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

(DS471)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

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US – Zeroing (Japan) (21.5) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009

TABLE OF EXHIBITS

Exhibit No.	Description
USA-125	Shorter Oxford Dictionary, Process

Mr. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, we again thank the Panel, and the Secretariat staff assisting you, for your extraordinary efforts on this dispute. We recognize that this is one of the most voluminous WTO disputes ever commenced.

2. At the outset, we present one overarching observation: more ink cannot fill the holes in China's deficient case. Since we last met, China has submitted to the Panel hundreds of additional pages. Nonetheless, China still lacks the requisite evidence and arguments to support its claims in this dispute. In particular, China's case suffers from the following failings, which we will discuss in our statement today:

— With respect to Commerce's application of the alternative, average-to-transaction comparison methodology and the use of zeroing, China has failed to seriously engage the text of the AD Agreement[1] and the GATT 1994,[2] and has failed to propose interpretations that would accord with the customary rules of interpretation of public international law. For example, China's interpretations would not give meaning to all of the terms of the covered agreements. Instead, China urges the Panel to adopt interpretations that are utterly divorced from the text of the covered agreements, and which would render certain terms of those agreements – even the sentence that addresses targeted dumping – *inutile*, contrary to the principle of effectiveness.

— With respect to the alleged Single Rate Presumption, China fails to establish the existence of a norm of general and prospective application or grapple with the facts and legal issues presented here and instead tries to import often inapposite analysis from other WTO disputes. In particular, China fails to address that the scope of its alleged norm is broader or different than that presented in other disputes, or present the precise facts that establish its "as-applied" claims.

— With respect to the alleged Use of Adverse Facts Available Norm, China continues to fail to specify the precise content of the alleged norm or present evidence that would establish its general and prospective nature. Moreover, China has failed to rebut that Commerce's process of corroboration, which is mandated by statute and ensures that any information selected by Commerce is reliable and relevant, is consistent with U.S. WTO obligations. Further, China fails to analyze the text of Article 6.1 of the AD Agreement, which plainly provides that the provision affords notice and opportunity to interested parties rather than affirmatively dictating what information investigating authorities must request.

— With respect to the six new determinations, China continues to fail to establish how they can be considered in this dispute in light of the governing provisions of the DSU.[3]

3. In the U.S. written submissions, statements to the Panel, and responses to the Panel's questions, the United States has demonstrated that China has failed to establish any breach of any provision of any of the covered agreements. We will not repeat in this statement the detailed

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] *General Agreement on Tariffs and Trade 1994*.
[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

arguments we have made previously, though we continue to rely on all of the arguments we have presented to the Panel during the course of the dispute. We will focus our statement today on key legal and factual issues that have been misconstrued by China in its second written submission.

I. CHINA'S CLAIMS UNDER ARTICLE 2.4.2 OF THE AD AGREEMENT ARE WITHOUT MERIT

4. The U.S. first written submission applies the customary rules of interpretation to explain when and how an investigating authority may utilize the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement, and it demonstrates that the challenged U.S. measures are fully consistent with that provision. Subsequent U.S. statements, responses to panel questions, and the U.S. second written submission have further elaborated the U.S. arguments in this regard.

5. For its part, China, throughout this dispute, has utterly failed to explain how the second sentence of Article 2.4.2 *should* be applied. China never describes what an investigating authority should do to identify a pattern of export prices which differ significantly. Nor does China describe what an investigating authority should do to apply the alternative comparison methodology in a manner that would actually, in the words of the Appellate Body, "unmask targeted dumping."[4] Instead of working to help the Panel give meaning to the terms of the second sentence of Article 2.4.2, China aims to deprive that provision of any meaning at all.

6. In its second written submission, China largely repeats or summarizes arguments on targeted dumping and zeroing that it has made earlier in the dispute. The United States has already responded to those arguments and demonstrated that they lack merit. Nevertheless, China asserts a number of times, incorrectly, that the United States has not rebutted or addressed China's arguments. Therefore, in order to avoid any confusion, we will use this part of our opening statement to briefly survey some of the issues related to targeted dumping and zeroing and, where appropriate, we will provide the Panel references to the portions of U.S. submissions, statements, and responses to panel questions where we have, indeed, responded to and rebutted China's arguments.

A. "Zeroing" in Connection with the Alternative, Average-to-Transaction Comparison Methodology Is Permissible and Necessary

7. In its second written submission, China asserts that "[t]he United States does not even attempt to provide an interpretative pathway for the Panel to reconcile zeroing under the W-T methodology with the established jurisprudence that rejects the notion of dumping as a transaction-specific concept."[5] Everything about China's assertion is wrong.

8. As an initial matter, we recall that the U.S. first written submission expressly states that the United States does not take the position that the results of transaction-specific comparisons

[4] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[5] China's Second Written Submission, para. 111.

are themselves "margins of dumping."[6] It is only China that continues to discuss the "notion of dumping as a transaction-specific concept."[7]

9. Additionally, contrary to China's assertion, the U.S. first written submission does provide the Panel a clear "interpretative pathway."[8] It does so by analyzing the text and context of the second sentence of Article 2.4.2. A proper application of the customary rules of interpretation demonstrates that 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.

10. China ignores the type of legal analysis necessary for the resolution of this dispute. In particular, China ignores the text of the second sentence of Article 2.4.2. Instead, China points to the terms "dumping" and "margins of dumping," which, of course, are not found in the second sentence of Article 2.4.2, and argues that the interpretative matter is settled by virtue of prior Appellate Body findings relating to those terms.[9] The U.S. second written submission addresses China's argument directly and shows that it lacks merit.[10] 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, have been 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. Because nothing in the text of the second sentence of Article 2.4.2 supports the interpretation China now proposes, China simply avoids discussing the text.

