of the USDOC's record.

Response:

16. As explained above in response to subpart (c) of this question, in the final issues and decision memorandum in the steel cylinders investigation, USDOC made the quoted statement concerning normal distribution solely in response to a specific argument made by a respondent interested party, which was itself premised on an assumption of a normal distribution.[18] USDOC did not make any similar statements in the coated paper or OCTG investigations. [19] This is not surprising. As we have explained, the *Nails* test does not assume a normal distribution and normal distribution is not a prerequisite for finding of a pattern of prices that differ significantly.

Question 96 (United States): Can the United States please clarify if it agrees with China's assertion that if a standard deviation of 1.96 instead of 1 was used, none of the alleged targets would have exceeded the 33% threshold necessary to pass the pattern test in any of the three challenged investigations?[20]

Response:

17. As explained in response to question 93, as well as in earlier U.S. submissions, statements, and responses to panel questions, China's arguments related to statistical probability analysis are not relevant to the Panel's review of the challenged determinations because USDOC

[17] *See, e.g., Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the People's Republic of China*, at Comment 2 ("OCTG OI Final I&D Memo") (Exhibit CHN-77).

[18] *See Steel Cylinders* OI, Final I&D Memo, at 29 (Exhibit CHN-66). *See also* Case Brief of Beijing Tianhai Industry Co., Ltd. (dated March 6, 2012), p. 37 (Exhibit USA-126).

[19] *See OCTG* OI, Final Issues and Decision Memorandum (Exhibit CHN-77); *Coated Paper* OI, Final Issues and Decision Memorandum (Exhibit CHN-64).

[20] China's Opening Statement at the Second Meeting of the Panel, para. 8.

did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

18. Additionally, because USDOC did not use a threshold of 1.96 standard deviations when applying the *Nails* test in the challenged determinations, the United States is not in a position to confirm or disconfirm China's assertion as to what the results of the *Nails* test would be if USDOC were to use a different threshold than the threshold of one standard deviation which it actually employed.

19. As the United States has explained,[21] however, the threshold of 1.96 standard deviations is not suitable for an analysis pursuant to the "pattern clause." The export price that is two or more standard deviations below the mean price is also highly unlikely to be observed; it is an "outlier." This is a direct consequence of the fact that, with normal probability distributions, which China assumes but USDOC did not, the probability of observing the export price to the alleged target in the tail of the normal distribution that is two or more standard deviations below the mean is just 2.5 percent. China's interpretation of the "pattern clause" limits it to identifying random and aberrational outliers, and such an interpretation finds no support in the text of the "pattern clause" of the second sentence of Article 2.4.2.

20. China seeks to replace the balanced approach taken by USDOC with an extreme approach – one actually noted and rejected by USDOC[22] – namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for such an extreme approach is China's insistence on the use of a particular type of statistical probability analysis, which the AD Agreement does not require.

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

Question 99: The Panel refers to China's argument that the "USDOC erred by attributing 'significance' to wider price gaps in the tail of the price distribution compared to price gaps

[21] *See* U.S. First Written Submission, paras. 130-138.

[22] *OCTG* OI, Final I&D Memo, at Comment 2 (Exhibit CHN-77).

closer to the mean, because this is an inherent feature of every peaked distribution with tails".[23] The Panel notes that there are some differences in the way in which China describes this argument in its first written submission and the way in which it describes this argument in its response to the Panel's question No. 6(c) following the first substantive meeting of the Panel with the parties. In its first written submission, China describes this argument in the following way:

> **[F]or any probability distribution with a "tail" – including the normal, unimodal distribution with one peak (as assumed by USDOC), a bimodal distribution with two peaks, or even a multi-peaked distribution – it holds true that gaps between any two price observations in the "tails" of the distribution are likely to be larger than pairwise gaps that are situated towards the peak (or peaks) of the distribution.[24]**

In its response to the Panel's question No. 6(c) following the first substantive meeting of the Panel with the parties, China describes this argument in the following way:

> **[I]t was inappropriate, in the three challenged determinations, for USDOC to attribute "significance" to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean, because this is an inherent feature of not only every normal distribution but, more generally, of any single-peaked distribution with tails.[25]**

e. To the United States. Can the United States please clarify whether it agrees with China's assertion that wider price gaps in the tail of the price distribution compared to price gaps closer to the mean is an inherent feature of not only every normal distribution but, more generally, of any single-peaked distribution with tails?

Response:

22. As explained in response to question 93, as well as in earlier U.S. submissions, statements, and responses to panel questions, China's arguments related to statistical probability analysis are not relevant to the Panel's review of the challenged determinations because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

[23] China's Second Written Submission, para. 15.

[24] China's First Written Submission, para. 231. (emphasis added)

[25] China's Response to Panel Question No. 6(c), para. 46. (emphasis added).

23. That being said, and to be of assistance to the Panel, the United State offers the following observations. As an initial matter, it is important to note that that USDOC does not apply the *Nails* test to individual transaction prices. Instead, USDOC applies the *Nails* test to weighted-average export prices, weighted by sales volumes, on a purchaser-specific, time period-specific, or region-specific basis. These are *not* random variables, because the prices underlying the averages are not random, but are the actual export prices which exhibit the pricing behavior of the exporter. Price setting by an exporter is not a random exercise. Furthermore, these actual export prices are for all of the export sales by the exporter during the period of investigation, which is the reason why a statistical probability analysis is not appropriate in this test. Accordingly, there is no basis to assume that the rank ordering or distribution of price averages is normal or approximately normal (single-peaked). However, if the distribution were normal or approximately normal, the United States agrees that price gaps in the middle of the distribution would tend to be smaller than price gaps in the tails, although the difference in gaps would vary inversely with the variance in average price.

Question 101: The Panel refers to paragraph 68 of the first expert statement by Professor Dr. Peter Egger (Exhibit CHN-1) wherein he states as follows:

> **In OCTG, [[***]] of the [[***]] CONNUMs used in the Price Gap Test have NT net prices lower than the AT price. If NT average prices lower than the AT average price are included in the overall NT average price gap, the weighted-average NT price gap increases for those [[***]] CONNUMs. In Coated Paper, [[***]] of the [[***]] CONNUMs used in the Price Gap Test have NT net prices lower than the AT price. Including those low NT net prices in the weighted-average NT price gap increases the weighted-average NT price gaps. (emphasis original)**

a. To the United States. The Panel understands from this statement that insofar as the OCTG and Coated Paper investigations are concerned, in at least some CONNUMs, prices to some non-targeted purchasers or time-periods were lower than prices to the allegedly targeted purchaser or time-period. When the USDOC applied the price gap test in these CONNUMs, the USDOC did not include these prices to the non-targeted purchasers or time-periods while calculating the weighted average non-target price gap. Does the United States agree with this factual assertion made in Professor Dr. Peter Egger's first expert statement as well as the Panel's understanding of what this factual assertion means?

Response:

24. As the United States has observed previously, the statements made on China's behalf by China's consultant should not be given any more weight or credibility than other statements made on China's behalf, for example, by China's attorneys. Exhibit CHN-1 simply is a part of China's presentation of its arguments to the Panel, and it should be viewed as such.

25. That being said, the United States can confirm that China's factual assertions contained in Exhibit CHN-1, to which the question refers, are correct. That is, for OCTG, [[***]] of the [[***]] CONNUMs used in the price gap test have NT net prices that are lower than the AT price, and for coated paper, [[***]] of the [[***]] CONNUMs used in the price gap test have NT net prices that are lower than the AT price. We can also confirm the Panel's understanding that, in both OCTG and coated paper, USDOC did not include these prices to non-targeted purchasers or time-periods while calculating the weighted-average non-target price gaps.

26. With respect to China's assertion in Exhibit CHN-1 that, in these two instances, including the lower NT net prices in the weighted-average NT price gap would increase the weighted-average NT price gaps, we note that, in the challenged determinations, USDOC did not calculate the weighted-average NT price gap in the manner suggested by China. That being said, it appears that China's assertion is correct in these two situations (it may not necessarily be true if the NT price gaps which have been disregarded are actually smaller than the calculated weighted-average NT price gap based on higher NT prices). Importantly, however, including the lower NT prices in the weighted-average NT price gap would not change the ultimate outcome of the price gap test either for the OCTG or coated paper investigation. China appeared to acknowledge this during the second panel meeting. In other words, by China's own admission, the conditions for applying the average-to-transaction comparison methodology are satisfied in the OCTG and coated paper investigations regardless of whether lower NT prices are included in or excluded from the calculation of the weighted-average NT price gaps.

27. Finally, even though the general operation of the *Nails* test is not at issue in this dispute, we observe that dropping NT prices below the AT price will not, necessarily, in all cases, result in an increase in the weighted-average NT price gap. The result will depend on the data. It may even be the case that including the NT prices below the AT would *decrease* the weighted average price gap.

c. To the United States. Can the United States please explain, by referring to the relevant parts of the record of the three challenged investigations, whether the USDOC explained the reasons for not taking into account the weighted average prices to non-targets which were lower than the weighted average price to the alleged target, in calculating the weighted average non-target price gap?

Response:

28. The final issues and decision memorandum for the steel cylinders investigation contains the following explanation of the rationale of the "gap test":

> [T]he price gap test determines whether the price gap associated with the alleged target is significant relative to the price gaps in the non-targeted group "above" the alleged target price gap. The significance in this context is determined based on whether the price gap associated with the alleged target is greater than the average price gap in the non-targeted group. In this regard, we have not set a bright-line standard or threshold, such as a fixed percentage, for measuring the price gap. If the difference exceeds the average price gap found in the group of

> non-target prices, then the difference in the price to the alleged target for a specific product is found to be significant. In essence, the price gap test qualifies whether a degree of separation between a low targeted price and the next lowest non-targeted prices is sufficient in determining the significant difference in prices with respect to the targeted sales. Further, we consider a five-percent share of sales to the alleged target, by volume, that are found to be at prices that differ significantly to be a reasonable indication of whether or not the alleged targeting has occurred. This threshold must be considered with the standard deviation test and the 33-percent sales volume threshold for determining whether there is a pattern of prices that differ significantly, as required by the statute.[26]

29. Regarding the decision to not take into account the weighted-average prices to non-targets which were lower than the weighted-average price to the alleged target, in calculating the weighted average non-target price gap, this was logical in light of what the "gap test" aims to measure. USDOC used the *Nails* test to identify a specific type of pattern, namely, a pattern of sufficiently low export prices as compared to other higher export prices. USDOC conducted its analysis on the basis of the "targeted dumping" allegation made by the domestic industry. Since USDOC used the *Nails* test to identify a pattern of low prices in relation to other higher export prices, it is logical that the "gap test" would compare the export prices to an alleged target to higher export prices to non-alleged targets. In the steel cylinders investigation, for example, USDOC explained that, "[w]e also do not agree with BTIC's argument that our gap test is arbitrary because it does not consider the weighted-average prices of non-targeted groups that are below the weighted-average price of the targeted group. BTIC does not demonstrate why the significant difference requirement can only be met by the use of gaps that both 'look up' and 'look down.'"[27]

30. In the OCTG and coated paper investigations, USDOC explained how the "gap test" operates.[28] With regard to the specific aspect of the "gap test" identified in this question, no interested party in the OCTG or coated paper investigations raised any related issues or questions, so there was no call for USDOC to discuss that aspect in the issues and decision memoranda in those investigations.

1.1.3 Qualitative assessment of the reasons behind the differences in the relevant export price pattern

Question 103 (United States): The Panel refers to the following statements contained in paragraphs 142 and 144 of the United States' first written submission:

> **As explained above, China's proposed interpretation of the "pattern clause," and specifically the term "significantly," is not supported by the text of the**

[26] *Steel Cylinders* OI, Final I&D Memo, pp. 29-30 (Exhibit CHN-66).

