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

(DS471)

SECOND EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

Executive Summary of the Second Written Submission and Opening Oral Statement of the United States at the Second Substantive Meeting of the Panel

January 11, 2016

I. INTRODUCTION

1. China continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. China still has failed to establish that the United States has breached any provision of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. CHINA'S CLAIMS RELATED TO USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT ARE WITHOUT MERIT

2. China's proposed interpretations are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely. While China attacks the *Nails* test applied by the U.S. Department of Commerce ("USDOC") in the challenged antidumping investigations, China does not describe how, in its view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

A. The "Pattern Clause" Does Not Require Investigating Authorities To Utilize any Particular Type of Statistical Analysis

3. China insists that it is "not arguing that the *Anti-Dumping Agreement* compels the adoption of any particular statistical method or particular standard deviation threshold or multiple thereof." However, at every turn, the arguments China advances belie that assertion. China's arguments are all 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 probability distribution, let alone assume the existence of a particular type of probability distribution, and we have not suggested that the *Nails* test would meet the requirements for statistical probability analysis as understood by China or even "as generally recognized in the field of statistics." 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.

4. China refers to the Appellate Body report in *US – Upland Cotton (Article 21.5 – Brazil)*. There are no parallels between the facts in that dispute and the facts here, and that portion of the *US – Upland Cotton (Article 21.5 – Brazil)* Appellate Body report does not contain findings that are relevant to the Panel's resolution of this dispute.

5. China asserts that, "USDOC designed the test as a statistical tool to conduct a probability analysis for purposes of assessing whether a set of observed export prices differed in a relevant way." China's assertion is wrong, and it is plainly contradicted by what USDOC said *at the time* it made its determinations.

6. China's interpretation of the "pattern clause" limits it to identifying random and aberrational outliers, or "unusually low" export prices. This interpretation, however, is incorrect. The terms of the second sentence of Article 2.4.2 do not refer to "unusually low export prices." Further, China's position is contrary to the logic of the second sentence of Article 2.4.2. Dumping may be "targeted" even in a situation where lower-priced sales are not "unusual" or "outliers." Lower prices may not be unusual and may not appear to be outliers at all.

B. The "Pattern Clause" Does Not Require Investigating Authorities To Analyze Export Sales on an Individual Basis

7. China argues that the second sentence of Article 2.4.2 of the AD Agreement establishes a "legal requirement to focus on individual export prices" and refers to the Appellate Body report in *US – Zeroing (Japan)*. To the extent that the Panel takes into account the Appellate Body's discussion in paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report, it should exercise caution in doing so. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the alternative, average-to-transaction comparison methodology. Furthermore, the Appellate Body expressly was not making findings of legal interpretation that resulted from an analysis undertaken pursuant to the customary rules of interpretation. Additionally, the Appellate Body simply was not addressing the question of whether or not it is permissible for an investigating authority to use weighted averages when examining export prices to determine if a "pattern" exists. While China quotes from the Appellate Body report, it offers no explanation for its assertion that the statements it quotes "strongly support China's interpretation."

8. China contends that its reading of the second sentence of Article 2.4.2 "ensures *parallelism* between the analysis of whether the W-T comparison methodology may be used and the substantive nature of the W-T comparison methodology, which by definition focuses on individual export prices." However, China's proposed reading lacks textual and contextual support.

9. China complains that "[i]t would be incongruous to interpret this text to permit an investigating authority to overlook the individual prices." We have explained that USDOC did not "overlook" any individual prices. Calculating weighted averages of the export prices to each of the purchasers is a way for the investigating authority to analyze the "hundreds or even thousands" of export prices and make a judgment about differences not among all of the hundreds or thousands of export prices, but among the small number of purchasers. China's argument once again reveals that China is seeking to impose statistical probability analysis as the standard against which an investigating authority's examination must be measured.

C. The "Pattern Clause" Does Not Require Investigating Authorities To Examine Why Export Prices Are Different

10. In China's view, even after the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean, including an inquiry into why they exist at all. Regardless of whether China frames its argument in terms of discerning an exporter's *intent* or identifying *reasons* for the

pattern of export prices that differ significantly, nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. Certain third parties agree.