11. China also attempts to avoid the U.S. mathematical equivalence argument and the implications of mathematical equivalence for the interpretation of the second sentence of Article 2.4.2. Again, we have addressed China's arguments previously and demonstrated why they fail.[11] Importantly, we stress that China does not argue with the math itself. China does not contend that mathematical equivalence would not, in fact, result. Rather, China merely suggests to the Panel various ways that the calculation of normal value might be manipulated in an effort to, in China's own words, "show that mathematical equivalence can be avoided."[12] We have demonstrated, though, that China cannot "avoid" the mathematical equivalence argument, nor has China undermined it. China's argument fails because manipulating normal value under the alternative comparison methodology and leaving it unchanged under the normal average-to-average comparison methodology would do nothing to address a pattern of significantly different *export prices* or to "unmask targeted dumping." Furthermore, China's argument fails because

[6] *See* First Written Submission of the United States of America (Confidential) (Corrected Version May 13, 2015) ("U.S. First Written Submission"), para. 217.
[7] China's Second Written Submission, para. 111.
[8] China's Second Written Submission, para. 111.
[9] *See* China's Second Written Submission, para. 112.
[10] *See* U.S. Second Written Submission, paras. 90-92.
[11] *See* U.S. Second Written Submission, paras. 93-105.
[12] Exhibit CHN-497, Table 4; *see also* China's Responses to the Panel's First Set of Questions, para. 129.

such manipulation of normal value also would, as China's own analysis demonstrates, yield results that are unpredictable and not systematic, and which 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."[13] In its opening statement this morning, China argues that "such increased uncertainty … is part of the exceptional remedy that the drafters of the *Anti-Dumping Agreement* have authorized in order to deal with an exceptional phenomenon."[14] That is, China argues that "uncertainty" is a *feature* of the second sentence of Article 2.4.2. This new argument is astonishing. It beggars belief, and it is a further indication of China's fundamental misunderstanding of the second sentence of Article 2.4.2. Nothing in the text of the AD Agreement or the GATT 1994, and nothing in any negotiating history documents, suggests that the drafters of the AD Agreement intended to increase uncertainty for exporters. Article VI of the GATT 1994 establishes that injurious dumping is "to be condemned"[15] and, together with the AD Agreement, provides Members with a remedy to "offset or prevent dumping."[16] The WTO agreements do not, however, in any way, work to increase uncertainty in the international trading system. Rather, the dispute settlement system should serve to provide "*security* and *predictability* to the multilateral trading system."[17] An interpretation of the second sentence of Article 2.4.2 that would, in China's own words, "increase[] uncertainty" for exporters simply is untenable.

12. In sum, we have shown that a proper application of the customary rules of interpretation leads only to one conclusion: zeroing in connection with the alternative, average-to-transaction comparison methodology must be permissible.

B. Commerce's Application of the Alternative, Average-to-Transaction Comparison Methodology to All Sales Is Not Inconsistent with Article 2.4.2 of the AD Agreement

13. In its second written submission, China continues to argue that an investigating authority "must limit the application of the W-T comparison methodology solely to those sales that comprise the relevant pricing pattern."[18] A significant problem with China's argument, however, is that it is premised on China misinterpretation of the term "pattern," which simply cannot be read as China proposes.

14. The "pattern" referred to in Article 2.4.2 of the AD Agreement is "a pattern of export prices which *differ significantly among* different purchasers, regions or time periods."[19] Accordingly, when analyzing export prices to purchasers, for example, any "pattern" that is "among different purchasers" necessarily must transcend at least two purchasers. Furthermore, any pattern of export prices which "differ significantly" necessarily must include both lower

[13] *See* U.S. Second Written Submission, para. 102.
[14] China's Opening Statement at the Second Panel Meeting, para. 41.
[15] GATT 1994, Art. VI:1.
[16] GATT 1994, Art. VI:2.
[17] DSU, Art. 3.2 (emphasis added).
[18] China's Second Written Submission, para. 89.
[19] Emphasis added.

export prices and the higher export prices from which they "differ significantly." Thus, the "pattern" cannot be exclusively the lower-priced export sales to one particular purchaser, but instead must be the difference or differences between export prices to one purchaser and export prices to another purchaser, or the differences among multiple purchasers. In other words, the term "pattern" cannot be understood to be synonymous with "target," a word that the parties and the Appellate Body have used, but which does not appear in the text of the AD Agreement. The meaning of the term "pattern" is one of the crucial interpretative questions before the Panel, and text of the "pattern clause" makes clear that China's proposed interpretation of that term cannot be correct.

15. Instead of engaging in a close examination of the text of the "pattern clause," China relies on a superficial contextual analysis that grasps for meaning in terms outside of the "pattern clause."[20] China's proposed interpretative analysis is inconsistent with the customary rules of interpretation.

16. China also contends that its position is supported by the Appellate Body report in *US – Zeroing (Japan)*.[21] We have addressed the *US – Zeroing (Japan)* Appellate Body report already, and we have explained why China's reliance on isolated statements in that report is misplaced.[22]

17. Additionally, China makes certain arguments and assertions in its second written submission related to the application of the alternative, average-to-transaction comparison methodology on a model-specific basis, and also discusses the Appellate Body report in *EC – Bed Linen*. The U.S. second written submission addresses China's contentions and shows that they lack merit. We respectfully refer the Panel to the discussion contained in the U.S. second written submission.[23]

C. Commerce Did Not Act Inconsistently with the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

18. With respect to the "pattern clause" and Commerce's application of the *Nails* test in the challenged investigations, the United States has demonstrated that each criticism China levels against the *Nails* test ultimately comes down to a comparison between the *Nails* test and China's proposed statistical probability analysis.[24] We have shown, however, that Commerce expressly was not, in the challenged investigations, making statistical inferences of the kind discussed by China.[25]

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[20] *See, e.g.*, China's Second Written Submission, para. 90.
[21] *See* China's Second Written Submission, paras. 92, 95.
[22] *See* U.S. First Written Submission, paras. 286-289, U.S. Responses to the Panel's First Set of Questions, para. 38, U.S. Second Written Submission, para. 34 and footnote 47.
[23] *See* U.S. Second Written Submission, paras. 73-80.
[24] *See* U.S. Second Written Submission, paras. 17-41.
[25] OCTG OI Final I&D Memo, at Comment 2 (Exhibit CHN-77); *see also* Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66) ("As we stated before, we do not use the standard deviation measure to make statistical inferences but, rather, use the standard deviation as a relative standard against which to measure

19. We have further shown that none of China's criticisms establishes that Commerce's application of the *Nails* test in the challenged antidumping investigations is inconsistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. Indeed, we have shown that, when China asserts that the purpose of the analysis under the "pattern clause" is to identify export prices that are "unusually low,"[26] China reveals that its understanding of the "pattern clause" is fundamentally incorrect. China's basic misunderstanding appears to lead it again and again to advance arguments related to statistical probability analysis, which simply are not at all relevant, either to an interpretation of the "pattern clause" of the second sentence of Article 2.4.2 or to a review of Commerce's determinations in the challenged antidumping investigations.