[27] *Steel Cylinders* OI, Final I&D Memo, p. 30 (Exhibit CHN-66).

[28] *See Coated Paper* OI, Final Targeted Dumping Memo, at 3 (Exhibit CHN-3); *OCTG* OI, Targeted Dumping Memo, at 6 (Exhibit CHN-80).

second sentence of Article 2.4.2, read in its context. The USDOC was not obligated to examine why there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement by not doing so.

With respect to the steel cylinders antidumping investigation, China contends that one of the respondents made an argument concerning variations in steel prices and that the USDOC "simply failed to address this issue." China is incorrect. The USDOC directly addressed the respondent's contention concerning increasing steel prices, including by explaining that "BTIC's argument about increases in the price of steel during the POI influencing the targeted dumping analysis is merely an unsupported assumption without the support of record evidence." (emphasis original; footnotes omitted)

a. If, in the United States' view, the USDOC was not required to examine "why" there were significant differences in export prices, in determining whether there was "a pattern of export prices which differed significantly", can the United States please explain why the USDOC found it necessary to address the reasons provided by BTIC, in the Steel Cylinders investigation, that increases in the price of steel during the POI influenced the USDOC's targeted dumping analysis?

b. Please explain whether the USDOC's response to BTIC in this regard was limited to noting that BTIC's argument was merely "an unsupported assumption without the support of record evidence".

Response:

31. The United States will address subparts (a) and (b) of this question together.

32. As it does routinely in antidumping investigations, USDOC issued a preliminary determination in the steel cylinders investigation and then provided all interested parties the opportunity to submit comments and rebuttal comments. The final issues and decision memorandum in steel cylinders sets forth "a complete list of issues for which [USDOC] received comments and rebuttal comments by parties."[29] In addition, the final issues and decision memorandum sets forth the "Department's Position" in response to the comments and rebuttal comments received. As a general matter, USDOC addresses the comments received from parties because doing so enhances the transparency of the decision-making process and is consistent with, *inter alia*, the requirement in Article 12.2.2 of the AD Agreement that public notice be given of "all relevant information on the matters of facts and law and reasons which have led to the imposition of final measures," including "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers."

[29] *Steel Cylinders* OI, Final I&D Memo, at 1 (Exhibit CHN-66).

33. In the steel cylinders investigation, BTIC made "arguments concerning finding other explanations for the price differences (physical characteristics, changes in the price of steel, and whether sales were EP or CEP."[30] USDOC responded to the arguments BTIC made by explaining, *inter alia*, that:

> while the Department may consider other factors in conducting a targeted dumping analysis, the Statute does not require the Department to determine "why" an exporter's pricing behavior may differ significantly as between different customers, regions or time periods. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to "why.''[31]

34. Additionally, with respect to BTIC's argument regarding physical characteristics, the USDOC explained that the same product characteristics that are used in dumping calculations apply in the analysis under the *Nails* test:

> Further, after the initiation of this investigation, based on comments submitted by interested parties, we determined the product characteristics most relevant in the identification of identical products. The targeted dumping test is performed on a CONNUM-specific basis, which identified non-targeted sales of products and alleged targeted sales as having the same CONNUM. As such, there is no basis to conclude that the products underlying the alleged targeted sales were so unique that they cannot serve as proper comparisons in the targeted dumping test. In addition, BTIC provided no argument with respect to why we should define identical products for purpose of targeted dumping analysis differently than how we identify identical products in the dumping margin calculations. [32]

35. USDOC also explained that BTIC's argument that a purported increase in the price of steel blooms and billets[33] influenced prices of Chinese steel cylinders in the United States was unsupported by record evidence:

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[30] *Steel Cylinders* OI, Final I&D Memo, at 32 (Exhibit CHN-66).

[31] *Steel Cylinders* OI, Final I&D Memo, at 32 (Exhibit CHN-66).

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

[33] To calculate BTIC's normal value in the investigation, USDOC derived the surrogate value for chromoly steel blooms and billets from Ukrainian import data, *i.e.*, the price of such imports to Ukraine. *Steel Cylinders* OI, Final I&D Memo, at 8 (Exhibit CHN-66). BTIC did not point to any evidence whatsoever that it factored purportedly increasing prices of steel blooms and billets imported by Ukraine from Russia into BTIC's own pricing of steel cylinders in the United States during the period of investigation. In fact, BTIC's case brief failed entirely to cite any record evidence to support its assertion that steel prices increased. Accordingly, USDOC reasonably concluded that BTIC's argument was an unsupported assumption without support of record evidence.

> BTIC's argument about increases in the price of steel during the POI influencing the targeted dumping analysis is merely an unsupported assumption without the support of record evidence.[34]

36. Further, with respect to the differences between EP and CEP sales, USDOC explained that such differences are already accounted for, because the targeted dumping analysis examines U.S. net prices:

> As to the fact that some sales are EP sales and others CEP sales, the Department's targeted dumping analysis examines net U.S. price (emphasis added), which would thus account for any differences in price due to different channels of trade. BTIC provides no evidentiary analysis as to how the Department's net U.S. price calculation would not account for such differences.[35]

37. Finally, USDOC explained the reason why it used the period of October through December in analyzing the petitioner's allegation:

> Also, we do not agree with the premise of BTIC's argument concerning not placing "groups" without targeted sales into the group of sales found to be targeted. The Department examined BTIC's sales for the allegedly targeted period October through December. The Petitioner based its targeted dumping allegation on that period and, accordingly, the Department analyzed the allegation based on that period. BTIC's argument seems to imply that the Department must parse out the period examined into different periods (or groups). However, for purposes of our analysis, October through December constituted the period defined in the petitioner's allegation and the period which the Department examined. The Department did not individually consider October, and November, and December. Furthermore, the statute does not require us to examine any particular time period. Therefore, where the petitioner alleged targeted dumping based on the October through December period, the Department properly relied on the October through December period in its analysis.[36]

38. As demonstrated by the above passages, China's contention that USDOC "simply failed to address"[37] BTIC's arguments lacks merit. USDOC did address BTIC's arguments and set forth its reasons for rejecting them.

Question 104 (United States): The Panel refers to paragraph 47 of the United States' second written submission, where the United States argues:

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[34] *Steel Cylinders* OI, Final I&D Memo, at 32 (Exhibit CHN-66).

[35] *Steel Cylinders* OI, Final I&D Memo, at 32 (Exhibit CHN-66).

[36] *Steel Cylinders* OI, Final I&D Memo, at 32 (Exhibit CHN-66).

[37] China's First Written Submission, para. 254.

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

When the United States submits that if an interested party presents facts and arguments, or if an investigating authority becomes aware of evidence that supports the conclusion that numerically large differences are qualitatively not important or notable, the investigating authority will be required to take that evidence into account, what kind of "facts" or "evidence" is the United States referring to? Please explain by giving examples of such facts or evidence. Would evidence of seasonal price variations or changes in input costs (as alleged in the Steel Cylinders investigation) qualify as such facts or evidence?

<u>Response:</u>

39. There may be a variety of kinds of facts or evidence that could go to the question of *how* export prices differ in a qualitative sense and whether export prices "differ significantly" for the purpose of the second sentence of Article 2.4.2 of the AD Agreement. It is not necessary to speculate, however, as to what such facts and evidence might be because, in the challenged investigations, no interested party presented any facts or evidence *at all* that would be relevant to the consideration of whether differences in export prices that are numerically large nevertheless are qualitatively not important or notable, such that the export prices should be viewed as not differing "significantly." Accordingly, there was nothing for USDOC to consider in the challenged investigations.

40. China criticizes USDOC for not examining whether there were commercial reasons or market explanations, such as "discounting," "seasonality," "inflation," or other exogenous factors, for the pattern of export prices identified.[38] However, we recall that China challenges the application of the *Nails* test in three specific investigations on an "as applied" basis, yet China has provided no evidence that such purported "discounting," "seasonality," or "inflation" conditions were factors relevant to USDOC's examination in the challenged investigations. Furthermore, such questions all go to *why* differences may exist between export prices.

[38] *See* China's First Written Submission, paras. 140-143, 247-255.

Answering them would not provide information about *how* the export prices are different, and whether the observed differences are "significant" in a qualitative sense. Thus, such questions are not germane to an application of the "pattern clause," which is a condition for using the alternative comparison methodology to "unmask targeted dumping."[39]

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

42. Similarly, if, for example, an exporter sells its product to customer A at a significantly lower price than to customer B through so-called "discounting" (*i.e.*, by selling at a discounted price to customer A but not to customer B), the investigating authority may find that there is a pattern of export prices that differ significantly *among different purchasers.* In this sense, the "discounting" is the mechanism by which an exporter engages in targeted dumping.

43. Finally, with respect to changes in input costs, it must be remembered that raw material input costs are not necessarily determinative of price.[40] Instead, price may be more a reflection of other factors, including market conditions. To the extent prices might change for some reason, USDOC may find this significant because those changes could be indicative of a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

1.1.4 Use of the weighted average of export prices rather than individual transaction prices

Question 105 (United States): China submits that if the USDOC had calculated the standard deviation on the basis of individual export transaction prices in the OCTG and Coated Paper investigations, the pattern test would not have been passed. China also submits that in the Steel Cylinders investigation, if the USDOC had calculated a standard deviation on the basis of individual export transaction prices, the pattern test would still

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

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

have been passed, but only [[***]] of [[***]] CONNUMs would have been found to be 1 standard deviation below the weighted average mean. Does the United States agree with these factual assertions by China?

Response:

44. As explained in response to question 93, as well as in earlier U.S. submissions, statements, and responses to panel questions, China's arguments related to statistical probability analysis, including its advocacy for the use of individual export prices in the calculation of the standard deviation, are not relevant to the Panel's review of the challenged determinations because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis. Additionally, the United States has demonstrated that Article 2.4.2 does not prohibit the use of weighted averages in connection with an investigating authority's analysis of a "pattern" within the meaning of the "pattern clause."[41]

45. In the challenged investigations, USDOC did not calculate the standard deviation on the basis of individual export transaction prices, as China suggests it should have. The United States is not in a position to confirm or disconfirm China's factual assertion about what the results of USDOC's calculations would have been had USDOC used an approach different from the approach it actually used.

1.2 Adequacy of explanations as to why the differences in the patterns of export prices could not be taken into account appropriately through the WA-WA or T-T methodology

Question 106 (United States): In paragraph 28 of its response to the Panel's question No. 16 following the first substantive meeting of the Panel with the parties, the United States submits that in investigations involving NME countries such as China, the T-T methodology cannot be used because in those investigations normal value is not based on transaction-specific home market sales. The United States therefore argues that, in the three challenged investigations, the pattern of export prices could not be taken into account appropriately by a comparison methodology which could not be used. Please clarify whether the USDOC's determinations in the three challenged investigations state that the T-T methodology could not be used by the USDOC to take into account appropriately the pattern of export prices which differed significantly among purchasers or time-periods, for the reason put forward by the United States in these proceedings.