11. In China's view, any numerical difference in export prices can be explained away. The quantitative difference between the export prices, in China's view, does not matter. China's proposed interpretation is untenable, and, as we have explained, it is inconsistent with prior Appellate Body findings regarding the meaning of the term "significant."

12. While China argues that the numerically large differences in export prices that USDOC observed in the challenged investigations were, for purportedly qualitative reasons, not significant, China's arguments go toward explaining *why* the prices were different, or giving reasons for the price differences. They do not address *how*, qualitatively, the differences, which were numerically large, were not important or notable.

13. China appears to acknowledge that there was no information in the administrative records of the coated paper and OCTG antidumping investigations that would have been relevant to an analysis of the kind of "qualitative factors" China discusses, and this is because the interested parties did not raise the issue of "qualitative factors" or present evidence to USDOC about that issue. In the steel cylinders antidumping investigation, as we have explained, USDOC responded to an argument by BTIC concerning increases in steel prices and determined that the argument was "merely an unsupported assumption without the support of record evidence."

D. China Has Failed To Establish that Certain SAS Programming Errors Constitute a Breach of the AD Agreement

14. China confirms that it is "challenging" the SAS programming errors, but adds nothing that would support a finding that an inadvertent error amounts to a breach of any provision of the WTO Agreement.

15. China continues to offer the Panel no explanation of how the identified SAS programming errors could reflect a failure to provide a reasoned and adequate explanation or a failure to establish the facts properly and evaluate them in a manner that was unbiased and objective. There are no parallels between the facts in *US – Upland Cotton (Article 21.5 – Brazil)* and the facts here, and the portion of the *US – Upland Cotton (Article 21.5 – Brazil)* Appellate Body report to which China refers does not contain findings that are relevant to the Panel's resolution of this dispute.

16. China acknowledges that "correction of the two types of programming errors does *not* lead to a situation in which the Price Gap Test would no longer be passed for at least one CONNUM in *OCTG* OI and *Coated Paper* OI." So, it is clear that the finding China seeks from the Panel related to the programming errors is advisory and not necessary to secure a positive solution to the dispute.

E. USDOC's Explanations in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Are Not Inconsistent with the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

17. It is logical for an investigating authority to examine the extent to which dumping would be masked by a normal comparison methodology, in contrast to the alternative comparison methodology, as it considers whether a normal comparison methodology can "take into account appropriately" the pattern of export prices that differ significantly. In other words, logically, some manner of comparison is necessary to test whether the average-to-average comparison methodology or the average-to-transaction comparison methodology can more "appropriately" take into account a pattern of significantly differing export prices. Such a comparative exercise is precisely what USDOC undertook in the challenged antidumping investigations. It is unclear what more, beyond such a comparative exercise, would be needed to satisfy the requirements of the "explanation clause."

18. China complains that comparing the result of the average-to-transaction comparison methodology (with zeroing) and the result of the average-to-average comparison methodology (without zeroing) is insufficient because, China argues, the use of zeroing is not permitted in the application of the alternative, average-to-transaction comparison methodology. However, as demonstrated in the U.S. first written submission, and as discussed further below, zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning.

F. The "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Does Not Require an Investigating Authority to Discuss Both the Average-to-Average and Transaction-to-Transaction Comparison Methodologies in Its Explanation

19. While the Appellate Body has not previously addressed the particular legal question that is before the Panel, neither in *US – Softwood Lumber (Article 21.5 – Canada)* nor in any other dispute, the *logical extension* of the Appellate Body findings is that the exceptional, average-to-transaction comparison methodology *should* "lead to results that are systematically different" when the conditions for its use have been met. Accordingly, as the U.S. first written submission demonstrates, 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 second sentence of Article 2.4.2 of the AD Agreement.

20. China also discusses the Appellate Body report in *US – Zeroing (Japan)*. We have already commented on the passage from the *US – Zeroing (Japan)* Appellate Body report in response to question 17. China, in an attempt to support its argument, refers to "grammatical convention" and provides to the Panel a dictionary definition of the word "either." In doing so, China appears to invite the Panel to apply a Vienna Convention analysis to the language in the *US – Zeroing (Japan)* Appellate Body report. Of course, an adopted report is not treaty language, and China's suggestion that this dispute should turn on a Vienna Convention analysis of a potentially ambiguous passage of the *US – Zeroing (Japan)* Appellate Body report only serves to highlight the weakness of China's argument.