20. Thus, for example, contrary to China's contention, Commerce was not required to engage in any "preliminary analysis of the manner in which the observed export prices in individual cases were distributed."[27] Such a preliminary analysis might be relevant if one were to undertake the kind of statistical probability analysis that China discusses, but Commerce did not undertake such an analysis, nor does Article 2.4.2 require an investigating authority to do so.

21. Additionally, China's criticism of Commerce's use of a single standard deviation simply is beside the point because, once again, Commerce did not undertake the kind of statistical probability analysis China discusses.[28] And when China asserts that "[t]he United States does not contest the accuracy of Professor Egger's analysis," China is not incorrect, but this is of no moment.[29] While the United States has not contested the accuracy of Professor Egger's analysis, neither has the United States sought to confirm that the analysis is correct, for the simple reason that the analysis is not relevant to the issues in this dispute. Accordingly, the United States takes no position with respect to its accuracy.

22. Also not relevant are China's arguments related to the purportedly "wider price gaps in the tail of the price distribution compared to price gaps closer to the mean."[30] These arguments miss the point because they are premised on China's contention that Commerce actually was undertaking the kind of statistical probability analysis that China discusses, despite Commerce's express statements in its determinations that it was not doing so. China asks the Panel to ignore the evidence before it, which, of course, the Panel cannot do.

23. China also repeats in its second written submission arguments it has made previously concerning Commerce's use of weighted averages in connection with its application of the *Nails* test in the challenged investigations.[31] In doing so, China summarizes what it calls the "essence"

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differences between the price to the alleged target and non-targeted group. For this purpose, one standard deviation below the average price is sufficient to distinguish the alleged target from the non-targeted group").

[26] *See, e.g.*, China's Reponses to the Panel's First Set of Questions, paras. 36, 45, 56, 95; China's Second Written Submission, paras. 11, 34, 66.

[27] *See* China's Second Written Submission, paras. 34-38.

[28] *See* China's Second Written Submission, paras. 39-42.

[29] China's Second Written Submission, para. 40.

[30] *See* China's Second Written Submission, paras. 43-58.

[31] *See* China's Second Written Submission, paras. 59-66.

of the U.S. argument concerning the interpretation of the second sentence of Article 2.4.2,[32] but China's summary distorts the U.S. position. The U.S. response to panel question 13, to which China refers, speaks for itself.[33] China's attempted rebuttal of the U.S. argument fails because it does not address the argument that the United States made.

24. China also suggests, incorrectly, that the United States has not responded to certain other arguments China has made.[34] Accordingly, to avoid any confusion, the United States notes that the U.S. second written submission responds to China's arguments related to the Appellate Body report in *US – Zeroing (Japan)* and demonstrates that the findings in that report do not support China's position.[35] The United States further notes that, with respect to arguments China presents in its response to panel question 14 and in various exhibits China has submitted to the Panel,[36] the U.S. second written submission demonstrates that China's arguments rest on flawed premises and are beside the point.[37]

25. With respect to its arguments concerning the assessment of whether export prices differed significantly in a qualitative sense, China's second written submission merely summarizes what China characterizes as "key points" that the parties made earlier in the dispute.[38] The United States has addressed all of China's arguments related to qualitative aspects previously.[39]

D. Commerce Did Not Act Inconsistently with the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

26. As it does with the "pattern clause" and the other issues related to targeted dumping and zeroing, China's second written submission presents arguments concerning the "explanation clause" that China has made before, and to which the United States has already responded.

27. For example, China argues that the explanations Commerce provided in the challenged investigations constitute merely a "boilerplate statement."[40] The U.S. second written submission explains why China's contention is baseless.[41] The explanations Commerce provided in each of the challenged investigations were reasoned and adequate and not inconsistent with the "explanation clause" of the second sentence of Article 2.4.2.

28. China also argues that the United States misreads the Appellate Body reports in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Zeroing (Japan)*. The U.S. second written submission discusses those Appellate Body reports, and demonstrates that it is China that

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[32] *See* China's Second Written Submission, paras. 61-62.
[33] *See* U.S. Responses to the Panel's First Set of Questions, paras. 20-23.
[34] *See* China's Second Written Submission, paras. 63 ("the United States has failed to explain") and 66 ("China's detailed, and as yet unrebutted, arguments").
[35] *See* U.S. Second Written Submission, paras. 33-35.
[36] *See* China's Second Written Submission, paras. 65-66.
[37] *See* U.S. Second Written Submission, paras. 38-41.
[38] *See* China's Second Written Submission, para. 69.
[39] *See* U.S. First Written Submission, paras. 67-83, 141-145; U.S. Second Written Submission, paras. 42-51.
[40] China's Second Written Submission, para. 78.
[41] *See* U.S. Second Written Submission, paras. 60-65.

misreads the reports and misunderstands their implications.[42] Neither report supports China's argument that an investigating authority is required to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided pursuant to the second sentence of Article 2.4.2 of the AD Agreement.

E. China's Arguments Related to Article 17.6(i) of the AD Agreement Lack Merit

29. China's second written submission discusses at some length the standard of factual review set forth in Article 17.6(i) of the AD Agreement.[43] The purpose of that discussion is unclear. As explained in the U.S. first written submission, the United States agrees with China that Article 17.6 of the AD Agreement and Article 11 of the DSU provide the applicable standard of review to be applied in this dispute.[44]

30. China acknowledges that it "does not rely on Article 17.6(i) as an independent basis for any of its legal claims."[45] Nevertheless, China asserts numerous times that Commerce did not establish the facts in the challenged investigations in a manner that was proper and did not evaluate the facts in a manner that was unbiased and objective. China claims that, because of those alleged failings, the United States has breached Article 2.4.2 of the AD Agreement. However, China has offered nothing to substantiate its assertion that Commerce did not establish the facts properly in the challenged investigations. Furthermore, when China suggests that the *Nails* test did not operate in an objective and unbiased manner, it is evident that China simply means that – in China's view – the *Nails* test did not comport with a particular type of statistical probability analysis, but such an analysis is not required under the AD Agreement. Or, put another way, the fact that Commerce undertook an analysis different from the type of analysis that China prefers does not mean that Commerce's evaluation lacked objectivity or was biased. Accordingly, China's contentions related to Article 17.6(i) of the AD Agreement are utterly without merit.