Response:

46. The explanations, within the meaning of the "explanation clause" of the second sentence of Article 2.4.2, that USDOC provided in the coated paper, OCTG, and steel cylinders

[41] *See e.g.*, U.S. First Written Submission, paras. 57-61, 146-155.

antidumping investigations refer to the average-to-average comparison methodology because that was the "normal" comparison methodology (that is, the methodology under the first sentence of Article 2.4.2) used in those investigations.[42] Furthermore, the U.S. first written submission demonstrates that an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the "explanation clause" of the second sentence of Article 2.4.2.[43]

1.3 Application of the WA-T methodology to all sales of the exporter to the United States

Question 107 (United States): The Panel refers to paragraph 56 of the United States' first written submission, where the United States argues:

> **Logically, an investigating authority might examine all of an exporter's export sales in search of "a pattern," and likely may find that "a pattern" exists which consists of all of the exporter's export sales, including lower export prices to certain purchasers, regions, or time periods and higher export prices to other purchasers, regions, or time periods. This is one kind of "pattern" that an investigating authority might find, and it is entirely consistent with the terms and the logic of the second sentence of Article 2.4.2 of the AD Agreement. China's narrow notion of a "pattern," on the other hand, is inconsistent with both the terms and the logic of that provision.**

Can the United States please explain, by referring to the relevant parts of the record of the three challenged investigations, whether the USDOC found the "pattern" to consist of all of the export sales of the relevant exporter?

Response:

47. The short answer is yes. Or, to state the matter more precisely, in applying the *Nails* test in the challenged investigations, when an exporter was alleged to have engaged in "targeted dumping," USDOC examined all of the exporter's export sales in search of "a pattern," and, where the facts supported such a conclusion, USDOC found that "a pattern" existed which consisted of all of the exporter's export sales, including lower export prices to certain purchasers, regions, or time periods and higher export prices to other purchasers, regions, or time periods.

48. The relevant part of the record where this is shown is in USDOC's explanations contained in its determinations and accompanying memoranda in the three challenged

[42] *See Coated Paper* OI, Final I&D Memo, pp. 23-24 (Exhibit CHN-64); *OCTG* OI, Final I&D Memo, Comment 2 (p. 10 of the PDF) (Exhibit CHN-77); *Steel Cylinders* OI, Final I&D Memo, p. 24 (Exhibit CHN-66).

[43] *See* U.S. First Written Submission, paras. 172-182, 191.

investigations.[44] Specifically, USDOC described how it compared export prices to an alleged target with the export prices to other non-targets, both for the purpose of the "standard deviation test" and the "gap test." Where USDOC found "a pattern" to exist, it was a pattern that transcended the alleged target and the non-targets and consisted of all of the exporter's sales during the period of investigation.

Question 109: The Panel notes that in paragraphs 26-36 of the first expert statement by Ms. Lisa Tenore (Exhibit CHN-2), Ms. Tenore presents a hypothetical example to explain the operation of the Nails test. In that hypothetical example, Ms. Tenore assumes that the alleged targeted purchasers were "ACME" and "RACINE". In paragraph 28 of that statement, while describing the operation of the Nails test through that hypothetical example, Ms. Tenore states as follows:

> **CONNUMs 1234 and 2345 were sold to both ATs and NTs. The resulting AT total sales quantity, *to be used as the denominator* in the calculation of the Pattern Test and Price Gap Test threshold percentages, is the total sales quantity of these CONNUMs. Specifically, 64 + 54 = 118, as shown in column A on rows C and D. CONNUM 5678 sold to ACME *was not sold to any of the NTs* so the 40 units associated with that CONNUM (shown in column A on row E) *would be excluded from ACME's total sales quantity and from the Pattern Test analysis*. Similarly, *CONNUM 3456 sold to RACINE (shown in column A on row F) was not sold to any NTs*. This CONNUM would be excluded from the Pattern Test analysis, and if RACINE did not purchase any other CONNUMs that were also purchased by an NT, the exporter's sales to RACINE could not be found to be targeted. (emphasis added)**

a. To the United States. This quoted excerpt from Ms. Tenore's statement suggests to the Panel that when, under the pattern test, the USDOC examined whether the quantity of exports to the alleged target in CONNUMs where the export price to the alleged target was 1 standard deviation below the CONNUM's weighted average mean exceeded 33% of the "total volume of a respondent's sales of subject merchandise" to the alleged target, the USDOC included in the denominator, the quantity of exports to the alleged target in only those CONNUMs which were sold to the alleged target as well as the non-targets.

Therefore, if a CONNUM was only sold to the alleged target, and not to a non-target, the quantity of exports made to the alleged target in that specific CONNUM was not included in the denominator.

[44] *See Coated Paper* OI, Final Targeted Dumping Memo, at 2-4 (Exhibit CHN-3); *OCTG* OI, Final I&D Memo, Comment 2 (pp. 7-11 of the PDF version of Exhibit CHN-77); *Steel Cylinders* OI, Final I&D Memo, at 22-24 (Exhibit CHN-66).

Can the United States please clarify whether the Panel's understanding is correct?

Response:

49. The Panel's understanding of the hypothetical presented in paragraphs 26-36 of Exhibit CHN-2 is correct.

b. To the United States. The Panel also understands from this hypothetical example that the numerical value of the denominator used in the pattern test (or, as the United States calls it, "standard-deviation test") and in the "price gap test" was the same. In other words, when the USDOC examined whether the quantity of exports that met the requirements of the price gap test exceeded 5% of the "total sales volume of the subject merchandise", the denominator used in the USDOC's calculation was numerically the same as that used under the pattern test.

Can the United States please confirm the Panel's understanding?

Response:

50. The Panel's understanding of the hypothetical presented in paragraphs 26-36 of Exhibit CHN-2 is correct.

c. To China and the United States. Can you please clarify whether, as a matter of fact, in the three challenged investigations, the USDOC excluded from the denominator, in the application of the 33% and 5% thresholds, the quantity of exports made to the alleged targeted purchaser (or time-period) in CONNUMs which were not also sold to non-targeted purchasers (or time-periods)? In other words, in the three challenged investigations, were there any CONNUMs exported by the concerned exporters, which were sold only to the alleged target and not to non-targets? If yes, were they included in the denominator used by the USDOC, under the pattern and price gap tests, in the application of the 33% and 5% thresholds?

Response:

51. In all three of the challenged investigations, there were CONNUMs that were sold only to an allegedly targeted purchaser (or time period). Such CONNUMs were not included in the denominator used in the pattern and price gap tests.

1.4 Use of zeroing under the WA-T methodology

Question 111: In paragraphs 91 and 92 of its second written submission, the United States asserts that:

> **It is crucial to recognize that, when the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, such as the meaning of the term "margin of dumping", those interpretations, on a basic level, are rooted in the text of the first sentence of Article 2.4.2 of the AD Agreement. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions." The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis".(footnotes omitted)**

There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met. Nothing in the text of Article 2.4.2 of the AD Agreement or the Appellate Body's prior interpretations of that provision supports China's proposed interpretation.

a. To the United States. Does the United States argue that the term "margin of dumping" is to be understood differently under the second sentence of Article 2.4.2 compared with its first sentence?

Response:

52. The United States is not arguing that the term "margin of dumping" is to be understood differently under the second sentence of Article 2.4.2 of the AD Agreement as compared with the first sentence of that article. The Appellate Body has found previously that the terms "dumping" and "margin of dumping" have the same meaning throughout the AD Agreement,[45] and, as explained in the U.S. first written submission, the United States is not asking the Panel to depart from those findings or any other findings of the Appellate Body related to zeroing.[46]

53. The United States does, however, ask the Panel to mirror the caution exercised by the Appellate Body in making those findings and in drawing interpretive conclusions from the text and context of the AD Agreement. The Appellate Body's findings in *US – Stainless Steel (Mexico)* and *US – Zeroing (Japan)* are of particular relevance. In the same breath, the Appellate Body explained what the definitions of "dumping" and "margin of dumping" are and stated clearly that those definitions apply throughout the AD Agreement, but simultaneously the Appellate Body emphasized that it was making no finding regarding the permissibility of zeroing

[45] *See US – Stainless Steel (Mexico) (AB)*, para. 94; *US – Zeroing (Japan) (AB)*, para. 114.

[46] *See* U.S. First Written Submission, para. 217.

under the alternative comparison methodology set forth in the second sentence of Article 2.4.2.[47] If the Appellate Body intended to convey that the prohibition on zeroing is a function of the definitions of "dumping" and "margin of dumping," it would not have emphasized the limitation of its findings in that manner. As we have shown, where the Appellate Body has found that zeroing is impermissible, such findings have been rooted in the text of the first sentence of Article 2.4.2 of the AD Agreement and that textual analysis has been supported by consideration of contextual elements, such as the definitions of "dumping and margin of dumping."

54. We have further demonstrated that the logical extension of what the Appellate Body has found previously is that zeroing is permissible when used in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2, when the conditions for its use are met. Such a use of zeroing would not be inconsistent with the definitions of "dumping" and "margin of dumping" that apply throughout the AD Agreement. As we have explained, while certain comparison results must be removed from the numerator of the dumping margin calculation, as a mask is removed, in order to "unmask targeted dumping," all export prices are still included in the denominator of the dumping margin calculation. Accordingly, the ultimate result of the average-to-transaction comparison methodology, with zeroing, is a single margin of dumping for an exporter for the product as a whole, which accords with prior Appellate Body findings and contextual analysis.

c. To the United States. The Panel notes that in US - Zeroing (EC), the Appellate Body found the use of zeroing in administrative reviews to be inconsistent with Article 9.3 of the AD Agreement and Article VI.2 of the GATT 1994. The Panel also notes that the textual elements of the first sentence of Article 2.4.2, referred to by the United States, do not appear in the texts of Article 9.3 of the AD Agreement or Article VI.2 of the GATT 1994. How does the United States reconcile this with its argument that the basis for the Appellate Body's findings that the use of zeroing was impermissible in the context of the W-W and T-T methodologies was those textual elements present in the first sentence of Article 2.4.2?

Response:

55. The Appellate Body's findings in *US – Zeroing (EC)*, in particular at paragraphs 123-135 of its report, merit close scrutiny. Those findings are quite nuanced and reflect the overall cautious approach in the Appellate Body's findings related to zeroing. The Appellate Body's findings in *US – Zeroing (EC)* do not, as China would have the Panel believe, mean that the Appellate Body has decided that the use of zeroing is prohibited in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement, when the conditions for the use of that exceptional methodology have been established. Indeed, well after issuing the Appellate Body report in *US – Zeroing (EC)*, the Appellate Body expressly stated that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the

[47] *See US – Stainless Steel (Mexico) (AB)*, para. 127; *US – Zeroing (Japan) (AB)*, para. 136.

second sentence of Article 2.4.2. Nor is it an issue before us in this appeal."[48] Accordingly, it would be an error to construe the Appellate Body's findings in *US – Zeroing (EC)* as a prohibition on use of zeroing in a situation in which the conditions set forth in the second sentence of Article 2.4.2 are present.

56. As an initial matter, we recall that, in *US – Zeroing (EC)*, the Appellate Body was not reviewing an application of the alternative, average-to-transaction comparison methodology to calculate a margin of dumping in a situation where the conditions for using the exceptional methodology had been established. Indeed, at the same time that it found zeroing impermissible with respect to the particular average-to-transaction comparison methodology that the United States had applied to assess antidumping duties, the Appellate Body recalled that its findings in *US – Softwood Lumber V*, on which the Appellate Body's findings in *US – Zeroing (EC)* were based, were made in the "specific context of the weighted-average-to-weighted-average methodology, and … did not address the issue of zeroing in the context of the other methodologies set out in Article 2.4.2."[49] So, the Appellate Body expressly avoided making a finding with regard to the exceptional comparison methodology set forth in the second sentence of Article 2.4.2, just as it did in *US – Softwood Lumber V*, *US – Softwood Lumber V (Article 21.5 – Canada)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)*.[50]

57. Additionally, and importantly, the Appellate Body noted that, "[a]lthough Article 9.3 [of the AD Agreement] sets out a requirement regarding the amount of the assessed anti-dumping duties, it does not prescribe a specific methodology according to which the duties should be assessed."[51] Rather, the Appellate Body reasoned that the "margin of dumping" established pursuant to Article 2 "operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on entries of the subject product (from that exporter) covered by the duty assessment proceeding."[52] It is critical to recognize the distinction between a "margin of dumping" and the assessment of antidumping duties. In actuality, in *US – Zeroing (EC)*, the Appellate Body was

[48] *US – Stainless Steel (Mexico) (AB)*, para. 127. *See also US – Zeroing (Japan) (AB)*, paras. 135-136 (distinguishing the transaction-to-transaction and average-to-transaction comparison methodologies and declining to further address whether zeroing is permitted under the second sentence of Article 2.4.2 when applying the average-to-transaction comparison methodology: "We wish to emphasize, however, that our analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."); *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98 (noting that "[t]he permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases" and "there is considerable uncertainty regarding how precisely the third methodology should be applied.").