G. USDOC's Application of the Alternative Average-to-Transaction Comparison Methodology to All Sales

21. China continues to argue that USDOC was required to apply the alternative, average-to-transaction comparison methodology on a model-specific basis, and limit its application only to certain models, because USDOC, China asserts, "decide[d] to identify the existence of a 'pattern' in a limited, model-specific, way." China appears to misunderstand USDOC's analysis and also misunderstands the Appellate Body report in *EC – Bed Linen*.

22. USDOC did not "seek[] to find 'patterns' by reference to models" in the challenged investigations. Instead, USDOC established the existence of "a pattern" – within the meaning of the second sentence of Article 2.4.2 – based on all of a respondent's sales of subject merchandise. This is evident from USDOC's discussion of its application of the *Nails* test in the challenged determinations.

23. China utterly fails to grapple with the import of the Appellate Body's findings in *EC – Bed Linen*. Despite the Appellate Body's findings in *EC – Bed Linen*, China continues to suggest that "an investigating authority may assess the existence of relevant pricing patterns on a model-specific basis," but the Appellate Body has clearly rejected this proposition and there is no support for it in the text of the second sentence of Article 2.4.2 of the AD Agreement.

H. China's Arguments Concerning the Appellate Body's Zeroing Findings Lack Merit

24. While the Appellate Body has addressed zeroing in numerous prior disputes involving different comparison methodologies, it has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. China also argues that the Appellate Body has previously "rejected" the mathematical equivalence argument. The U.S. first written submission discusses at some length the Appellate Body's prior consideration of the mathematical equivalence argument and demonstrates that the Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection.

25. China further contends that "the function of Article 2.4.2, second sentence, is found in that it allows a different *process*, as opposed to requiring a different *outcome*, in determining the margin of dumping in the presence of a relevant pricing pattern." China misses the point of the U.S. argument. The United States does not argue that the alternative, average-to-transaction comparison methodology necessarily must yield a different outcome. The outcome may or may not be different, depending on the facts.

26. China argues that the Appellate Body's findings related to the meaning of the term "margin of dumping" compel the conclusion that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology. China's reasoning is flawed, and China's argument bears no connection whatsoever to the text of Article 2.4.2 of the AD Agreement or prior Appellate Body findings.

27. 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. 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.

I. China's Effort To "Avoid" Mathematical Equivalence Is Unpersuasive

28. China does not dispute that, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the challenged antidumping investigations. The dispute between the parties is not about arithmetic or algebra. It is about so-called "assumptions" related to the calculation of normal value. It is China's assumptions that are untenable and without explanation. Each of the scenarios in Exhibit CHN-497 depends on and is exclusively premised on manipulating the calculation of normal value for the application of the average-to-transaction comparison methodology while not making any similar change to the calculation of normal value for the application of the average-to-average comparison methodology. Yet, China fails to explain why changing the calculation of the *normal value* used in the application of the normal average-to-average comparison methodology and the exceptional average-to-transaction comparison methodology would in any way address a pattern of significantly differing *export prices* among different purchasers, regions, or time periods. There is no logical reason why an investigating authority would do so and China has not explained how calculating normal value differently would assist an investigating authority to, in the words of the Appellate Body, "unmask targeted dumping."

29. There also is no textual basis in Article 2.4.2 of the AD Agreement to support calculating normal value differently for the purposes of applying the average-to-average and average-to-transaction comparison methodologies set forth in the first and second sentences of Article 2.4.2, respectively. The phrase "weighted average normal value" in the first sentence of Article 2.4.2 is nearly identical to and conveys the same meaning as the phrase "normal value established on a weighted average basis" in Article 2.4.2, second sentence.

30. The United States does not argue that the investigating authority's flexibility to use monthly normal values is limited by the terms of Article 2.4.2 of the AD Agreement. China simply has failed to explain the logic of changing the basis of the calculation of the weighted-average normal value as part of the effort to "unmask" dumping concealed by a pattern of significantly differing export prices.

31. While China attempts to avoid mathematical equivalence, it expends no effort to advance an interpretation of the second sentence of Article 2.4.2 that would give that provision meaning or permit investigating authorities to use the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."