F. China's Claims Concerning the PET Film Third Administrative Review Lack Merit

31. Concerning China's claims against the use of zeroing in the PET film third administrative review, in its second written submission, China asserts that "the United States has failed to rebut the arguments upon which China's claim rests,"[46] and China suggests that it is "puzzled by the degree to which the United States ignores China's arguments."[47] This is empty rhetoric.

32. The U.S. first written submission explained the consequential nature of China's claims under Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, and demonstrated

[42] *See* U.S. Second Written Submission, paras. 68-71
[43] *See* China's Second Written Submission, paras. 10-26.
[44] *See* U.S. First Written Submission, paras. 19-22.
[45] China's Second Written Submission, para. 13.
[46] China's Second Written Submission, para. 116.
[47] China's Second Written Submission, para. 124.

why China's claims against the PET film third administrative review fail.[48] In its opening statement at the first panel meeting and in response to panel question 27, China responded to the U.S. argument by articulating for the first time its arguments related to the scope of application of Article 2.4.2 of the AD Agreement.[49] The Panel did not ask the United States any questions about China's new arguments. Accordingly, at the first appropriate opportunity, in the U.S. second written submission, the United States addressed China's arguments and demonstrated that they lack merit.[50] The United States has in no sense failed to rebut China's arguments, nor have we ignored them.

33. We will not repeat here the arguments we have made previously. Rather, we respectfully refer the Panel to the arguments presented in the U.S. second written submission concerning prior Appellate Body findings related to the use of zeroing in administrative reviews,[51] the findings of the panel in *US – Zeroing (EC)*, on which China mistakenly relies,[52] and the proper understanding of the scope of application of Article 2.4.2 of the AD Agreement.[53]

II. CHINA'S CLAIMS UNDER ARTICLES 6.10 AND 9.2 OF THE AD AGREEMENT ARE WITHOUT MERIT

34. We now turn to China's claims concerning the alleged Single Rate Presumption norm. The central argument in China's second written submission – and indeed throughout this dispute – is that this is "not the first dispute to address a Member's … presumption of government control."[54] In short, China's principal argument can be distilled to the notion that since breaches of WTO obligations were found in other disputes that involved the use of presumptions, this Panel should do the same here.

35. As an initial matter, China's invitation to the Panel to transpose findings from other disputes is legally impermissible. To make out its case on the matter that it referred to the DSB,[55] China must put forward sufficient evidence and argumentation to show that the specific measures at issue in this dispute are inconsistent with WTO rules.[56] China has not done so.

36. China's characterization of its claims as simply requiring a repetition of existing analysis from other reports is wrong. Despite China's attempts to argue its claims are identical to those presented in preceding disputes, China's claims are far more sweeping and are novel in several important respects. In particular, this is:

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[48] *See* U.S. First Written Submission, paras. 318-325.
[49] *See* China's Opening Statement at the First Panel Meeting, paras. 60-65; China's Responses to the Panel's First Set of Questions, paras. 131-137.
[50] *See* U.S. Second Written Submission, paras. 106-117.
[51] *See* U.S. Second Written Submission, para. 108; *see also* U.S. First Written Submission, paras. 324.
[52] *See* U.S. Second Written Submission, paras. 109-112.
[53] *See* U.S. Second Written Submission, paras. 113-116.
[54] China's Second Written Submission, para. 198.
[55] DSU Article 7.1 (panel's terms of reference are "[t]o examine … the matter refer to the DSB by [the complaining party]"); *US – Anti-Dumping Measures on Oil Country Tubular Goods (Mexico) (AB)*, para. 129.
[56] *US – Continued Zeroing (AB)*, para. 190.

- The first dispute that challenges an investigating authority's very ability to follow an approach to ascertain a respondent's relationship to the Chinese government; and

- The first dispute that alleges as-applied breaches of Articles 6.10 and 9.2 without the complainant even trying to prove that any actual exporter or producer was wrongly denied an individual margin of dumping; and

Accordingly, the analysis from other disputes does not reach the far-reaching challenge presented by China here.

37. Thus, China's claims stand – or as we believe fall – on what it has presented in this dispute. And, as the United States has shown, China's claims have at least two fundamental failings: (1) a failure to establish the existence of the alleged norm – which means the "as-such" challenge must fail – and (2) a failure to demonstrate how Commerce's conduct in particular proceedings breached the United States' WTO obligations, which defeats the "as-applied" challenge.

A. China's Failure to Establish The Existence of the Alleged Single Rate Presumption Norm Means its "As Such" Claim Must Fail

38. With respect to the first failing – to prove the existence of the alleged norm – China asserts the evidence in favor of finding its existence is "overwhelming."[57] The record shows otherwise. Perhaps China uses this phrase to recognize the high burden a complaining party must meet to establish the existence of an unwritten measure.[58] In any event, a critical examination of the precise scope of China's alleged norm and the quality of China's evidence reveals that China's position is simply untenable.

1. China's Norm is Broader Than That Alleged in Any Prior WTO Dispute

39. China has dubbed the alleged norm it is challenging in this dispute as the "Single Rate Presumption." But China is not simply challenging the use of a presumption by the investigating authority. Despite China's nomenclature, the alleged "Single Rate Presumption" alleged by China's is comprised of more than a presumption of state control. Specifically, China's alleged norm also takes issue that Chinese entities "must complete USDOC's separate rate application and satisfy the 'Separate Rate Test'."[59] Thus, when China points repeatedly to the analysis in *US – Shrimp II* as confirming its evidence meets its high burden, that argument is misplaced because it ignores the more limited norm alleged in that dispute.[60]

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[57] China's Second Written Submission, para. 181.
[58] *See EC – Zeroing (AB)*, para. 198; *see also US – Shrimp II*, para. 7.130.
[59] China's Second Written Submission, para. 175.
[60] China's Second Written Submission, para. 184, 198, China's First Written Submission, para. 330.