[49] *US – Zeroing (EC) (AB)*, para. 127.

[50] *See US – Zeroing (EC) (AB)*, para. 127 (explaining that the Appellate Body did not address in *US – Softwood Lumber V* the issue of zeroing in the context of the other methodologies set out in Article 2.4.2, beyond the average-to-average comparison methodology); *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98; *US – Stainless Steel (Mexico) (AB)*, para. 127; *US – Zeroing (Japan) (AB)*, para. 136.

[51] *US – Zeroing (EC) (AB)*, para. 131.

[52] *US – Zeroing (EC) (AB)*, para. 130.

not reviewing the calculation of a margin of dumping at all. Rather, it was reviewing USDOC's assessment of antidumping duties. The Appellate Body's ultimate conclusion hinges on the definition of the term "margin of dumping" in Article 9.3 of the AD Agreement. However, the reason that the Appellate Body found a breach of Article 9.3 is because the Appellate Body considered that the U.S. assessment of antidumping duties using the average-to-transaction comparison methodology, with zeroing, in a situation in which it had not been established that the "pattern" and "explanation" conditions were met, necessarily exceeded the "margin of dumping" as the Appellate Body had elaborated that term in *EC – Bed Linen* and *US – Softwood Lumber V*.[53]

58. Of course, as the Appellate Body itself noted, the *EC – Bed Linen* and *US – Softwood Lumber V* disputes involved the calculation of a margin of dumping using the average-to-average comparison methodology.[54] So, that was the comparison the Appellate Body was making. That is, the Appellate Body compared the U.S. assessment of antidumping duties using the average-to-transaction comparison methodology with zeroing (without having established that the conditions in the second sentence were met) and the "ceiling"[55] of the "margin of dumping" calculated using the average-to-average comparison methodology without zeroing. The result of such a comparison was that the antidumping duties assessed pursuant to the average-to-transaction comparison were higher than the "margin of dumping" calculated using the average-to-average comparison methodology, and so the Appellate Body found a breach of Article 9.3 of the AD Agreement because the amount of antidumping duty assessed exceeded the "margin of dumping."

59. Here, China begs the question when it argues that it follows from prior Appellate Body findings related to the term "margin of dumping" that zeroing is prohibited under the second sentence of Article 2.4.2 of the AD Agreement. That is not what the Appellate Body found in *US – Zeroing (EC)*, or in any other Appellate Body report. As we have explained, the Appellate Body has gone out of its way to emphasize that it has not addressed and answered that question. If, as the United States has demonstrated, zeroing is permitted under the second sentence of Article 2.4.2, then a dumping margin calculated using the alternative, average-to-transaction comparison methodology with zeroing *when the conditions for use of that methodology have been established* is a "margin of dumping" within the meaning of the AD Agreement, and in accordance with previous Appellate Body findings. Accordingly, such a margin would not be inconsistent with Article 2.4.2 of the AD Agreement, or any other provision of the AD Agreement, and assessing antidumping duties using such a margin as a "ceiling"[56] would not breach Article 9.3 of the AD Agreement.

[53] *See US – Zeroing (EC) (AB)*, paras. 125-126 and 133-134.

[54] *See US – Zeroing (EC) (AB)*, para. 127.

[55] *US – Zeroing (EC) (AB)*, para. 130.

[56] *US – Zeroing (EC) (AB)*, para. 130.

2 THE ALLEGED SINGLE RATE PRESUMPTION

Question 113: To the United States. The United States has pointed out that "China's Accession Protocol and Working Party Report provide both a legal and factual predicate for USDOC's treatment of Chinese companies as part of a single China-government entity".

a. Could the United States please identify the specific legal provision of China's Accession Protocol that provides such legal and factual predicate and explain why?

Response:

60. Section 15 of China's Accession Protocol, particularly when read in conjunction with certain provisions of the Working Party Report – as discussed below in response to Part (b) of this question – establish a legal and factual predicate for USDOC's treatment of Chinese companies as part of a single China-government entity. Specifically, Section 15 confirms that non-market economy ("NME") conditions exist in China and that Members' ability to take actions against dumping would not be frustrated or impaired because of these conditions.

61. Section 15 of China's Accession Protocol provides that Members' investigating authorities do not have to use domestic costs and prices in China for price comparability analysis. China reads the language of Section 15 as permitting *exclusively* a derogation with respect to how investigating authorities may make normal value calculations in antidumping investigations involving products from China.[57] China's narrow reading of this text is misplaced and fails to account for the logical implications of the provisions. In considering this issue, the Appellate Body's prior interpretative analysis is instructive:

> [T]he task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication.[58]

Here, Section 15's language concerning normal value calculations serves as confirmation that NME conditions exist in China, and that these conditions – state control of pricing and output – permit an investigating authority to forego the use of Chinese domestic costs and prices in anti-dumping calculations. Once one acknowledges the obvious reason for why Section 15 allows a deviation from traditional rules for normal value calculation – the existence of NME conditions in China – the logical implication is that those conditions would also extend to export price determinations. Specifically, if the state controls the pricing and output of a particular factory,

[57] China's Second Written Submission, para. 212; China's Response to Panel Question No.39, paras. 179-180.

[58] *US – Carbon Steel (AB)*, para. 65.

that control applies whether the good from the factory is sent for domestic consumption or exported abroad.[59]

62. Thus, in order to ensure proper price comparability, investigating authorities when confronted with non-market economy conditions must also be able to ensure that export price calculations are not distorted. Thus, an interpretation of Section 15 that construes it exclusively as a derogation for how normal value may be calculated for Chinese respondents would create serious problems for investigating authorities trying to address injurious dumping. Indeed, a particular irony to such an interpretation is that companies that are found not to be part of the China government entity could be disadvantaged in antidumping investigations in comparison to those under the control of the Chinese government, since the Chinese government could potentially manipulate export price by rechanneling sales though different legal entities under its control on the basis they are nominally distinct.

63. A more logical interpretation is that Section 15's silence on export price is simply a reflection that there was – and is – no need to explicitly reference the issue in order for Members to address it. At least two reasons justify such silence. First, as noted above, explicit reference is not required because Section 15 of the Accession Protocol addresses it by implication. Second, Members viewed existing mechanisms being used in Chinese antidumping investigations at the time of China's accession – such as treating Chinese companies as part of a single China-government entity absent evidence demonstrating independence – as sufficient to address concerns arising with export price. Members reasonably belied these methods *to be already consistent with the AD Agreement* and required no special explication. Indeed, the third party statements from *EC – Fasteners* before the Appellate Body support both points:

- "Brazil contends that one of the situations in which the general rule of individual dumping margin calculation contained in the first sentence of Article 6.10 of the Anti-Dumping Agreement is not applicable is where prices and costs are not established according to market economy rules. This conclusion is supported in Article 2.7 of the Anti-Dumping Agreement, which refers to the second Ad Note to Article VI:1 of the GATT 1994, and, in the particular case of China, reinforced by paragraph 15(a)(ii) of China's Accession Protocol." *EC – Fasteners (AB)*, para. 249

    - "In Colombia's view, as long as this threshold provides the elements to collect the evidence necessary to demonstrate that such a link does not exist, it is consistent with Article 6.10 of the Anti-Dumping Agreement. Colombia further submits that the Appellate Body can take into account China's Accession Protocol and the Accession Working Party Report as guidance in relation to the Members' concerns regarding anti-dumping investigations concerning products from China." *EC – Fasteners (AB)*, para. 252

[59] *See* U.S. First Written Submission, paras. 372-373.

- "In Japan's view, it is at least questionable whether Members would not, in any event, be allowed to presume that the Chinese State is the source of price discrimination on the basis of Article 15(a) and (d) of China's Accession Protocol, read together with paragraph 151 of China's Accession Working Party Report. Japan maintains, however, that any presumption in that regard must be rebuttable." *EC – Fasteners (AB)*, para. 257

64. Indeed, at the time China's accession to the WTO was being negotiated and finalized, the United States was not alone among WTO Members in having collapsed various legal entities into a single China government entity in the course of an antidumping proceeding. Yet despite this being well known at the time of China's accession, it appears no Member following China's accession believed such an approach had suddenly become impermissible following China's accession and that they were limited only to addressing calculations of normal value.

65. In short, Section 15, properly interpreted, and considered in context with relevant provisions of the Working Party Report, as discussed in the U.S. response to Part (b) of this question, provide the legal and factual predicate for USDOC's consideration of Chinese companies as part of a single China-government entity for purposes of price comparability.

b. Could the United States please indicate, with precision, which paragraph(s) of China's Working Party Report support such a statement? In your response, please specify the relevant part(s) of the text of the paragraph(s) that you may identify, and explain how such part(s) support your proposition.

Response:

66. As discussed in prior submissions, certain paragraphs of the Working Party Report demonstrate that Members were concerned that China had not transitioned to a market economy and that investigating authorities could address the corresponding implications in their price comparability analysis.[60] The United States refers to footnote 330 of the United States Second

[60] *See* U.S. First Written Submission, paras. 366-371; U.S. Responses to Panel Questions Nos. 38 & 40, paras. 100-110; U.S. Second Written Submission, paras. 193-200.

Written Submission, which discusses a number of examples[61] where the Working Party Report takes note of the Chinese government's particular involvement in economic activities.[62]

67. The following two paragraphs from the Working Party Report are particularly instructive in showing that the Working Party Report supports USDOC's treatment of certain Chinese companies as part of a single China government entity. These paragraphs are 150 and 151(b) of the Working Party Report.

Paragraph 150	Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.
Paragraph 151(b)	[Chapeau:] The representative of China expressed concern with regard to past measures taken by certain WTO Members which had treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determinations. In response to these concerns, members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following: . . .

[61] *See id.*, paras. 147-152 (Exhibit USA-34) (noting the special difficulties that could arise because China had not yet transitioned to a full market economy). The Working Party Report includes a number of examples of the GOC's role in economic activity: First, rather than fully privatize its SOEs, the Government of China had opted for a program of equitization whereby SOEs were converted into joint-stock or limited liability companies in which the State can hold any percentage of shares. In fact, line ministries (which controlled SOEs during the central planning era) would hold the State's stakes in these companies. *Id.*, paras. 43-49 (Exhibit USA-34). China further envisioned that an indefinite number of SOEs, including large and important ones as well as the banks, would remain wholly or majority state-owned for an undefined time period; the open-ended list of such enterprises in the Working Party Report is extensive and encompasses industries and sectors far beyond those normally considered national security-related or a natural monopoly natural monopolies. *Id.*, paras. 43-49 (Exhibit USA-34).

[62] The United States notes again that the Appellate Body did not analyze the Working Party Report in its analysis in *EC – Fasteners* concerning China's claims under Article 6.10 and 9.2.