32. The scenarios presented in Table 4 of Exhibit CHN-497 support the argument made in the U.S. opening statement at the first panel meeting concerning the unpredictability of changing the basis for the calculation of normal value in the manner that China proposes. The results are unpredictable and not systematic, and they bear no relationship to the pattern of significantly differing export prices or the aim of the second sentence of Article 2.4.2 to "unmask targeted

dumping."

33. China also argues that the U.S. mathematical equivalence argument "fails to grapple with the relevance of the T-T methodology," which "will generally yield results that are different from both W-W and W-T methodologies, even though zeroing is not permissible under the T-T methodology." China's observation does not support its position. The United States has never argued that the transaction-to-transaction comparison methodology should lead to the same result as either the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing). The Appellate Body has found that there is no hierarchy between the average-to-average and transaction-to-transaction comparison methodologies and they should not be interpreted in a way that would "lead to results that are systematically different." This does not mean that the outcomes of these two methodologies should be mathematically the *same*.

J. "As Applied" Claims Related to the PET Film Third Administrative Review

34. China's arguments that prior Appellate Body findings establish that zeroing is "never permissible" in administrative reviews and that recourse to the alternative, average-to-transaction comparison methodology is "only available in original investigations" are incorrect.

35. The Appellate Body has never found that the use of zeroing in an administrative review is impermissible when it is used in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. China's reading of the Appellate Body report in *US – Zeroing (EC)* is untenable. The Appellate Body did not endorse the *US – Zeroing (EC)* panel's legal reasoning concerning the term "during the investigation phase" in Article 2.4.2.

36. China's argument that "recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations" and is not available in assessing the precise amount of antidumping duty in administrative reviews is not supported by the text of Articles 2.4.2 and 9.3 of the AD Agreement or by logic. Article 9.3 of the AD Agreement provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." A margin of dumping established pursuant to the second sentence of Article 2.4.2 is a margin of dumping established under Article 2. Even if the term "during the investigation phase" is interpreted in the manner for which China argues, the implication simply would be that there is no *requirement* to apply the comparison methodologies described in Article 2.4.2 in the context of administrative reviews. It would not follow, logically, that it would be impermissible for an investigating authority to apply those comparison methodologies in administrative reviews.

III. CHINA'S CLAIMS AND ARGUMENTS CONCERNING THE ALLEGED SINGLE RATE PRESUMPTION AND THE ALLEGED USE OF ADVERSE FACTS AVAILABLE NORMS DO NOT COMPORT WITH THE DSU OR THE PANEL'S WORKING PROCEDURES

A. The Six New Determinations China Introduced During The First Substantive Meeting Are Not Within The Panel's Terms Of Reference

37. China introduced six new antidumping determinations during the course of the first substantive meeting that are in fact "new measures" that are not within the Panel's terms of reference and cannot be challenged in this dispute. These new measures are outside the scope of this dispute because China did not consult with the United States over them in accordance with Article 4.4 of the DSU or identify them in its Panel Request per Article 6.2 of the DSU.

38. China fails to recognize that under the DSU, the concept of – and need to identify – "measures" is discrete from the concept of and need to identify the requisite "legal basis of the complaint." Thus, whatever the level of precision with respect to the *legal basis* put forward by China, it is irrelevant for whether the requirement to identify *the measure* in both the Request for Consultations and the Panel Request has been fulfilled. Moreover, when China concedes that only particular arguments from China's first written submission may even be relevant for a particular determination, this only further highlights that these determinations are new measures.

B. China's Recent Arguments Are Contrary to the Panel's Working Procedures and the DSU

39. China has presented extensive arguments that properly belonged in its first written submission per paragraph 6 of the Panel's Working Procedures. Indeed, the situation here is more prejudicial than in the *EC – Fasteners* dispute (in which a previous panel has similarly been faced with a situation in which China provided evidence and arguments going to its primary case well beyond its first submission) because the substantive deficiency is qualitatively higher. Moreover, unlike *EC – Fasteners*, which concerned a single antidumping determination, the present dispute entails dozens and dozens of determinations increasing the potential prejudice upon the United States and undermining its rights to present a full defense, including by having sufficient time to prepare its submissions (DSU Article 12.4) and to receive the facts of China's case and China's arguments *before* presenting its own first submission (DSU Article 12.6 & Appendix 3, para. 4).