40. The alleged NME norm found to exist in *US – Shrimp II* consisted of the rebuttable presumption that companies belong to an NME entity and that a single rate is issued to that entity.[61] Unlike China, Vietnam did not challenge the existence of the Separate Rate Test. Thus, this is the *first* dispute that challenges not simply the purported application of a presumption of state control for non-market economies, but also whether a Member may maintain an approach through which it examines whether nominally distinct legal entities should be treated as a single exporter or not. China as the complainant may certainly frame its claims as it wishes, but having set out a broad claim, it is now China's burden to prove *all of it*. China has not met this burden.

2. China's Evidence And Argumentation Do Not Prove The Existence of the Norm China Has Alleged

41. With that point in mind – a broader alleged norm – we turn to the evidence China has proffered. Our submissions set forth in detail why we believe the evidence presented by China regarding the alleged Single Rate Presumption norm is deficient.[62] We will highlight today four observations.

42. First, China has not pointed to specific evidence in support of its allegation that the Separate Rate Test has general and prospective application. Instead, China's submissions repeatedly reference that the evidence here is for the most part the same that was presented in *US – Shrimp II.*[63] But as we have noted, the norm alleged in that dispute was narrower.[64]

43. Second, the United States has presented rebuttal evidence and arguments in this dispute that were not presented in *US – Shrimp II*. For example, the United States has provided a memorandum from 10 years ago that clearly states the Antidumping Manual is not intended to create any expectations.[65] The United States has also provided an example where a description of a practice in the Antidumping Manual is not an accurate statement of how Commerce presently approaches that issue.[66] Thus the United States has presented evidence that was not at issue in any prior dispute. This evidence establishes even more definitely that the Antidumping Manual should not be considered evidence that specific approaches described in the Manual are intended to be measures of a general and prospective application.

44. Third, China's evidence on the alleged "repeated and consistent application" of the alleged norm is inherently deficient.[67] A consistent outcome serves only to prove the existence of a consistent set of facts.[68] It does not prove or even necessarily illuminate the separate question of whether a norm is directing the outcome that arises from those facts.[69] As succinctly

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[61] *United States – Shrimp II*, para. 7.131.
[62] *See e.g.*, United States; Second Written Submission, paras. 131-177.
[63] *See e.g.*, China's First Written Submission, paras. 330, 375.
[64] China's Second Written Submission, para. 184, 198, China's First Written Submission, para. 330.
[65] U.S. Second Written Submission, para. 148, Exhibit USA-108.
[66] U.S. Second Written Submission, para. 147, n. 220, Exhibit USA-110.
[67] China's Second Written Submission, para. 181
[68] *US – Anti-Dumping Measures on Oil Country Tubular Goods (Mexico) (AB)*, paras. 206-207.
[69] *US – Export Restraints*, para. 8.126.

noted by one prior panel, "[t]hat a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not transform it into a measure."[70]

45. The Appellate Body has made similar observations. For example, in a prior trade remedy dispute the Appellate Body found the existence of an unwritten measure because the "evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract."[71]

46. Fourth, China mischaracterizes the U.S. position on what evidence may prove a norm. China claims the U.S. argument is "that norms cannot be changed."[72] That is not the U.S. position. The issue is that norms of general and prospective application actually must possess *general and prospective* application. In other words, the measure actually must create "principles or criteria applicable in future cases"[73] that will be applied to determine conduct in future cases. The United States is simply noting the obvious: that China's attempts to point to past and specific conduct whether through its tabulations or selective excerpts of U.S. court decisions does not indicate what measure directed that conduct and whether the past conduct will impact future conduct.

47. In sum, each piece of evidence China has presented is deficient in not only proving the first element of its alleged Single Rate Presumption norm – the existence of the presumption – but particularly so when it comes to clearly establishing the second element: the Separate Rate Test.

B. China's Failure To Prove Commerce's Conduct in the Challenged Determinations Defeats China's As-Applied Claims

1. China's "As-Applied" Claims Under Articles 6.10 and 9.2 Must Fail Because China Has Not Proven Particular Exporters, Producers or Suppliers Were Denied an Individual Rate

48. Turning to China's as-applied claims under Articles 6.10 and 9.2, China has not established the specific facts that prove particular exporters, producers, or suppliers were actually denied an individual rate in any of the challenged determinations. The facts differ among the many individual determinations challenged by China – and require particularized analysis. China has acknowledged as much with respect to its "as-applied" Article 9.4 claim concerning the alleged Single Rate Presumption, which we will discuss shortly:

[70] *US – Steel Plate*, para. 7.22.
[71] *US – Zeroing (EC) (AB)*, para. 204.
[72] China's Second Written Submission, para. 185-188.
[73] *Japan – Film*, para. 10.388.

> While the challenged determinations share important core characteristics, some of their specific factual circumstances differ. Accordingly, the Panel may reach different characterizations for different determinations.[74]

These different facts mean that the inclusion of respondents in the China government entity cannot be assumed to have been done simply on the basis of presumption. For example, the United States has pointed out how one respondent, Double Coin, in Tires AR5, was found on the basis of facts and evidence to be part of the China government entity.[75] In other words, Commerce's analysis to include Double Coin in the China government entity was based on facts and evidence, not a presumption.

49. Where Commerce found respondents to be part of the China government entity on the basis of facts and evidence, there can be no claim that Articles 6.10 and 9.2 were breached. Indeed, the Appellate Body's analysis in *EC – Fasteners* expressly found that under Articles 6.10 and 9.2, an investigating authority may find that nominally distinct entities can be treated "as a single entity for the purpose of determining individual dumping margins and antidumping duties … due to State's control or material influence in and coordination of these exporters' pricing and output."[76] In other determinations, the China government entity was not under review.[77] In this situation, there also could be no claim that an exporter or producer was wrongly denied an individual rate under Articles 6.10 and 9.2.

50. 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. China has not done so. Instead of attempting to meet its burden of showing that each of the challenged proceedings is inconsistent with obligations under Articles 6.10 and 9.2 through argumentation and evidence, China has simply proffered numerous exhibits upon the Panel and asked it to undertake such work. To the extent that China believes that a WTO panel has the role of, and responsibility of, investigating and constructing China's *prima facie* case, China is mistaken. On this point, we think the Panel's analysis from *US – Shrimp (Ecuador)* instructive:

> we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case. We take note in this regard that the Appellate Body has cautioned panels against ruling on a claim before the party bearing the burden of proof has made a prima facie case. In *EC-Hormones*, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing a prima facie case and shifted the burden of proof to the responding party.

