

1. INTRODUCTION

1.1 Complaint by China

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

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

1.2 Panel Establishment and Composition

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

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

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

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

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

1.6 Brazil, Canada, the European Union, India, Japan, the Republic of Korea (Korea), Norway, the Russian Federation (Russia), the Kingdom of Saudi

¹ See WT/DS471/1.

² WT/DS471/5 and WT/DS471/5/Corr.1.

³ See WT/DSB/M/343.

⁴ WT/DS471/6.

Arabia, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Turkey, Ukraine, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel Proceedings

1.3.1 General

1.7 After consultations with the parties, the Panel adopted its Working Procedures⁵ and timetable on 11 February 2015. Following the parties' requests, the Panel modified its timetable on 1 April 2015 and again on 28 July 2015.⁶

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

1.3.2 Additional Working Procedures on Business Confidential Information (BCI)

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

2. FACTUAL ASPECTS

2.1 In this dispute, China presents claims with respect to three issues concerning certain anti-dumping measures imposed by the United States Department of Commerce (USDOC), namely, the use of the weighted average-to-transaction (WA-T) methodology in dumping margin calculations, the treatment of multiple companies as a non-market economy-wide entity (NME-

⁵ See the Panel's Working Procedures in Annex A-1.

⁶ In this regard, based on the United States' request for an extension, dated 26 March 2015, of the deadline for the United States' first written submission, and after taking into consideration China's comments on the United States' request, the Panel, through its communication dated 1 April 2015, extended the deadline for the United States' first written submission and the third parties' written submissions. On the basis of a joint request received from China and the United States, on 27 July 2015, requesting an extension of the deadline for the parties' responses to written questions posed by the Panel following the first substantive meeting as well as the second written submission of the parties, the Panel, through its communication dated 28 July 2015, extended the deadlines for these submissions by the parties. Due to the extension of the deadline for written questions posed by the Panel following the first substantive meeting, the Panel also extended the deadline for submission of the first executive summaries of the parties.

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

Report of the Panel

wide entity), and the manner in which the USDOC determines anti-dumping duty rates for such an entity as well as the level of such duty rates.⁸

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

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

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

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

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

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

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

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

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

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

3. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

- 3.1 China requests the Panel to find as follows¹⁴:
- a. The United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in three challenged determinations¹⁵ of the USDOC, because in each of these determinations¹⁶:
 - i. The USDOC used the WA-T methodology without having properly met the first condition of Article 2.4.2, second sentence. Specifically:
 - the USDOC used the statistical tools of its own choice in an arbitrary and biased manner;
 - the USDOC's reliance, in the Nails test, on weighted-average prices instead of individual export transactions was inconsistent with the treaty text and biased the Nails test, as applied, towards finding a pattern; and
 - the USDOC failed to assess whether the observed export prices differed significantly in a qualitative sense.
 - ii. The USDOC used the WA-T methodology without having properly met the second condition of Article 2.4.2, second sentence. Specifically, the USDOC's explanation as to why it could not use the weighted average-to-weighted average (WA-WA) comparison methodology was inadequate, and the USDOC did not address whether the transaction-to-transaction (T-T) comparison methodology could appropriately take account of the relevant pricing pattern.
 - iii. The USDOC applied the WA-T methodology to all reported US sales by the Chinese exporters APP-China (in the *Coated Paper* investigation), BTIC (in the *Steel Cylinders* investigation) and TPCO (in the *OCTG*

¹⁴ China's second written submission, paras. 495-502.

¹⁵ In this regard, China challenges the following determinations of the USDOC: *OCTG* OI, *Steel Cylinders* OI and *Coated Paper* OI. (China's second written submission, para. 495).

¹⁶ China's second written submission, para. 495.

Report of the Panel

- investigation) despite the fact that it had identified a relevant pricing pattern only amongst a subset of US sales.
- iv. The USDOC impermissibly applied zeroing procedures when aggregating the transaction-specific WA-T intermediate comparison results, thereby failing properly to determine a margin of dumping for the product as a whole.
 - b. The United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, in the third administrative review in *PET Film*, because through the application of zeroing procedures, the USDOC failed to determine a margin of dumping for the product as a whole and, in so doing, artificially inflated the level of the anti-dumping duty for the DuPont Group as assessed in this administrative review.¹⁷
 - c. The Panel should reject the United States' contention that the six challenged determinations filed with the Panel during the course of the first substantive meeting – namely, the fifth administrative review in *OTR Tires*, the first administrative review in *Solar*, the fourth administrative review in *Diamond Sawblades*, the second administrative review in *Wood Flooring*, the fifth administrative review in *PET Film*, and the ninth administrative review in *Furniture* – fall outside the Panel's terms of reference.¹⁸
 - d. The United States acted inconsistently with Articles 6.10, 9.2, and 9.4 of the Anti-Dumping Agreement, because the USDOC's Single Rate Presumption for NMEs, as such and as applied in the 38 challenged determinations, violates these provisions of the Anti-Dumping Agreement in the following manner¹⁹:

China's as such claims

- i. Article 6.10 of the Anti-Dumping Agreement, because by presuming the existence of a single NME-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC fails to determine an individual margin of dumping for each known exporter or producer.
- ii. Article 9.2 of the Anti-Dumping Agreement, because by presuming the existence of a single NME-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC fails to specify individual duties for each supplier.

¹⁷ China's second written submission, para. 496.