IV. CHINA STILL HAS NOT ESTABLISHED THE EXISTENCE OF AN ALLEGED "SINGLE RATE PRESUMPTION" NORM OR AN ALLEGED "ADVERSE FACTS AVAILABLE" NORM

40. China's challenge to both a purported "Single Rate Presumption" norm and a purported "Adverse Facts Available" norm rests on China meeting the "high threshold" that such unwritten norms exist. China has not shown the existence of anything with independent operational effect, in the sense of doing something or requiring something to be done, which could establish the existence of such norms as measures. China does not show the existence of norms that affect USDOC's behavior generally and prospectively. Regarding the alleged Adverse Facts Available norm, China has additionally failed to articulate the content of the purported norm. Consequently, China's "as-such" challenges to these alleged measures must fail.

A. China's Evidence Still Fails to Demonstrate That The Alleged Single Rate Presumption Norm Applies Generally and Prospectively

1. The Evidence Generally

41. China's purported evidence does not show that any alleged Single Rate Presumption has

any type of general and prospective application, let alone legally binding effect.

a. Policy Bulletin 05.1

42. The first piece of evidence that China relies upon is a statement taken from Policy Bulletin 05.1. That statement does not establish the existence of a rule that has independent operational effect or otherwise directs USDOC's future conduct. The cited statement is located in a section titled "Background" and, thus, does not demonstrate that the alleged Single Rate Presumption has a "normative" character. China's attempt to equate Policy Bulletin 05.1 with the Sunset Policy Bulletin at issue in *US –OCTG Sunset Reviews* is also misplaced, particularly as in that dispute, unlike in this dispute, Argentina challenged the Sunset Policy Bulletin ("SPB") itself as a measure.

43. Moreover, China's excerpted language when put next to the adjoining sentences makes clear that what, if anything, may happen in the future is a particular procedure concerning a separate rate application. Critically, China has not explained what words in the proffered excerpt will "necessarily give rise" to the alleged Single Rate Presumption. To the extent China relies on the language noting the "Department presumes", the use of the present tense confirms that, at most, the USDOC is describing conduct in the past up to the present.

b. Antidumping Manual

44. China relies on three sentences from the Antidumping Manual to assert the existence of the norm. China does not explain how or why any of the text in these sentences establishes or otherwise supports its contention that the alleged Single Rate Presumption will "necessarily give rise" with respect to particular situations in the future.

45. Instead, China asserts these statements serve "as a *justification* and a *motivation* for the decision in the instant investigation or review." Justification, however, does not speak to general and prospective application. With respect to motivation, the cited statements do not in any way evince in any respect future and general application. Moreover, the Antidumping Manual contains an explicit disclaimer and USDOC, nearly 10 years ago, had explicitly, and publicly stated in a memorandum that the manual is not meant to be relied upon by the public

c. Rulings by U.S. Courts

46. The language referenced from the various court decisions do not support the existence of a norm of general and prospective effect. These statements simply note, at most, that USDOC has done something previously, and then done something different at a subsequent time. The statements also note that it is well settled under U.S. law that USDOC may undertake such actions. The fact that a particular exercise of discretion is lawful under a Member's domestic legal framework does not mean that this is the only choice available under domestic law, nor that the agency will continue to exercise its discretion in the exact same way in the future.

d. Tabulated statements from 38 challenged determinations and Statements from other sampled determinations

47. The various tabulations, such as Table SRP, provided by China are nothing but the string

of cases that the Appellate Body explicitly described as insufficient evidence – and thus do not prove the existence of the alleged norm. Indeed, nowhere in its submissions does China actually direct the Panel as to what aspect or entry in the table proves general and prospective application.

2. The Evidence With Respect to the Separate Rate Test

48. As China implicitly concedes through its reference to a "first element," China's alleged norm is different from the unwritten norm alleged in *US – Shrimp II (Viet Nam*). Specifically, China alleges that the alleged norm includes two elements, the latter involving a Separate Rate Test. Furthermore, China has not identified in its submissions what evidence China is putting forward to establish the general and prospective nature of this second element.