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[74] China's First Opening Statement, para. 128.
[75] U.S. Second Written Submission, para. 265.
[76] *EC – Fasteners (AB)*, para. 382.
[77] *See* Furniture AR9, Shrimp AR9, Tires AR3, OCTG AR1, Retail Bags AR4, PET Film AR3, PET Film AR4, PET AR5.

…

> we must satisfy ourselves that Ecuador has established a *prima facie* case of violation, and notably that it has presented 'evidence and argument … sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[78]

In short, China has not met the evidentiary burden for its claims under Articles 6.10 and 9.2.

III. CHINA'S CLAIMS UNDER ARTICLE 9.4 ARE WITHOUT MERIT

51. In its first written submission, China noted that "[t]o the extent the PRC-wide entity was *not* individually investigated … USDOC failed to assign a rate consistent with the disciplines imposed by Article 9.4…"[79] In making this argument, China implicitly acknowledges that if the China government entity was subject to examination and received its own rate, then China's Article 9.4 claims fail. The failure of various firms to establish independence from the China-government entity does not detract from an examination of the China-government entity. Accordingly, even under the way China has framed its own arguments, China's "as-applied" claims turn on whether or not – in each of the challenged determinations – the China-government entity was investigated. China's "as-applied" claims fail to address this key factual issue, and for this reason, its "as-applied" claims must fail.

52. Specific to China's claims concerning the second obligation under 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. Without the requisite preconditions having been met, a company would not be entitled to an individual rate, *irrespective of the alleged Single Rate Presumption.*

53. In sum, the United States recalls that Article 9.4 applies when certain "exporters or producers [are] not included in the examination." Here, China's as-applied claims fail because China did not – and cannot prove – that in the challenged determinations examination of certain exporters was limited and did not extend to the China-Government entity.

IV. CHINA'S CLAIMS UNDER ARTICLES 6.1, 6.8 AND ANNEX II OF THE AD AGREEMENT ARE WITHOUT MERIT

54. We now turn to China's claims concerning Commerce's use of facts available. There is a principal point that needs to be noted and emphasized again at the outset. Under the AD Agreement, investigating authorities may draw inferences – including adverse inferences – in selecting from available facts where a non-cooperative party has withheld some of the relevant facts.[80] In the intervening period since China filed its panel request, the Appellate Body has

[78] *US – Shrimp (Ecuador)*, paras. 7.9-7.11; *see also US – Gambling (AB)*, para. 140.
[79] China's First Written Submission, para. 718 (emphasis original).
[80] *US – Carbon Steel (India) (AB)*, para. 4.469

confirmed this point.[81] In an apparent attempt to reframe its arguments, China asserts its complaint rests with the use of "adverse facts" rather than adverse inferences.

55. This argument is a tautology as demonstrated by China's continued failure to explain what, if anything, make a particular fact "adverse." While China asserts that it has no concern with adverse inferences,[82] that is precisely its grievance because it is the inference that leads to the selection of a fact that China considers adverse to its interests. China has not identified any other attribute of a fact that could render it "adverse." Indeed, it is telling that at one point in its responses to the Panel's Questions, China notes that "the adverse inference and the selection of adverse facts are two sides of the same coin."[83] With that overarching point in mind, we proceed to address some of the specific points raised in China's second written submission.

A. China's "As Such" Claims Concerning Special Circumspection and the Resort to Facts Available in the Absence of a Request for Information Are Inconsistent with the DSU

56. The United States has explained that consideration of China's two "as such" claims regarding USDOC's initial decision to apply facts available would be inconsistent with the DSU.[84]

57. In an attempt to bring these claims within the terms of reference of this dispute, China now 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."[85] This phrase, however, is so lacking in specificity that – if this is indeed the only relevant phrase – then 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 "to provide a brief summary of the complaint sufficient to present the problem clearly." This is so because Annex II contains multiple distinct obligations. As noted by the Appellate Body, where a provision establishes multiple obligations, simply listing the provision "may fall short of the standard of Article 6.2."[86] Here, China's claim per its new position on the relevant language in the panel request cites not a single provision, but an entire portion of the AD Agreement: namely, all of Annex II, which contains seven paragraphs and even more obligations. Accordingly, if China wishes to maintain its position that the relevant language in the panel request identifying China's complaint is limited to what China now contends in its second written submission, the necessary legal result would be that, as a jurisdictional matter under Article 6.2 of the DSU, *all of China's claims* regarding the use of facts available are outside the terms of reference of this proceeding.[87]

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[81] *Id.*
[82] China's Second Written Submission, para. 331.
[83] China's Responses to the Panel's First Set of Questions, para. 367.
[84] U.S. First Written Submission, paras. 493-502.
[85] China's Second Written Submission, para. 323.
[86] *Korea – Dairy (AB)*, para. 124.
[87] *EC – Large Civil Aircraft (AB)*, para. 791.

B. China Still Has Not Demonstrated the Existence of the Alleged "Use of Adverse Facts Available Norm"

58. China's claims also suffer from severe legal and factual deficiencies. We begin with those related to the alleged norm. Specifically, despite the length of the discussion in China's submissions, China has not precisely – nor consistently – explained what the alleged "Use of Adverse Facts Available Norm" is, nor has China shown that it is a norm of general and prospective application. On this basis alone, China's claim on the alleged norm must fail.

1. China Still Cannot Specify the Precise Content of the Norm

59. In its second written submission, China asserts that its response to Panel Question 67(a) explains the precise content of the alleged norm.[88] As an initial matter, this statement would seem to be an acknowledgement by China that it did not present the content of its norm in its first written submission – or even at the First Panel Meeting. In this case, China has failed to comply with the requirement in the Working Procedures to "present the facts of the case" in its first written submission and all evidence for its *prima facie* case "no later than during the first substantive meeting."[89] Accordingly, China's claims with respect to the alleged norm cannot be sustained for this reason alone.

60. In addition, China still has not remedied the problem, either in its second written submission or in its response to Panel Question 67(a). China alleges that the alleged norm is triggered by a finding by Commerce of non-cooperation. If so, then it appears that the finding of non-cooperation is something that results in the application of the norm, and is a step that is external to and distinct from the norm itself. What it left in the alleged norm, is a "[1] *process* that by design, [2] involves the making of an adverse inference and [3] the selection of adverse facts…"[90]

61. Members of the Panel: that is not stating precise content. Every aspect of that description is too inchoate to be meaningfully understood, particularly in light of other contradictions in China's arguments.