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

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

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

China's as applied claims concerning 38 challenged determinations²⁰ of the USDOC

- iv. Article 6.10 of the Anti-Dumping Agreement, because by presuming the existence of a single PRC-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC failed to determine an individual margin of dumping for each known exporter or producer.
- v. Article 9.2 of the Anti-Dumping Agreement, because by presuming the existence of a single PRC-wide entity and by assigning a single dumping rate to that entity, including all of the producers or exporters within it, the USDOC failed to specify individual duties for each supplier.
- vi. Article 9.4 of the Anti-Dumping Agreement, because in each of the challenged determinations, the USDOC used sampling under the second sentence of Article 6.10, yet, by applying the Separate Rate Test, it imposed an additional condition, not contemplated by Article 9.4, for the receipt of an individual duty by non-selected producers or exporters included within the PRC-wide entity.
- e. The United States acted inconsistently with Articles 6.1, 6.8 and Annex II of the Anti-Dumping Agreement, because the USDOC's failure to request the information required to calculate a margin of dumping for the PRC-wide entity in 30 challenged

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

Report of the Panel

determinations²¹ in which the USDOC determined a rate for the PRC-wide entity violated these provisions of the Anti-Dumping Agreement in the following manner²²:

- i. Article 6.1 of the Anti-Dumping Agreement, because the USDOC did not give notice of the information required and did not provide ample opportunity for certain interested parties to present, in writing, all evidence they considered to be relevant.
 - ii. Article 6.8 and Annex II of the Anti-Dumping Agreement, because the USDOC had recourse to facts available to determine the rate for the PRC-wide entity, and all the producers or exporters included within it, without having specified in detail the information required in order to calculate a margin of dumping for the PRC-wide entity.
- f. The United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement, because the USDOC's use of adverse facts available in certain challenged determinations and its AFA Norm, as such, violate these provisions of the Anti-Dumping Agreement in the following manner²³:

China's as such claims

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

²¹ In this regard, China challenges the following determinations of the USDOC: *Aluminum OI, Aluminum AR1, Aluminum AR2, Coated Paper OI, Shrimp OI, Shrimp AR7, Shrimp AR8, OTR Tires OI, OTR Tires AR5, OCTG OI, Solar OI, Solar AR1, Diamond Sawblades OI, Diamond Sawblades AR1, Diamond Sawblades AR2, Diamond Sawblades AR3, Diamond Sawblades AR4, Steel Cylinders OI, Wood Flooring OI, Wood Flooring AR1, Wood Flooring AR2, Ribbons OI, Ribbons AR1, Ribbons AR3, Bags OI, Bags AR3, PET Film OI, Furniture OI, Furniture AR7, and Furniture AR8*. (China's second written submission, para. 500, fn 765).

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

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

China's as applied claims

- ii. The USDOC's use of facts available in each of the 20 challenged determinations²⁴ in which the USDOC made an express finding of non-cooperation as well as the eight challenged administrative reviews²⁵ in which the USDOC pulled-forward or re-applied a facts available rate is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, because each determination involved application of the WTO-inconsistent AFA Norm; and in each determination, the USDOC: (a) failed to undertake a comparative, evaluative process aimed at identifying the best information available, but rather chose information that was adverse to the interests of the PRC-wide entity and all of the producers or exporters included within it; (b) selected facts available based on the procedural circumstance of non-cooperation alone; (c) failed to properly undertake a reasoned and selective evaluation in order to find the best facts available; and (d) failed to provide a reasoned and adequate explanation of how it had exercised special circumspection and selected the best information available.
- iii. The USDOC's use of facts available in two challenged determinations — the fifth administrative review in *OTR Tires* and the fourth administrative review in *Diamond Sawblades* — is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, because in each determination, the USDOC: (a) failed properly to undertake a reasoned and selective evaluation in order to find the best facts available; and (b) failed to provide a reasoned and adequate explanation of how it had exercised special circumspection and selected the best information available.
- g. The United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement, in assigning a rate to the PRC-wide entity and all of the distinct producers or exporters included within it in

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

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

Report of the Panel

30 challenged determinations.²⁶ This is because, to the extent that the PRC-wide entity was not individually investigated in any of these challenged determinations, the anti-dumping duties applied to the PRC-wide entity as well as the non-individually investigated producers or exporters included within that entity exceeded the weighted average of the rates determined for the mandatory respondents, excluding facts available, zero or *de minimis* rates or otherwise failed to comply with the disciplines of Article 9.4.²⁷

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

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

4. ARGUMENTS OF THE PARTIES

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

5. ARGUMENTS OF THE THIRD PARTIES

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

6. INTERIM REVIEW

6.1 On 15 April 2016, the Panel issued its Interim Report to the parties. On 3 May 2016, China and the United States each submitted written requests for the Panel to review aspects of the Interim Report. On 23 May 2016, both parties

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

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

submitted comments on the other's requests for review. Neither party requested an interim review meeting.

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

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

6.1 China's Claims Concerning the USDOC's Use of the WA-T Methodology under Article 2.4.2 of the Anti-Dumping Agreement

6.4 China requests us to modify the first sentence of **paragraph 7.2** where we describe the WA-WA and T-T methodologies as the two "normal" methodologies provided for in Article 2.4.2 of the Anti-Dumping Agreement, because the word "normal" does not appear in that provision. Instead, China requests us to refer to these methodologies as the two methodologies that must "normally" be used, to accurately reflect the text of Article 2.4.2. The United States has not commented on this request by China. In order to address China's concern in this regard, we have made the suggested modification to this paragraph.

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