B. China's Evidence Still Fails to Demonstrate The Content of The Alleged Adverse Facts Available Norm

49. China's own description of the alleged Use of Adverse Facts Available Norm ("Adverse Facts Available Norm") highlights three critical defects. First, while China recognizes at the outset that a norm must apply "whenever," its own description of the purported norm is lacking in that regard. Second, China has failed to specify what constitutes "adverse information" or "adverse facts." Third, China's reference to the "process" employed by USDOC failed to identify the discrete conduct that is required by the alleged norm.

C. China's Evidence Still Fails to Demonstrate The Existence of an Alleged Adverse Facts Available Norm with General and Prospective Application

50. The statements cited by China do not speak to the actual selection of facts. Moreover, as these statements are phrased conditionally – "in many cases" or "[o]ccasionally" – China cannot reasonably claim that they evince general and prospective application.

V. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES HAS BREACHED ARTICLES 6.10 AND 9.2 ON ACCOUNT OF A "SINGLE RATE PRESUMPTION"

A. China's Arguments Fail to Address That USDOC May Treat Nominally Distinct Respondents as a Single Entity

51. China has failed to satisfy its *prima facie* case because all of its arguments go to the first, inapposite question of treatment of individual companies. Where an entity has been properly established, there is no basis to evaluate further whether the individual companies properly within the entity have been assigned an individual margin and duty.

B. China Has Otherwise Failed To Establish Its *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With Articles 6.10 and 9.2

52. China does not explain for those cases in which the China-government entity is not under review, how the alleged Single Rate Presumption precludes individual producers/exporters who are grouped within the entity from receiving an individual margin of dumping. Additionally,

China has not demonstrated through evidence that the rate assigned to the China-government entity is inconsistent with Article 9.2 in each challenged investigation. It bears emphasis that China has not addressed U.S. arguments concerning USDOC's Separate Rate Application and Separate Rate Certification. Specifically, USDOC asks a company to provide information that goes to whether the company's export activities are controlled by the Chinese Government. The questions asked by USDOC go to factors that the Appellate Body in *EC – Fasteners* found could be considered to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity."

53. China's failure to put forward the requisite evidence means that is unclear whether evidence gathered from the Separate Rate Test was relied upon, and not any presumption. Because of the particularized circumstances, it was incumbent upon China to demonstrate the exporters, producers, or suppliers were denied an individual rate in the challenged proceedings. In other words, in a particular proceeding no company may have been treated as part of the China-government entity on account of a presumption, or a company may have been so treated on the basis of record evidence.

C. China Has Not Addressed The Importance Of China's Accession Protocol And The Working Party Report

54. As the United States has established, 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. Paragraph 15 of the Accession Protocol, placed in proper context, and relevant provisions of the Working Party Report, provide the basis for USDOC's recognition that multiple companies may comprise a single China-government entity.

55. 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.

56. A more logical interpretation is that Section 15's silence on export price is simply a reflection that there was no need to explicitly reference the issue in order for Members to address it. At least two reasons justify such silence. First, explicit reference is not required because it is addressed by implication. Second, Members viewed existing mechanisms being used in Chinese antidumping investigations at the time of China's accession –treating Chinese companies as part of a single China-government entity absent evidence demonstrating independence – as sufficient to address concerns arising with export price.

VI. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

57. China's arguments fail because Article 9.4 applies only where the China-government entity is not under examination. Where the China-government entity receives its own rate, the facts in a proceeding will often, if not always, subject the China-government entity to

examination. In several of the referenced determinations, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination.

A. China Has Failed To Establish A *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With The Second Obligation Of Article 9.4

58. There are two critical defects to China's "as such" claim. First, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. Moreover, China must demonstrate that the China-government entity is not under examination. In nearly every determination referenced by China, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination. In those few determinations referenced by China in which the China-government entity was not under review or in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

59. This leads to the second defect in China's claim. The crux of China's claim here – that the alleged Single Rate Presumption is "as such" inconsistent with the second obligation of Article 9.4 – rests on the applicability of the very particular situation described in Article 6.10.2 and the last sentence of Article 9.4. China ignores that the last sentence of Article 6.10.2 does not provide for an *automatic* right to an individual rate for those companies not included in the examination, but creates certain prerequisite conditions. China does not point to a single example where there exists such a company that has met these conditions.