62. First, the term "process" tells us nothing about the precise acts or facts of this norm. Indeed, the plain meaning of the term "process" is "the act or fact of going or being carried on."[91] China has given us no description as to what acts or facts are taking place, which is striking considering that China claims the process has a design to it.

63. Second, the process involves – though it is not clear how – the making of an adverse inference. But this provides little guidance as to the object of China's challenge because China

[88] China's Second Written Submission, para. 342.
[89] Working Procedures, Rules 6 and 8.
[90] China's Second Written Submission, para. 342 (emphasis original).
[91] Shorter Oxford Dictionary, Process, def., Exhibit USA-125

repeatedly states that it has no issue with the use of inferences, which China concedes "is a natural part of any adjudicative or quasi-adjudicative process."[92]

64. Finally, the alleged norm entails "adverse facts," which as we have stated repeatedly is a *non-sequitur*, since the investigating authority does not know the substance of the missing information. Moreover, China has not shown that the selected facts were not a reasonable replacement for the missing information based on Commerce's corroboration. Remarkably, China since our last meeting has made its notion of "adverse facts" even more confusing. Specifically, China now recognizes that Commerce does not always use the highest rate on the record for NME entities" and asserts that this is not part of the content of the norm. In short, rather than tell us what the norm is, China has only told us what the norm is not.

2. China Cannot Adduce Evidence in Support of the Alleged Norm's General and Prospective Application

65. We have addressed China's evidence concerning the alleged norm at length in our submissions and today will make three brief observations.

66. First, China asserts that the United States agrees with China that Commerce's practice in prior proceedings constitutes what it calls administrative guidance.[93] We do not agree. Prior practice may, at most, indicate that a particular approach may be permissible or appropriate, not that it will apply generally and prospectively.

67. Second, China continues to assume any statement by Commerce concerning actions in a determination explaining why it acted goes beyond explanation to indicate that a particular rule or norm exits. [94] China's assumption is incorrect. U.S. agencies are generally required under U.S. law to explain the basis behind their decisions. But the existence of an explanation concerning the facts in a particular situation does not mean that the agency is engaged in some sort of rulemaking of general application.

68. Finally, we note a point made by China regarding the court decisions it has submitted. Notably, China asserts that the statements in the court decisions "do not shed light on the precise content of the norm" to the extent they assert Commerce always uses adverse facts available or always uses the highest rate on the record for NME entities.[95] The United States agrees – the court decisions cited by China evaluate the specific Commerce determinations at issue, and do not address the existence of any alleged rule or norm of general application. And given this, it is plain that China's reliance on U.S. domestic judicial decisions is misplaced. This discrepancy simply highlights the unsuitability of China's evidence in trying to prove the existence of an alleged norm of general and prospective application.

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[92] China's Response to the Panel's First Set of Questions, para. 363.
[93] China's Second Written Submission, para. 373.
[94] China's Second Written Submission, paras. 372-377.
[95] China's Response to the Panel's First Set of Questions, para. 405.

C. China Has Not Demonstrated That Commerce's Selection of Facts Available Lacks Special Circumspection

69. In each of the challenged determinations, Commerce took into account all information on the record, including information from the petition, and *including the rates assigned to cooperating companies*. What China does not address is that where an interested party declined to cooperate in an investigation, Commerce was entitled to, and did, take this factor into account in selecting from the available information on the record. In a number of instances in the challenged investigations, Commerce reasonably found that the rates of cooperating parties were less probative than other information on the record. As our submissions make clear though, where there was another rate on the record that had greater probative value, Commerce made use of that rate as facts available, including for the China-government entity's rate.[96]

70. Despite the number of determinations under challenge, China has not in a single instance made any argument in support of its prima facie case with respect to what facts China contends Commerce should have used instead of those chosen. This failure highlights the problem with China's claims both conceptually and from an evidentiary perspective. Conceptually, it demonstrates that China has yet to explain what is deficient with Commerce's approach to corroboration. As the United States has explained, U.S. law concerning corroboration – a measure that is not subject to challenge in this dispute – directs that any information selected by Commerce is reliable and relevant, consistent with the United States' obligations under Article 6.8 and Annex II.[97] From an evidentiary perspective, it confirms that China has failed to make its *prima facie* case for its "as-applied" claims.

D. China Still Has Not Demonstrated the Applicability of Article 6.1

71. China suggests there is a division between the parties regarding whether Article 6.1 should be interpreted "objectively" or "subjectively."[98] This assertion is unhelpful to the analysis. The question is what obligations does Article 6.1 impose?

72. Article 6.1, by its plain text, provides that investigating authorities are to give notice to interested parties of the information the authorities require and give opportunity to interested parties to present in writing the evidence that the interested parties deem relevant.[99] Commerce acted in accordance with provision. Specifically, it gave notice to all known parties of the information it required, and only resorted to facts available when the information was not provided, not complete, or not verifiable.

73. China seeks to impose a new obligation that is divorced from any textual underpinning. Specifically, China claims Article 6.1, by virtue only of the use of the word "require," is a substantive obligation that requires an investigating authority to affirmatively request certain types of information. China, however, ignores the immediate context for the term "require" in

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[96] *See e.g.*, U.S. Second Written Submission, paras. 290-303.
[97] *See e.g.*, U.S. First Written Submission, paras. 470-483.
[98] China's Second Written Submission, paras. 231-232.
[99] *Guatemala – Cement II*, para. 8.178; *United States – OCTG Sunset Reviews*, para. 7.115.

the provision: "notice of the information *which* the authorities require…." The use of the term "which" indicates a non-essential clause, *i.e.*, one that provides information but does not change the meaning of the sentence. In other words, the essential meaning for the first part of Article 6.1 is regarding interested parties being given *notice.* Moreover, China's assertion that a failure to accept that Article 6.1 imposes an obligation on an investigating authority to affirmatively request certain information would render the provision "circular and meaningless" is demonstrably false.[100] To the contrary, under the plain, common-sense reading of Article 6.1, the provision provides interested parties important procedural protections by ensuring they are afforded notice and opportunity to respond to requests for information.