	(b) The importing WTO Member should ensure that it had notified its market-economy criteria and its methodology for determining price comparability to the Committee on Anti-Dumping Practices before they were applied.

68. First, Paragraph 150 notes that Members recognized that China had not transitioned to a market economy. The paragraph, like Section 15 of the Accession Protocol, is based on the recognition that NME conditions may preclude using Chinese domestic prices in anti-dumping investigations. And, as discussed above in response to part (a) of this question, the logical corollary is that investigating authorities may also address the impact of NME conditions on export prices in order to ensure proper price comparability.

69. Second, Paragraph 151, particularly subparagraph (b), also provides a basis whereby investigating authorities should be entitled to presume Chinese companies are part of a China government entity absent evidence indicating otherwise. The chapeau notes China's concerns about anti-dumping proceedings in which it is designated an NME, but the relevant subparts of paragraph 151 – such as subparagraph b – do not require Members to abandon their treatment of China as an NME. Instead, Members committed to greater transparency and opportunity for Chinese respondents to participate in proceedings. The fact that subparagraph (b) provides that Members should notify (i) their market economy criteria and (ii) their methodology for price comparability buttresses the understanding, albeit implicit, that NME conditions exist in China until China demonstrates otherwise to a Member's satisfaction and that NME conditions may necessitate a different price comparability methodology. Notably, paragraph 151 imposes no substantive limitations on that methodology but rather requires procedural transparency.

70. These examples, as well as those discussed in prior submissions, demonstrate that during the accession process, Members expressed concerns in the Working Party Report about how the fact that China had not yet transitioned to a market economy could affect the conduct of antidumping and countervailing duty investigations and the application of the AD and SCM Agreement. As discussed above in response to Part (a) above, it would be incorrect to assume that the concerns raised by Members with respect to the impact of the Chinese government on its economy began and ended with the determination of normal value, and did not extend to other aspects of the price comparison. Such a reading would ignore those paragraphs of the Working Party Report which describe that China *planned* to develop an economy where the State continued to play a predominant role.[63] This would also disregard Members' expressed concerns about the significant level of influence of the Government of China on its economy and how such influence could affect trade remedy proceedings.

[63] *See* U.S. First Written Submission, paras. 171-176 (Exhibit USA-34).

Question 114: To China and the United States. What is the proper characterization of China's Working Party Report under Articles 31 and 32 of the Vienna Convention on the Law of Treaties? In responding to this question, please distinguish the paragraphs of China's Working Party Report that contain binding commitments from those that do not.

Response:

71. Provisions of the Working Party Report that have been incorporated into China's Protocol of Accession are part of the WTO Agreement and thus treaty text that can be interpreted in accordance with Articles 31, 32 – and 33 – of the Vienna Convention on the Law of Treaties ("VCLT").[64] In contrast, the rest of the Working Party Report, while not treaty text, can be considered preparatory work and thus can be examined as a supplementary means of interpreting China's Accession Protocol under Article 32 of the VCLT.

Working Party Commitments That Have Been Incorporated

72. Section 1.2 of the China's Accession Protocol provides in pertinent part as follows:

> This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.

Thus, per the terms of this provision, China's Accession Protocol is part of the WTO Agreement as are certain specified commitments.[65] Paragraph 342 of the Working Party Report identifies which paragraphs of the Working Party Report contain China's commitments:

> The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs 18-19, 22 23, 35-36, 40, 42, 46 47, 49, 60, 62, 64, 68, 70, 73, 75, 78 79, 83 84, 86, 91 93, 96, 100 103, 107, 111, 115 117, 119 120, 122 123, 126 132, 136, 138, 140, 143, 145, 146, 148, 152, 154, 157, 162, 165, 167 168, 170 174, 177 178, 180, 182, 184 185, 187, 190 197, 199 200, 203 207, 210, 212 213, 215, 217, 222 223, 225, 227 228, 231 235, 238 242, 252, 256, 259, 263, 265, 270, 275, 284, 286, 288, 291, 292, 296, 299, 302, 304 305, 307 310, 312 318, 320, 322, 331 334, 336, 339 and 341 of this

[64] *See US – Shrimp II*, para. 7.175 ("Provisions contained in Accession Protocols are binding upon the parties and are therefore treaty text to be interpreted pursuant to customary rules of interpretation, in particular Articles 31 and 32 of the Vienna Convention. By virtue of paragraph 2 of Viet Nam's Accession Protocol, the commitment contained in paragraph 255 of its Working Party Report is incorporated by reference into the Accession Protocol and is therefore treaty language. In contrast, paragraph 254 is not referred to in Viet Nam's Accession Protocol and, therefore, is not treaty text.")

[65] *China – Rare Earths (AB)*, para. 5.72 ("The 'terms' of China's accession are spelt out in China's Accession Protocol and those specific commitments of China's Accession Working Party Report that are incorporated into its Accession Protocol. Pursuant to Paragraph 1.2 of China's Accession Protocol, the Protocol, in its entirety, is made 'an integral part of the WTO Agreement'. When used in different contexts in China's Accession Protocol, the term 'the WTO Agreement' may refer narrowly to the Marrakesh Agreement alone, or it may refer broadly to the Marrakesh Agreement together with the Multilateral Trade Agreements annexed thereto.")

> Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.

These commitments in the Working Party Report are, as noted treaty text by virtue of the incorporation, and can be subject to dispute settlement.[66] As treaty text, these commitments can be interpreted under customary rules of treaty interpretation as reflected in Articles 31, 32, and 33 of the VCLT.

Unincorporated Working Party Report

73. The portions of the Working Report that are not incorporated into China's Accession Protocol are not treaty text. However, the Working Report may be relevant in interpreting China's Accession Protocol to the extent portions of the report can be considered preparatory materials or part of the circumstances attendant to the Accession Protocol's conclusion. In this regard, it is important to recognize that paragraph 2 of the Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization explicitly notes that working party reports are a key part of the accession process and are to be taken into account by the Ministerial Conference in considering an application by a state to the WTO:

> (a) Any State or separate customs territory may request the Preparatory Committee to propose for approval by the Ministerial Conference of the WTO the terms of its accession to the WTO Agreement in accordance with Article XII of that Agreement. If such a request is made by a State or separate customs territory which is in the process of acceding to GATT 1947, the Preparatory Committee shall, to the extent practicable, examine the request jointly with the Working Party established by the CONTRACTING PARTIES to GATT 1947 to examine the accession of that State or separate customs territory.
>
> (b) The Preparatory Committee shall submit to the Ministerial Conference a report on its examination of the request. The report may include a protocol of accession, including a schedule of concessions and commitments to GATT 1994 and a schedule of specific commitments for the GATS, for approval by the Ministerial Conference. The report of the Preparatory Committee shall be taken into account by the Ministerial Conference in its consideration of any application by the State or separate customs territory concerned to accede to the WTO Agreement.

Accordingly, while the unincorporated portions of the Working Party Report may not be treaty text, they may serve as materials that can be examined as supplementary means of interpretation under Article 32 of the VCLT.

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[66] *China – Raw Materials (AB)*, para. 7.114 ("Finally, all parties agree that commitments included in the related Working Party Report, and incorporated into the Accession Protocol by cross-reference, are binding and enforceable through WTO dispute settlement proceedings."); *see also e.g.*, *China – Rare Earths*, paras. 8.12 & 8.13 (finding breaches of Working Party Report commitments).

3 CHINA'S CLAIMS UNDER ARTICLES 6.1 AND 6.8, THE FIRST SENTENCE OF ARTICLE 9.4 AND PARAGRAPHS 1 AND 7 OF ANNEX II TO THE AD AGREEMENT

3.1 The alleged AFA Norm

Question 117: In a number of anti-dumping determinations placed on the record, the USDOC makes the following statements: (a) the USDOC's "practice, when selecting an [adverse facts available] rate from among the possible sources of information, has been to ensure that the rate is sufficiently adverse 'as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the [USDOC] with complete and accurate information in a timely manner'"; and/or (b) "[i]n selecting a rate based on [adverse facts available], the [USDOC] selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated". In such determinations, the USDOC also explains its "practice" to select as "adverse facts available" or "AFA" the higher of the highest margin alleged in the petition or the highest calculated rate of any respondent in the investigation.

b. To the United States. The Panel notes the United States' argument that China has not explained "what actually constitutes an 'adverse fact'".[67] Please explain the meaning of the term "adverse facts available" as used by the USDOC in the determinations cited above.

Response:

74. "Adverse facts available" or "AFA" is simply a term USDOC has used in the challenged determinations to refer to the particular fact selected as a result of applying an adverse inference in selecting from among the available facts where a party has failed or otherwise refused to cooperate in providing necessary information.[68] As noted, where a party refuses to provide the information, it is not possible for the administering authority to know whether the information it selects is, in reality, favorable or unfavorable (adverse) to the interests of the uncooperative party from the limited information available on the record. As the Appellate Body has recognized, in applying facts available the administering authority is selecting "a replacement for an unknown fact."[69]

[67] U.S. Second Written Submission, para. 170.

[68] *See Jinan Yipin Corp. Ltd., v. United States*, 526 F.Supp.2d 1347, 1353, n. 7 (Ct. Int'l Trade 2007) ("Commerce uses the shorthand term 'adverse facts available' to refer to two separate procedures. Specifically, the Department uses "facts otherwise available" under 19 U.S.C. § 1677e(a) when needed information is unavailable on the record or otherwise deficient according to § 1677e(a). See 19 U.S.C. § 1677e(a). When selecting from among the facts otherwise available, Commerce uses inferences adverse to a party that fails to cooperate by not acting to the best of its ability in responding to the Department's requests for information. See id. § 1677e(b).") (Exhibit USA-127).

[69] *US-Hot Rolled Carbon Steel from India (AB)*, para. 4.426.

75. China, however, argues that by applying an adverse inference the result is necessarily adverse to the interests of the non-cooperative party.[70] China does not – because it cannot – explain how such a conclusion is tenable without knowledge of the unknown fact. China's conclusion is nothing more than speculation, unsupported by any factual information on the record of any of the challenged determinations. Rather, China rests its argument and its conclusion solely upon the term USDOC uses to refer to the information selected when it applies an adverse inference. As the United States has demonstrated, and will discuss further below, a rate calculated in a situation where a party fully cooperates may well be higher than the rate selected in a situation where that party declines to cooperate and where the rate is thus determined based on other available facts and taking account of an adverse inference. Merely because the term AFA is applied to the information selected does not make it *per se* adverse to the interests of the non-cooperating party, nor does it make it punitive. As the Appellate Body has recognized, "authorization to use an inference that is 'adverse to the interests' of a non-cooperating party is not necessarily inconsistent with Article 12.7."[71] Thus, not only has China failed to demonstrate that the information selected through the use of an adverse inference is, in fact, adverse to the interests of the non-cooperating party, more critically it has failed to demonstrate that the result is inconsistent with Article 6.8 and Annex II of the AD Agreement. The Panel, therefore, must reject China's argument.

c. To the United States. Could the United States please explain the substantive and procedural requirements under US law for the USDOC to change certain aspects of its anti-dumping practice? In responding to this question, please consider the reference in the United States' first written submission to the *US – Steel Plate* panel report where that panel took note of the United States' assertion that "under its governing laws, the USDOC may change a practice provided it explains its decision".

d. To the United States. If there are such requirements, would they also apply to changes that the USDOC may introduce to the "practice" referred to in the determinations cited above regarding the application of facts available in anti-dumping proceedings involving NME-wide entities?

Response: The United States will answer subsections 11.c and d together.