B. China Has Failed To Establish That USDOC Acted Inconsistently With The First Obligation Of Article 9.4 In The 26 Challenged Determinations

60. China argues that USDOC acts inconsistently with Article 9.4's first obligation concerning the "ceiling rate for the level of duties that may be applied to non-selected exporters or producers" in 26 challenged determinations. However, in 19 of the challenged determinations, the China-government entity was under examination and received its own rate pursuant to Article 6.8. The pertinent issue is USDOC's treatment of the China-government entity *as a whole*, rather than simply the treatment of the individual companies. For those seven (7) determinations in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

VII. CHINA HAS NOT DEMONSTRATED THAT USDOC WAS REQUIRED TO SEND A DUMPING QUESTIONNAIRE TO ALL MEMBERS OF THE CHINA-GOVERNMENT ENTITY IN 26 OF THE CHALLENGED DETERMINATIONS

61. China has failed to establish that the United States has breached Articles 6.1, 6.8, and Annex II of the AD Agreement for the 26 challenged determinations. Despite the numerous requests for information made by USDOC, China's claims focus instead on the information that was not requested. Specifically, China's argument is that USDOC was required to send a dumping questionnaire to all members of the China-government entity in all instances, no matter the circumstances. Nothing in the AD Agreement requires so.

A. China's Article 6.1 Claims With Respect to the 26 Challenged

Determinations Are Legally And Factually Deficient

62. China continues to put forth an interpretation of Article 6.1 of the AD Agreement which purports to govern not just an investigating authority's procedural obligations with respect to notifying parties "of the information which the authorities require", but also the content of the information required for a certain determination. The *substantive* issue of which information is required for a particular determination is addressed elsewhere in the AD Agreement.

B. China Has Not Demonstrated That USDOC Resorted To Facts Available In 7 Challenged Determinations[1]

63. The record is undisputed that USDOC did *not* make a finding of noncooperation in these 7 reviews. As found by the panel in *US – Shrimp II (Viet Nam),* applying a rate that had previously been determined in a prior proceeding does not equate to a determination that is governed by Article 6.8. Additionally, with respect to China's "as such" claim, according to China, the alleged Use of Adverse Facts Available norm is only triggered where USDOC makes a finding of noncooperation. Because USDOC did not make such a finding with respect to these 7 reviews, the alleged norm was not triggered per China's own definition.

C. China Has Not Established That USDOC Acted Inconsistently With Article 6.8 and Annex II(1) In Tires AR5 and Diamond Sawblades AR4

64. In Tires AR5, that part of the China-government entity that USDOC found to be cooperative did not represent the entirety of the entity. In Diamond Sawblades AR4, USDOC made no findings with respect to the level of cooperation of the China-government entity. Importantly, in both of these reviews, because China has not demonstrated that USDOC resorted to facts available, it has failed to demonstrate any inconsistency with Article 6.8 and Annex II(1).

D. China Has Not Demonstrated That USDOC's Resort To Facts Available In The 19 Challenged Determinations Is Inconsistent With Article 6.8 And Annex II(1)

65. The crux of China's as applied arguments with respect to USDOC's resort to facts available is that in each determination USDOC could not resort to facts available because it did not send a dumping questionnaire to each and every member of the China-government entity, regardless of the circumstances. USDOC's determination to resort to facts available in assigning a margin to the China-government entity in the 19 challenged proceedings is consistent with Article 6.8 and Annex II(1) because the China-government entity was notified of a request for and failed to provide necessary information.

66. China argues that resort to facts available based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information is not a proper basis to reach a finding of noncooperation. However, if a party could pick and choose what information it submits, it would be incentivized to only selectively disclose

[1] These are (1) Diamond Sawblades AR1, (2) Diamond Sawblades AR2, (3) Diamond Sawblades AR3, (4) Furniture AR8, (5) Retail Bags AR3, (6) Ribbons AR1, and (7) Wood Flooring AR1.

information that benefits its interests rather than ensure the most appropriate determination.