74. China's position is also implicitly at odds with the Appellate Body's analysis in *Mexico – Rice*. In that dispute, the Appellate Body recognized that any investigating authority only had to give notice to exporters that were known to it.[101] If Article 6.1 imposed a substantive obligation on an investigating authority to affirmatively request certain information, then presumably an investigating authority would also be obliged to seek out interested parties that might possess the requisite information.

V. THE SIX NEW DETERMINATIONS CHINA RAISED AT THE CONCLUSION OF THE FIRST PANEL MEETING ARE OUTSIDE THE SCOPE OF THIS DISPUTE

75. China is seeking the inclusion of six new determinations into this dispute as measures for the Panel to issue findings upon. As we have already explained why these new measures are outside the Panel's terms of reference, we limit our comments to three particular arguments raised by China in its second written submission.

76. First, China cites the analysis from *US – Zeroing (Japan) (21.5)* to assert that these new determinations are within the terms of reference of this dispute.[102] What China omits is that the analysis from that dispute is directly tied to the fact that it was a compliance proceeding. As the Appellate Body noted:

[100] China's Second Written Submission, para. 230.
[101] *Mexico – Rice (AB)*, para. 251.
[102] China's Second Written Submission, para. 149, 152.

> whereas the statement in *EC – Chicken Cuts* to which the United States refers was made in the context of original WTO proceedings, we are dealing here with Article 21.5 proceedings. .. [T]he requirements of Article 6.2 must be adapted to a panel request under Article 21.5, and the scope and function of Article 21.5 proceedings necessarily inform the interpretation of the Article 6.2 requirements in such proceedings. The proceedings before us present circumstances in which the inclusion of Review 9 was necessary for the Panel to assess whether compliance had been achieved, and thereby resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings.[103]

Members of the Panel - this is not a compliance proceeding and the six new determinations are not measures taken to comply. Accordingly, China's reliance on *US – Zeroing (Japan) (21.5)* is misplaced.

77. Second, China confuses two very different issues: claims under the DSU and the issue of when factual evidence must be submitted under the working procedures. In particular, China argues that because it submitted these determinations before the close of the First Panel Meeting, they can be admitted as evidence under Rule 8 of the Working Procedures.[104] China, however, is not introducing these determinations as evidence, but as *measures* upon which it requests the Panel to issue findings. Accordingly, their consideration is subject to the requirements of the DSU – which as we have explained means that they needed to be identified in the Panel Request itself – and must have been subject to consultations. We do agree the Working Procedures are relevant though. Specifically, they reinforce that these measures are untimely as China needed to present its case concerning them in its first written submission.[105]

78. Finally, China asserts that *China's* due process rights would be breached if the Panel failed to consider these new measures – and asserts that a failure to consider these measures would burden WTO dispute settlement since China would have to bring a new dispute or wait for a compliance proceeding. As an initial matter, the United States notes that China's argument fails to comply with the basic proposition that it is the DSU itself that establishes the rights and obligations of parties in dispute settlement, and it is not for China to argue that it should obtain additional rights, or be excused from obligations, because China views the specific rules in the DSU to be unfair. In any event, it is the rights of the United States as a defending party – not those of China -- that are involved here. China, as the complaining party, chose the timing of this dispute. If China wished to include certain expected future measures in the dispute, China could have waited to file the dispute until those measures were issued.

79. Finally, what China is seeking to accomplish threatens the effectiveness of WTO dispute settlement. Specifically, the approach of China would encourage gamesmanship and uncertainty. Complainants could draft extremely broad panel requests and then include new measures at a time of their choosing thus depriving parties – and panels – with the ability to adequately

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[103] *US – Zeroing (Japan) (21.5) (AB)*, para. 125.
[104] China's Second Written Submission, para. 159.
[105] Working Procedure Rule 6.

prepare. Indeed, as the Working Procedures to this dispute suggest, the proceedings following the First Panel Meeting are typically meant to be an opportunity to further clarify the parties' arguments, not to consider them for the first time.

80. Moreover, the United States notes that China's assertion that the United States' due process rights are protected because it could present a response in its Second Written Submission, or in its oral statements at the Second Panel Meeting, is absurd. These new determinations were included in China's closing statement without any argumentation as to how they breached U.S. WTO obligations. Putting aside the logistical difficulties China's suggestion invites, the issue is not whether the United States could find some method by which to mitigate the problem, but whether the appropriate method per the DSU and the Working Procedures – receiving notice of the measure in the Panel Request and preparing a response in its first written submission – was effectuated. Clearly, it was not.

VI. CONCLUSION

81. As we proceed to conclude, we recall a point raised by China in its closing statement at the first panel meeting. China noted that this is a case of "*economic* significance" as a "large number of antidumping proceedings with a large volume of trade have been negatively affected by the United States' practices."[106] But China does not acknowledge that the same point – economic significance – of course could be made for the United States and other WTO Members that are placed in the position of defending challenges to antidumping measures. The United States has concluded that the dumped imports subject to the investigations at issue in this dispute caused material injury to U.S. domestic industries, and China has not challenged those injury determinations. Members who impose antidumping measures have industries employing tens of thousands of workers that rely on their investigating authorities being able to take appropriate action to remedy "injurious dumping," and such "injurious dumping," per the terms of the WTO Agreement, is "to be condemned."[107]

82. While economic significance may provide a motivation for a Member to bring a dispute, it cannot serve as a justification for altering the parties' respective burdens or for changing substantive or procedural rules set out in the WTO Agreement. Put plainly, the DSU does not allow China or any other Member to cut corners or take shortcuts in obtaining findings -- regardless of their economic interests. Yet that is what China is asking for here. Rather than expending the effort to attempt to make a prima facie case with respect to alleged unwritten measures and numerous individual determinations, China has simply submitted – often untimely – a massive collection of documents with the expectation that the Panel will undertake the role of a complaining party and develop the factual and legal case for China. As the Appellate Body has recognized, for a panel to do so would be legal error. Moreover, even if China had in fact attempted to develop its prima facie case, those efforts would have been unavailing – the U.S. measures at issue here are fully in accord with the disciplines set out in Article VI of the GATT 1994 and the AD Agreement.

[106] China, First Closing Statement, para. 2.
[107] GATT 1994, Article VI:2.

83. Mr. Chairman, members of the Panel, this concludes our opening statement. We thank you again for your attention to this matter and look forward to addressing any additional questions that you might have.