76. As an initial matter, the United States would like to clarify what the term "practice" is with respect to USDOC. Practice refers to what USDOC has done *in the past*. Under U.S. law, agencies are not required to follow past practice, rather agencies must provide explanations for their determinations, and those determinations must comport with the relevant statute. The United States notes that prior panels have considered claims against USDOC "practice" – and

[70] China's First Written Submission, para. 433 ("By definition, the use of an adverse inference entails the extrapolation of a conclusion from information that yields a "harmful" or "unfavorable" result for the NME-wide entity and each of the producers/exporters included within the NME-wide entity.")

[71] *US-Hot Rolled Carbon Steel from India (AB)*, para. 4.469 (discussing the equivalent of Article 6.8 of the SCM Agreement).

rejected them – because they have recognized that practice for USDOC is simply the past decisions of USDOC:

> In particular, we do not agree with the notion that the practice is an "administrative procedure" in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations. Rather, as India suggests a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC. We note in this regard that the USDOC decisions on application of facts available turn on the particular facts of each case, and the outcome may be the application of total facts available or partial facts available, depending on those facts. India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree.
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> ***
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> The challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something[72]

77. By contrast, a change in a regulation under U.S. law would require an administering agency to engage in a notice and comment rulemaking procedure, which entails publication of a proposed rule in the Federal Register, and the opportunity for the general public to comment on the proposed rule.[73] The agency would then consider the comments, and issue a final rule by publishing a notice of the final rule in the Federal Register. In that notice, the agency would also address the public comments. This procedure, required pursuant to statute, was followed by USDOC in promulgating its regulation on facts available under 19 CFR § 351.308.

78. With specific regard to facts available determinations, the U.S. statute and regulation provide USDOC with complete discretion to either apply an adverse inference or not when a party has refused or otherwise failed to cooperate to the best of its ability.[74] Moreover, given the diversity of USDOC decisions in this area, the United States does not agree with China that there exists any well-defined practice. As demonstrated from the examples the United States provided and discusses further in the U.S. answer to question 69, USDOC has exercised its discretion not

[72] *US – Steel Plate*, para. 7.22-7.23.

[73] *See* 5 U.S.C. § 553 (Exhibit USA-128).

[74] *See* 19 U.S.C. § 1677e (Exhibit CHN-153) ("If the administering authority…finds that an interested party has failed to cooperate to the best of its ability to comply with a request for information form the administering authority…, the administering authority…, in reaching the applicable determination under this title, *may* use an inference that is adverse to the interest of that party in selecting from among the facts otherwise available.") (emphasis added).

to apply an adverse inference in selecting from the available facts, depending on the facts and circumstances of the case.

79. An example may be helpful in understanding that China has not established the existence of any consistent practice, and most certainly has not met the much higher burden of showing the existence of an unwritten measure that constitutes a rule or norm of general application. In *Flowers from Mexico*, the weighted-average calculated dumping rate for a fully cooperating party was 264.43 percent. Importantly, the *adverse facts* that USDOC applied to parties that refused to provide necessary information in that case was a substantially lower rate of 39.95 percent. The domestic industry in that case argued in its comments to USDOC that by applying the lower rate the authority was "unnecessarily and unfairly departing from its practice of assigning non-responding companies the highest available margin."[75] USDOC rejected the argument and continued to apply the lower rate, on the ground that the information on the record showed the calculated rate of 264.43 percent was not reflective of other companies, and by extension, not reflective of the flower industry. This determination demonstrates that facts available determinations are based upon the particular facts and circumstances of the case, and not upon the statements China has hand-selected to reflect an alleged USDOC practice, as well as a supposed rule or norm of general application. Importantly, in the challenged determinations, USDOC has continued to base its examination of facts available on the same concerns developed and identified in *Flowers from Mexico*, as noted by the United States,[76] notwithstanding the statement of using the highest rate. The statements China relies upon are simply an incomplete reflection of USDOC's administration of the U.S. law governing the application of facts available. As the United States has noted, if the selected statements are supposed to reflect USDOC's practice, or even more improbably, some sort of rule or norm of general application, then USDOC would always select the higher of the highest rate. As the United States demonstrated, that is simply not the case.[77]

80. In sum, China cannot rely on these statements or purported practice to sustain a finding that a norm or rule of general and prospective application exists.

e. To the United States. The Panel notes that, in response to the Panel's question No. 81(a) following the first substantive meeting of the Panel with the parties, the United States explains that corroboration means that the USDOC "will examine whether the information to be used has probative value".[78] At what stage in an anti-dumping proceeding involving an NME

[75] *Fresh Cut Flowers from Mexico*, 61 Fed. Reg. 6812, 6814 (Feb. 22, 1996) (Exhibit USA-56).

[76] U.S. Second Written Submission, para. 293.

[77] China claimed certain language within the *Steel Cylinders OI* determination reflected a practice that supports a finding for the alleged AFA Norm's existence when the purported practice reflected in the language highlighted by China was not even carried out in that very determination. *See* U.S. Closing Statement at the Second Substantive Meeting of the Panel, para. 16.

[78] U.S. Response to Panel Question No. 81(a), para. 200 (referring to Uruguay Round Agreement Act, Statement of Administrative Action, H.R. Rep. 103-316, vol. 1, at 870 (1994), (Exhibit USA-51); and 19 C.F.R. § 351.308(d), (Exhibit CHN-152)).

country does this corroboration exercise take place? Specifically, does it take place before or after the USDOC has found an NME-wide entity to be non-cooperating and has decided to draw adverse inferences with respect to that entity? Does corroboration serve to determine which information should be used to replace the missing information or does it serve to verify whether the information that the USDOC may use following the application of adverse inferences has a basis on the record?

Response:

81. As an initial matter, under U.S. statute, if necessary information is on the record, even if a party failed to cooperate, USDOC must use that information, provided it meets certain requirements, such as being verifiable.[79] The statute provides in pertinent part that:

> the administering authority … shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.[80]

82. After USDOC has determined that necessary information is missing, then again under U.S. statute and regulation, USDOC determines whether "an interested party has failed to cooperate by not acting to the best of its ability" and, if so, whether to apply an adverse inference when selecting from among the facts available.[81]

83. When relying on secondary information, USDOC must "to the extent practicable, corroborate that information from independent sources that are reasonable at {USDOC's}

[79] *See* 19 U.S.C. § 1677m(e) (Exhibit CHN-154).

[80] *Id.*

[81] See 19 U.S.C. § 1677e(b) (Exhibit CHN-153).

disposal."[82] This echoes the requirement in Annex II, paragraph 7, stating "authorities should, where practicable, check the information from other independent sources at their disposal...." USDOC must complete this corroboration exercise whether it selects information using an adverse inference or not: corroboration is triggered by the type of information selected (*i.e.*, secondary information) not by how USDOC selects that information (*i.e.*, whether based on the application of an adverse inference or not).[83]

84. Through corroboration, it can be determined which information may replace the missing information. In corroborating the information, USDOC examines whether the information has probative value; in other words, whether it is both reliable and relevant.[84] In cases where the information is found to lack probative value, USDOC has not used that information as facts available.[85] Thus, corroboration serves to determine which information can (and cannot) be used as facts available.

Question 118: To the United States. Please explain the statutory, regulatory and/or administrative differences under US law between the use of *partial* facts and *total* facts available. Have there been anti-dumping investigations or administrative reviews where the USDOC applied partial, as opposed to total, facts available with respect to an *NME-wide entity* found to be non-cooperating?

Response:

85. The same statute and regulations apply in cases of both total and partial facts available. Under the relevant U.S. statute and regulations, which China has not challenged in this dispute, USDOC is permitted to resort to facts available when parties refuse or otherwise fail to provide necessary information.[86] In those circumstances, USDOC may rely upon secondary information contained in the application, a final determination in a previous investigation, a previous review or other proceeding, or any other information placed on the record.[87]

86. Per this statutory and legal framework, when USDOC finds that a party is non-cooperative, but necessary information is nevertheless on the record, the law requires that

[82] 19 U.S.C. § 1677e(c) (Exhibit CHN-153); 19 CFR §351.308(a) and (b) (Exhibit CHN-152).

[83] *See, e.g.*, Low Enriched Uranium from France: Preliminary Results of Antidumping Duty Administrative Review, 71 Fed. Reg. 11,386, 11,389 (Mar. 7, 2006) (Exhibit USA-129); Cotton Shop Towels from Pakistan: Final Results of Countervailing Duty Administrative Review, 66 Fed. Reg. 42,514 (Aug. 13, 2001) (Exhibit USA-130) and accompanying Issues & Decision Memorandum at 2 (Exhibit USA-131).

[84] *Uruguay Round Agreement Act, Statement of Administrative Action*, H.R. Rep. 103-316, vol. 1, at 870 (1994). (Exhibit USA-51); 19 C.F.R. § 351.308(d) (Exhibit CHN-152).

[85] *See, e.g.*, *Wood Flooring* OI, and *Steel Cylinders* OI.

[86] 19 U.S.C. § 1677e(a) (Exhibit CHN-153); 19 CFR §351.308(a) and (b) (Exhibit CHN-152).

[87] 19 U.S.C. §1677e(b) (Exhibit CHN-153); 19 CFR §351.308(a) and (c) (Exhibit CHN-152).

Commerce use the information in making its determination, provided that certain conditions are satisfied, such as the information that is provided is timely and verifiable for example.[88] In those circumstances, USDOC will use the information on the record and will fill any gaps of missing with partial facts available. In those situations in which the information provided is not verifiable or usable, USDOC must fill the entire gap in the record, also referred to as total facts available.

87. For example, in the *OCTG OI*, the respondent TPCO failed to report certain downstream sales, specifically those to "Company B" and certain purchases of compressed air.[89] Although the domestic industry argued that USDOC should apply total facts available with an adverse inference, and find that all of the respondent TPCO's information was unreliable, USDOC determined that applying partial facts available to fill the gaps left in the record was appropriate.[90] USDOC found that TPCO's information was timely, reliable, and not so incomplete that it could not be used.[91] Therefore, for TPCO's unreported downstream sales, USDOC selected the application rate as partial facts available. For certain purchases of compressed air, USDOC valued all of the compressed air based on the electricity consumption used to produce the amount of compressed air consumed in the production of subject merchandise because electricity is the main input required to produce compressed air. This information, used as facts available, was information TPCO provided to USDOC in the course of the investigation.[92]

88. As to the Panel's question whether there have been anti-dumping investigations or administrative reviews where the USDOC applied partial, as opposed to total, facts available with respect to a non-cooperating NME-wide entity, the answer turns on whether the non-cooperation was partial or full. In a case where the NME entity provides no information – that is, full non-cooperation, there is no information provided to USDOC that can be used as partial facts available. Accordingly, a case of full non-cooperation is likely to lead to the use of total facts available. In contrast, where the non-cooperation is only partial, USDOC will use partial facts available, and not total facts available where the information provided meets the statutory requirements for its use.

Question 119: To China and the United States. Is there, under US anti-dumping law/practice, a way, other than through the alleged Single Rate Presumption challenged in these proceedings, to define an NME-wide or a similar entity in anti-dumping proceedings involving NME countries?

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[88] *See* 19 U.S.C. § 1677m(e). (Exhibit CHN-154)

[89] *OCTG* OI, Issues & Decision Memorandum at Comments 9, 22.

[90] *OCTG* OI, Issues & Decision Memorandum at Comment 8.

[91] *OCTG* OI, Issues & Decision Memorandum at Comment 8.

[92] *OCTG* OI, Issues & Decision Memorandum at Comment 22.

89. In the proceedings challenged by China, USDOC did not identify or apply any other mechanism to treat certain Chinese companies as part of a *single China-government entity*. In these proceedings, as discussed above in the U.S. response to Question 113, USDOC's consideration of Chinese companies as part of a single China-government entity has both a legal and factual predicate in the Accession Protocol and the Working Party Report. Given this foundation, USDOC properly applied a presumption in these proceedings that could be rebutted with facts and evidence.