VIII. CHINA'S CLAIMS CONTINUE TO CONFUSE USDOC'S RESORT TO FACTS AVAILABLE WITH THE SUBSEQUENT SELECTION OF FACTS AVAILABLE

67. Two of China's three "as such" claims should be found outside of the Panel's terms of reference because they are related not to the alleged Use of Adverse Facts Available norm, but rather, to USDOC's resort to facts available through a finding of noncooperation. These are: China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} a facts available rate for NME-wide entities based on the (frequently presumed) procedural circumstances of non-cooperation{,}" and China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} Adverse Facts Available in circumstances when it has not requested the necessary information{.}"

IX. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II IN SELECTING THE FACTS AVAILABLE FOR THE CHINA-GOVERNMENT ENTITY

A. In Selecting From Among The Available Facts, USDOC Performed A Comparative, Evaluative Assessment

68. USDOC considers the universe of information on the record. This included information contained in the domestic parties' application for initiating an anti-dumping investigation, information that was obtained during the course of the investigation or administrative review, such as dumping margins from cooperating parties, data on sales transactions and normal value provided by those cooperating parties, and any other information obtained by USDOC during the course of the investigation or review. USDOC considered all of this information and selected from among the facts available, taking a party's non-cooperation into account.

69. USDOC then ensured that the rate selected had probative value, meaning it was both reliable and relevant, by checking the selected rate with independent sources of information on the record. USDOC performed this comparative, evaluative assessment at least twice during each determination: at the preliminary determination or results, and again at the final determination or results. Apart from this examination, USDOC also considers whether the rate selected is aberrational or unusual, is not reflective of the missing information, and therefore should be rejected for use as facts available.

B. USDOC's Process Did Not Automatically Select The Highest Available Rate

70. If the "the highest of" language cited by China accurately reflected USDOC's determinations, then the rates selected would be the highest rates available. In the challenged determinations in which USDOC resorted to facts available, the highest rate was rejected in many cases based upon an examination of the probative value of such rates. The same point holds with respect to China's reliance on the U.S. court rulings it cites. In *Lifestyle Enterprise, Inc. v. United States*, China ignores the court's language that such rates "*must be reasonably accurate estimates of respondents' rates*" and instead focuses on the language of a "built-in increase" as a deterrent. In so doing, China fails to realize that the notion of deterring non-cooperation is no more than taking account of a party's failure to cooperate.

71. China also points to the term "sufficiently adverse" as if USDOC performs a test to ensure the rate selected is adverse enough to deter non-compliance. There is no test to determine whether a rate is "sufficiently adverse" to induce cooperation. Rather, by taking into account the party's non-cooperation, USDOC may apply an inference that *may* be unfavorable, which may incentivize a party to cooperate.

72. In the challenged determinations, China is unable to point to any rate in which the evidence supporting that rate has greater probative value for the non-cooperating entity *as a whole*. Instead, China breaks apart the NME-entity into component parts to make its argument that the rate selected is inaccurate. In doing so, China concedes that the comparator or benchmark that it insists be used as the hallmark of accuracy – *i.e.*, the all others rate - is *not* a reasonable replacement for a party that has "genuinely" failed to cooperate.

73. China argues that the rate assigned to separate rate companies is an appropriate comparison rate in determining whether the rate assigned to the China-government entity is "adverse" or a reasonable replacement for missing facts. However, those companies that receive a separate rate have demonstrated that they are eligible for a separate rate, and, in certain proceedings, cooperated by responding to a request for Q&V information. In contrast, those companies that are within the China-government entity failed to demonstrate that they are eligible for a separate rate, and, in those proceedings at issue, the entity itself failed to cooperate.

74. China points to factors that it claims USDOC does not consider when selecting a facts available rate for the China-government entity, including the rates of cooperating respondents, the rate assigned as the all others rate, the age of the selected information, and information about the non-cooperative company's age and size. However, USDOC does consider the rates of cooperating respondents and the all others rate but, depending on the facts and circumstances of the particular case, may find that this information has less probative value because it does not correspond with a party's non-cooperation.

X. THE PANEL MAY EXERCISE JUDICIAL ECONOMY ON CLAIMS RELATING TO THE USE OF ADVERSE FACTS AVAILABLE NORM OR DISMISS THEM UNDER ARTICLE 6.2 OF THE DSU

75. If the Panel finds for China on any of its claims 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.

76. China asserts that relevant description in the panel request of China's facts available claims is contained only in the following, general phrase: "inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement." This phrase, however, is so lacking in specificity that all of China's claims under Article 6.8 and Annex II would fail to comply with the requirement of Article 6.2 of the DSU.

XI. CONCLUSION

77. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject China's claims.