90. However, as discussed in more detail in United States Responses to Panel Question 41, (paras. 111-112), U.S. law provides a mechanism by which certain affiliated producers and exporters may be treated as a single entity. This mechanism has not been applied in considering whether exporters in China are part of the China-government entity. However, as noted in the U.S. Response to Questions 36[93] and 43,[94] this mechanism has been used to collapse affiliated Chinese companies into a single entity, although not the China government entity

Questions 121 & 126:

> **121: To China and the United States. Please explain, in general, the characteristics a measure must possess in order to qualify as a norm that has general and prospective application for purposes of WTO dispute settlement.**
>
> **126: To China and the United States. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found the SPB of the USDOC to be a measure of general and prospective application. In its reasoning, the Appellate Body found that:**
>
> **[T]he SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance.**

Does the above statement by the Appellate Body suggest that the analysis of whether a measure "provides administrative guidance and creates expectations" is separate from the assessment of whether an alleged norm has general and prospective application?

> **Response:** The United States provides a common response to Questions 121 and 126 and proceeds by answering Question 126 first as the analysis for that question also addresses Question 121.

91. Yes, although the question is perhaps better phrased as "the analysis of whether a measure 'provides administrative guidance and creates expectations' is separate from the assessment of whether a measure has general and prospective application." That is, the first

[93] U.S. Response to Panel Question No. 36, para. 91.

[94] U.S. Response to Panel Question No. 41, paras. 111-112.

question to be analyzed goes to the question of whether the measure is a rule or norm, and thus it may create confusion to also use the word 'norm" in the second part of the analysis. As discussed below, while there is some overlap in the queries, the first query is whether a rule or norm exists, while the second concerns whether the measure has the attributes of general and prospective application.

92. In considering this matter, the Appellate Body's analysis from *US – Zeroing (EC) (AB)* is somewhat instructive:

> In our view, when bringing a challenge against such a "rule or norm" *that constitutes a measure of general and prospective application*, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application.[95]

Implicit in the statement is that not all norms or rules constitutes measures of general and prospective application. Accordingly the first step is trying to discern whether a rule or norm exists.

Determining the Existence of a Rule or Norm

93. The phrase "rule or norm of general application" of course is not contained in the WTO agreement; rather, it is a concept that has been used in a number of disputes to describe what types of measures are susceptible to challenge in WTO dispute settlement. To assist in understanding this concept, the definition of the word norm may be helpful: the term "norm" includes "an authoritative standard" and "a principle of right action **binding** upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior."[96] The Appellate Body in *OCTG Sunset Reviews* found that one way of evaluating whether a rule or norm exists is to examine whether an instrument provides administrative guidance and creates expectations. Under this formulation, the United States considers the administrative guidance element – that is, some rule that is binding on an authority – to be more pertinent and useful. The question of "expectations" is somewhat circular and subjective, and depends on the legitimacy of the expectations, which in turn reverts to questions of whether the measure actually required a particular result. In short, the key to the first step is to ascertain whether there is indeed content to the norm by virtue of something being binding. Even if that is established though, a panel must then determine whether there is general and prospective application of the alleged measure.

General and Prospective Application

94. Ascertaining general and prospective application overlaps with the analysis used to identify the content of the alleged norm because the measure must have normative character not only with respect to a particular content of the rule at issue but also with respect to the measure's

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

[96] Webster's Ninth New Collegiate Dictionary, p. 806 norm (Exhibit USA-132) (emphasis added).

general and prospective application. Specifically, the United States highlights that the Appellate Body's analysis in *OCTG Sunset Reviews* explicitly stated that it was clear that the "intent" of general and prospective application existed in the SPB. In other words, it was established that the SPB – by virtue of its explicit intent – created guidance and expectations with respect to the SPB's general and prospective application.

95. Turning to what are the characteristics general and prospective application respectively, the Appellate Body's recent statements in *Argentina – Import Measures* are instructive. With respect to what established the *general application* of the measure in that dispute, the Appellate Body noted "{t}he systematic nature of the unwritten TRRs measure is evidenced by and manifested in the fact that TRRs are applied to economic operators in a broad variety of different sectors as part of an organized effort, coordinated and implemented at the highest levels of government, and aimed at achieving import substitution and reduction of trade deficit within the framework of the 'managed trade' policy."[97] Put more plainly, a characteristic of general application is that it applies across various situation rather than being contingent or affected by particular circumstances.

96. The Appellate Body also stated that evidence which "show{s} that the TRRs measure has present and continued application, in the sense that it is currently applied and it will continue to be applied in the future until the underlying policy is modified or withdrawn{,}" is indicative of *prospective application*.[98] If an alleged measure is subject to change at any time, is not envisaged to apply invariably in the future, and its application can be contingent on particular circumstances, then it cannot be sustained that this measure has general and prospective application.

97. In short, a rule or norm with general and prospective application suggests a measure that requires certain conduct or action by a government authority, as contrasted to some pattern of similar results arising from similar sets of facts. It also involves systemic, continued application in the future until the underlying measure is modified or withdrawn.

3.2 Alleged violations of Articles 6.1 and 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II to the AD Agreement

Question 132: To China and the United States. If China's "as such" and "as applied" claims under the alleged Single Rate Presumption stand, in what sense, if at all, would findings on China's "as such" and "as applied" claims presented under the heading "VI. China's Claims under Article 6.1, Article 6.8, Annex II and Article 9.4 Regarding the NME-Wide Methodology and the Use of Adverse Facts Available Norm Through Which USDOC Assigns a Rate to NME-Wide Entities" in China's first written submission contribute to the positive resolution of the dispute?

[97] *Argentina – Import Measures (AB)*, para. 5.142.

[98] *Id.* at para. 5.143.

Response:

98. If the Panel finds for China on any of its claims[99] against the alleged Single Rate Presumption, then additional findings under Articles 6.1, 6.8 and Annex II, and Article 9.4 would not contribute to a positive resolution of the dispute because such findings – and the underlying analysis – would not be relevant in resolving the dispute. To recall, China's case against the Single Rate Presumption entails the following:

- That the alleged Single Rate Presumption is a norm which is intended to have general and prospective application;
- The norm is inconsistent with Articles 6.10, 9.2, and the second obligation of Article 9.4 both "as such" and "as applied" in each of the challenged proceedings (including the six new proceedings which China raised for the first time at the first panel hearing).[100]

China also raises the following claims related to USDOC's request for information and resort to facts available and selection of facts available:

- That USDOC acted inconsistently with Article 6.1, and Article 6.8 and Annex II in certain of the challenged proceedings;
- That the alleged Use of Adverse Facts Available Norm is a norm which is intended to have general and prospective application;
- That the Use of Adverse Facts Available Norm is inconsistent Article 6.8 and Annex II both "as such" and "as applied" in certain of the challenged proceedings; or
- Alternatively, China claims that USDOC's selection of facts available is inconsistent with Article 6.8 and Annex II in certain of the challenged

[99] The United States notes that a finding on any of the claims under the alleged Single Rate Presumption also calls into question what additional positive resolution would be secured by finding the alleged Single Rate Presumption also inconsistent with the remaining claims. For example, if the Panel were to find that alleged Single Rate Presumption inconsistent with Article 6.10, it is unclear what additional precise recommendation would be added by any findings under Articles 9.2 and 9.4.

[100] Importantly, because China has premised its "as applied" claims on the existence of the alleged Single Rate Presumption, if the Panel finds that China has not established that the alleged Single Rate Presumption is a norm that is intended to have general and prospective application, then each of China's Article 6.10, 9.2, and second obligation of Article 9.4 claims – "as such" and "as applied" – must fail. *See* China's First Written Submission paras. 378-379, 386. The United States also notes that, regardless of the Panel's findings with respect to the existence of the alleged norm and China's as such and as applied claims with respect to Articles 6.10 and 9.2, the Panel may still find that China has failed to establish its *prima facie* case that there is an as such or as applied violation of the second obligation of Article 9.4, given the fact-specific nature of this provision and the nature of China's claims. *See* U.S. First Written Submission, paras. 389-391; U.S. Response to Panel Question No. 46 & 50, paras. 120-121, 130-137; U.S. Second Written Submission, paras. 214-225.

proceedings, regardless of the Panel's findings with respect to the existence of the norm; and

- Finally, China claims that the rate assigned to the China government entity in certain of the challenged proceedings is inconsistent with the first obligation of Article 9.4.

99. In particular, China's claims concerning USDOC's request for information, resort to facts available, and selection of facts available are predicated on the treatment of purportedly distinct exporters and producers being wrongly attached to what China dubs a "fictional" entity.[101] Furthermore, China has clarified that its claims with respect to the alleged Use of Adverse Facts Available norm relate, to USDOC's failure to consider that the China-government entity is allegedly a fictional entity based on presumption and not facts before resorting to facts available.[102]

100. Thus, if the China-government entity itself is found to be inconsistent with U.S. WTO obligations, then it becomes unclear how findings under Articles 6.1, 6.8, and Annex II would contribute to positive resolution of the dispute because these claims are contingent on USDOC's treatment of certain exporters and producers as part of the China-government entity, which—under the scenario presented in the Panel's question.[103]

101. The panel's analysis in *China – Broiler Products* is instructive on this point. In that dispute, the Panel found that the injury determination had a flawed price effects analysis and that this analysis affected the investigating authority's other injury findings such as causation and impact. Although there were separate reasons alleged by the United States for why the causation and impact analysis were flawed, the Panel took judicial economy on those aspects noting that the causation and impact analysis would necessarily have to be reconsidered in light of the price effects finding.[104]

102. Moreover the complexity of the facts and analysis under Articles 6.1, 6.8, and Annex II also militate in favor of a finding of judicial economy for two reasons. As the Appellate Body has noted, the DSU does not encourage panels to clarify legal issues outside the context of resolving a dispute:

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[101] China's Second Written Submission, para. 226.

[102] China's Response to Panel Question No. 80, paras. 702-703, 740-745.

[103] *See US – Animals*, para. 7.675 ("In an 'as applied' situation like that in the present dispute, it is the Panel's view that any measures the United States takes to bring its measures into conformity with Article 6.1 would have the additional result of remedying any potential inconsistency with Article 6.2 if one were to exist. We do not see that a finding on Argentina's 'as applied' claim under Article 6.2 would aid in providing a positive resolution to this dispute."); *Columbia – Textiles*, para. 7.108 ("a finding as to whether or not the obligations in Articles II:1(a) and II:1(b) of the GATT 1994 are applicable to "illicit trade" would be merely theoretical and would be neither necessary nor of practical use in achieving a satisfactory settlement of the matter placed before this Panel.").

[104] *China – Broiler Products*, para. 7.584-7.585.

> Although a few GATT 1947 and WTO panels did make broader rulings, by considering and deciding issues that were not absolutely necessary to dispose of the particular dispute, there is nothing anywhere in the DSU that requires panels to do so.
>
> Furthermore, such a requirement is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the DSU explicitly states:
>
> > The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.
>
> Thus, the basic aim of dispute settlement in the WTO is to settle disputes. … Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.[105]

103. China's arguments to the contrary are not persuasive. At the Second Panel Meeting, China's delegate argued that judicial economy would be inappropriate because that the Use of Adverse Facts Available Norm is a separate measure from the alleged Single Rate Presumption Norm. The critical issue though in determining the appropriateness of judicial economy is not how China has demarcated the measures, but whether the findings with respect to them would contribute to a positive resolution.

104. Here, China's submissions make it clear that the essential component to all of China's claims concerning USDOC's request for information, resort to facts available, and selection of facts available, as well as the alleged Use of Adverse Facts Available Norm, is the existence of a China government entity established through the alleged Single Rate Presumption norm.

- China FWS para. 401: China demonstrates that USDOC acted inconsistently with Article 6.1 in the challenged determinations in which it determined a rate for the *PRC-wide entity* because USDOC: (i) failed to request the detailed information necessary to calculate a margin of dumping for the *PRC-wide entity, including from the distinct producers/exporters* comprising the entity, and thereby failed to give notice of the required information (as shorthand, China generally refers to this as "failing to request information"); and (ii) failed to *give the PRC-wide entity, including the distinct legal entities comprising it*, ample opportunity to submit relevant evidence for that determination.[106]

[105] *US – Shirts & Blouses (AB)*, p. 19.

[106] (Emphasis added).

- China SWS para. 402: China demonstrates that USDOC acted inconsistently with Article 6.1 in the challenged determinations in which it determined a rate for *the PRC-wide entity* because USDOC: (i) failed to request the detailed information necessary to calculate a margin of *dumping for the PRC-wide entity, including from the distinct producers/exporters comprising the entity*, and thereby failed to give notice of the required information (as shorthand, China generally refers to this as "failing to request information"); and (ii) failed to give *the PRC-wide entity, including the distinct legal entities* comprising it, ample opportunity to submit relevant evidence for that determination (as shorthand, China generally refers to this as "failing to provide rights of defense").[107]

- China SWS para. 404: [W]hen USDOC considers that an *NME-wide entity* is non-cooperative, the finding of non-cooperation drives the adoption of adverse inferences triggering the selection of adverse information, even when other facts and circumstances would need to be taken into account in order to select the best information available in the circumstances. For this reason, the norm is inconsistent with Article 6.8 and Annex II(7).[108]

Indeed, perhaps most compelling is that "China [itself] emphasizes that a finding of non-cooperation of the China-government entity is the trigger for the Use of Adverse Facts Available norm."[109] But if the Panel reaches findings calling into question the existence and composition of the entity, then the very trigger has disappeared – and so should, per China's logic, the Use of the Adverse Facts Available norm. Thus, because China's complaint regarding the Single Rate Presumption undergirds its entire complaint under Articles 6.1, 6.8, and Annex II, any findings under those provisions would not contribute to a positive resolution of this dispute.

105. On a final note, the above holds true as well for China's claims under Article 9.4's first obligation. Were the Panel to find that the existence and composition of the entity itself is called into question, it is uncertain why the Panel should resolve the issue of the resulting rate that is assigned to the entity. Moreover, as the United States has established, the fundamental question for the Panel in evaluating China's claims under both the first and second obligations of Article 9.4 is whether the China-government entity itself was "not included in the examination." As noted in the U.S. Second Written Submission at paragraph 209, it appears that China agrees with this assessment. Thus, if the Panel finds no basis for the existence of the entity, the Panel may find that it cannot evaluate whether the entity is included in the examination, and thus may not be in a position to evaluate China's Article 9.4 claims.

[107] (Emphasis added).

[108] (Emphasis added).

[109] *See* China's First Written Submission, para. 436; *see also* e.g., para. 493; China's Second Written Submission, para. 342.

Question 133: To the United States. In its response to the Panel's question No. 85 following the first substantive meeting of the Panel with the parties, the United States explains how, in its view, the USDOC exercised special circumspection and selected the "best" facts available in the 26 determinations originally challenged by China under its claims on Articles 6.1 and 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II to the AD Agreement.[110] Could the United States provide a similar explanation with respect to the four new determinations challenged by China under these claims during the first substantive meeting of the Panel with the parties, in case the Panel were to find that these determinations fall within its terms of reference?

Response:

106. The United States provides an explanation for each of the four new determinations below.

Diamond Sawblades AR4

107. On December 30, 2013, USDOC initiated an administrative review of the antidumping duty order on diamond sawblades from China based on timely requests for review.[111] The period of review was November 1, 2012, through October 31, 2013.[112]

108. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity. USDOC did not make any findings with respect to the level of cooperation of the China-government entity and, in assigning a rate to the entity, USDOC pulled-forward the rate that was previously applied in the Diamond Sawblades AR2 remand redetermination.[113] That rate was based on a simple average of ATM's calculated weighted-average dumping margin and the previously assigned China-government entity rate.[114] Therefore, there was no occasion for USDOC to special circumspection, as that term is used in Annex II, because USDOC did not apply facts available under Article 6.8 of the Agreement.

[110] U.S. Response to Panel Question No. 85, paras. 212-315.

[111] *See* Diamond Sawblades AR4 Preliminary Determination Memo at 1 (Exhibit CHN – 481).

[112] *Id.*

[113] *See* Diamond Sawblades AR4 Preliminary Determination Memo at 9 ("In the last completed review, we denied a separate rate to ATM Single Entity because ATM Single Entity's corporate ownership was similar with no meaningful difference to that as described in the remand redetermination issued on May 6, 2013, in which we denied a separate rate to ATM Single Entity based upon an analysis under the autonomy in selecting management prong of the separate rate test. In this review, the separate rate certification ATM Single Entity provided has not demonstrated any significant differences from the previous review. Therefore, we preliminarily are denying ATM Single Entity a separate rate status and are assigning the PRC-wide rate accordingly.") (internal footnotes omitted) (Exhibit CHN-481), unchanged in Diamond Sawblades AR4 Final Decision Memo at 5-6 (Exhibit CHN-473).

[114] Diamond Sawblades AR4 Final Decision Memo at 11 (Exhibit CHN-473).

OTR Tires AR5

109. On November 8, 2013, USDOC initiated an administrative review of the antidumping duty order on off-the-road tires from China based on timely requests for review.[115] The period of review was September 1, 2012, through August 30, 2013.[116]

110. In this review, USDOC determined that the mandatory respondent Double Coin[117] was part of the China-government entity.[118] Double Coin is wholly-owned by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC). USDOC found that the SASAC also wielded significant control over Double Coin's Board of Directors. Therefore, USDOC determined that Double Coin had not demonstrated the absence of government control over its export activities.

111. Because Double Coin participated in the administrative review and provided USDOC with its verified sales and production data, USDOC was able to calculate a weighted-average dumping margin with respect to Double Coin's data as part of the China-government entity. Because USDOC did not have information on the record with respect to the full composition of the China-government entity, USDOC could not determine Double Coin's portion of the China-government. With the limitations of available facts, USDOC accounted for Double Coin's questionnaire response by calculating a simple average of Double Coin's calculated weighted-average dumping margin and the previously assigned China-government entity rate. This new rate was then assigned to the China-government entity as a whole, which included Double Coin.[119] Because USDOC did not apply facts available, there was no occasion for USDOC to special circumspection, as that term is used in Annex II, because USDOC did not apply facts available under Article 6.8 of the Agreement.

Solar AR1

112. On February 3, 2014, USDOC initiated an administrative review of the antidumping duty order on crystalline silicon photovoltaic cells from China based on timely requests for review.[120] The period of review was May 25, 2012, through November 30, 2013.[121] USDOC determined

[115] *See* Tires AR5 Preliminary Decision Memo at n.1 (Exhibit CHN-478).

[116] *See* Tires AR5 Final Decision Memo at 1 (Exhibit CHN – 472).

[117] Double Coin is a collapsed entity consisting of Double Coin Group Jiangsu Tyre Co., Ltd.; Double Coin Group Shanghai Donghai Tyre Co., Ltd.; and Double Coin Holdings, Ltd.

[118] *See* Tires AR5 Final Results (Exhibit USA-102); Tires AR5 Final Decision Memo at cmt 1 (Exhibit CHN-472).

[119] *See* Tires AR5 Final, 80 Fed. Reg. 20,197, 20,199 (Apr. 15, 2015) (Exhibit CHN-486).

[120] *See* Solar AR1 Prelim, 80 Fed. Reg. 1021 at n.4 (Jan. 8, 2015) (Exhibit CHN-234)

[121] *See* Solar AR1 Prelim, 80 Fed. Reg. 1021 (Jan. 8, 2015) (Exhibit CHN-234)

the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying facts available in determining a rate for the China-government entity.[122]

113. In its preliminary results, USDOC considered the universe of facts on the record, including rates from the application, calculated rates from the investigation and from a cooperating respondent, and transactional information from the investigation and the cooperating respondent. USDOC considered all of the information on the record, which included application rates ranging from 49.88 to 249.96 percent,[123] calculated rates for cooperating respondent of 1.82,[124] and the cooperating respondent's transactional information. USDOC determined that the cooperative respondent's calculated rate had less probative value because it was a cooperative rate and thus did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative. After considering all of the evidence on the record, USDOC preliminarily selected the highest application rate as facts available for the China-government entity, which had been assigned to the China-government entity during the investigation.[125] To ensure the rate had probative value, USDOC examined the evidence on the record and determined that no evidence called into question the relevance or reliability of the selected rate.[126]

114. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[127] USDOC re-examined the application rates, the cooperating respondents' transactional information from the investigation and current period of review, and the cooperating respondents' calculated rates of 0.79 and 33.08 percent.[128] Again, USDOC determined that the cooperating respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation as above. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[129] In response to parties' comments, USDOC determined that the selected rate fell "within the range" of one the mandatory respondents' transactional information and that "several margins calculated on Wuxi Suntech's sales were significantly above {highest rate} and many more are at a level

[122] *Id.*

[123] Solar OI, Initiation, 76 Fed. Reg. at 70963 (Exhibit CHN-181).

[124] *See* Solar AR1 Prelim, 80 Fed. Reg. 1021 (Jan. 8, 2015) (Exhibit CHN-234); Solar OI Final Determination, 77 Fed. Reg. 63,795 (Exhibit CHN-44).

[125] *See* Solar AR1 Prelim, 80 Fed. Reg. 1021 (Jan. 8, 2015) (Exhibit CHN-234)

[126] *See* Solar AR1 Preliminary Decision Memorandum at 16-18 (Exhibit CHN-488).

[127] See Solar AR1 Final, 80 Fed. Reg. 40,998 (July 14, 2015) (Exhibit CHN-489).

[128] The cooperating respondent had been treated as a single entity for the preliminary results. In the final results, USDOC determined that the entities should not have been collapsed and thus calculated two weighted-average dumping margins. See Solar AR1 Final, 80 Fed. Reg. 40,998, 40,0001 (July 14, 2015) (Exhibit CHN-489).

[129] *Id.*

similar to {that rate}."[130] Based on that analysis, USDOC concluded that the selected rate was "reflective of transactions that occurred during the period of review."[131]

Wood Flooring AR2

115. On February 3, 2014, USDOC initiated an administrative review of the antidumping duty order on diamond sawblades from China based on timely requests for review.[132] The period of review was December 1, 2012, through November 30, 2013.[133]

116. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity. USDOC did not make any findings with respect to the level of cooperation of the China-government entity. Rather, USDOC pulled-forward the rate that was previously applied to the China government entity and did not make a determination based upon facts available. Therefore, there was no basis for USDOC to engage in special circumspection, or to corroborate secondary information because USDOC did not apply facts available under Article 6.8 of the AD Agreement.

[130] *See* Solar AR1 Final Decision Memorandum at 17 (Exhibit CHN-487).

[131] *Id.*

[132] *See* Wood Flooring AR2 Preliminary Results, 80 Fed. Reg. 1388 at n.5 (Jan. 9, 2015) (Exhibit CHN-262).

[133] *See* Wood Flooring AR2 Preliminary Results, 80 Fed. Reg. 1388 (Jan. 9, 2015) (Exhibit CHN-262).