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

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I. INTRODUCTION

1. As it did in its first written submission, China continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. The U.S. first written submission demonstrates why China's claims fail. Statements and written filings China has made since filing its first written submission have not improved China's case. As we have shown in previous U.S. submissions, statements, and responses to the Panel's questions, and as we elaborate further in this submission, 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").

2. This submission is organized as follows. In section II, we address China's claims related to the application by the U.S. Department of Commerce ("USDOC") of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. With respect to China's claims under Article 2.4.2 of the AD Agreement, section II.B addresses China's "as applied" claims related to USDOC's final determinations in the coated paper, OCTG, and steel cylinders antidumping investigations. Section II.B.1 provides further arguments related to what we call the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, and section II.B.2 provides further arguments related to what we call the "explanation clause" of the second sentence of Article 2.4.2. We demonstrate that, in arguments it has presented since filing its first written submission, China still has failed to establish that USDOC acted inconsistently with Article 2.4.2 by finding, in the challenged antidumping investigations, that the conditions of the "pattern clause" and the "explanation clause" were met.

3. Then, in sections II.B.3 and II.B.4 we further discuss how the alternative, average-to-transaction comparison methodology provided in Article 2.4.2 of the AD Agreement is to be applied. We demonstrate that China still has not shown that USDOC's application of the average-to-transaction comparison methodology to all sales in the challenged antidumping investigations or USDOC's use of zeroing in connection with its application of the alternative comparison methodology when the conditions in the second sentence of Article 2.4.2 have been established is inconsistent with Article 2.4.2 or any other provision of the AD Agreement.

4. Section II.C presents additional arguments related to China's claims concerning the use of zeroing in the third administrative review of the antidumping order on PET film. We show that China's claims continue to lack any merit.

5. In section III, we address how China has attempted to expand the scope of this dispute with respect to both the alleged Single Rate Presumption norm and the alleged Use of Adverse Facts Available norm. In particular, we discuss two problems with China's conduct in these very proceedings. First, we discuss in Section III.A how China in contravention of the requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") has attempted to bring into this dispute new measures that were not included in China's Panel Request nor subject to consultation with the United States. Second, in Section III.B, we show how China – contrary again to the DSU and in this instance the Panel's Working Procedures – has presented arguments that properly belonged in its first written submission. By unreasonably

delaying the presentation of these arguments, China has caused prejudice to the United States in its ability to defend its interests in this dispute.

6. In section IV, we address that China has failed to demonstrate the existence of the alleged Single Rate Presumption norm and the alleged Use of Adverse Facts Available Norm because the evidence fails to establish necessary prerequisites for demonstrating such norms exist. Section IV.A explains that various deficiencies in China's purported evidence in support of the alleged Single Rate Presumption preclude a finding that the alleged norm has general and prospective application. Section IV.B and IV.C respectively address how the purported evidence is deficient in establishing the precise content and the general and prospective application of the alleged Use of Adverse Facts Available Norm.

7. In sections V and VI, we address that China has failed to establish that the United States has breached Articles 6.10, 9.2, and 9.4 on account of alleged Single Rate Presumption norm. As the United States will demonstrate, these provisions permit investigating authorities like USDOC to ensure antidumping measures remain effective by being able to address the reality of state control over the export activities of firms in Members such as China by imposing where appropriate a single duty on nominally distinct firms. Notably, the United States will explain how China's challenge in this dispute is broader than any brought previously because China takes issue with not simply whether an investigating authority may presume that export activities of companies in China are subject to state control, but the very mechanisms by which they may ascertain as much – and which the Appellate Body has said are permissible to use.

8. In sections VIII, IX, and X, the United States addresses China's various claims that USDOC acted inconsistent with Articles 6.1, 6.8 and Annex II of the AD Agreement in its use of facts available. In these sections, the United States seeks to confirm an obvious point explicitly stated in the AD Agreement: a non-cooperative party could receive a less favorable result than if that party had cooperated.

9. In particular, the United States will demonstrate in section VIII that to the extent facts available determinations were made in the challenged proceedings, there was no obligation under the AD Agreement for USDOC, once it has found one component of the China government entity to be uncooperative, to send questionnaires to other constituent components, and thereby allow for manipulation of antidumping duties. In section IX, the United States will address China's non-sequitur that USDOC actively seeks adverse information to use against Chinese companies. To the contrary, USDOC is not in a position to know whether information is adverse to the interests of a party or not precisely because the interested party has failed to provide the requested information. In such circumstances, as recognized by the Appellate Body, investigating authorities are allowed to make inferences to select from the available information that take into account the fact of a party's non-cooperation. In section X, the United States demonstrates that USDOC's corroboration process, contrary to China's assertions, ensures that USDOC's selection of facts is a comparative, evaluative assessment consistent with Article 6.8 and Annex II.

10. In section XI, the United States concludes this submission. In short, the United States will continue to demonstrate in this submission that the obligations in the AD Agreement correctly permit investigating authorities to take effective measures against dumping. China's

attempt to overturn this critical right of Members must fail because China's arguments for its legal interpretations are without merit and, as with its purported evidence of USDOC's actions, are too little and, often as well, too late.

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

A. Introduction

11. The U.S. first written submission explains in detail the reasons why the Panel should conclude that the measures challenged by China are not inconsistent with Article 2.4.2 of the AD Agreement or any other provision of the covered agreements.[1] As we have demonstrated, and as we elaborate further in this section, the interpretations that the United States proposes are those that result from the proper application of the customary rules of interpretation of public international law. China's proposed interpretations, on the other hand, are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely.

12. The United States observes that, while China attacks the *Nails* test applied by 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. In contrast, USDOC, through its application of the *Nails* test in the challenged antidumping investigations, has undertaken a rigorous, holistic examination to determine whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods, and it has done so in a manner that gives effect to both the "pattern clause" and the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.

13. As we did in the U.S. first written submission, we address below China's claims related to the "pattern clause" and the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement, as well as China's claims related to how the exceptional, average-to-transaction comparison methodology may be applied, including the extent of its application and the use of zeroing. We also address China's claims related to the use of zeroing in the third administrative review of the antidumping order on PET film. We focus the discussion in this submission on arguments China has made since it filed its first written submission.

14. For the reasons given below, the United States continues to urge the Panel to engage in a thorough interpretative analysis in accordance with the customary rules of interpretation of public international law. We remain confident that doing so will lead the Panel to conclude that

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[1] *See* First Written Submission of the United States of America (Confidential) (Corrected Version May 13, 2015) ("U.S. First Written Submission"), paras. 24-325.

China's claims are without merit, and the measures challenged by China are not inconsistent with Article 2.4.2 of the AD Agreement or any other provision of the covered agreements.

B. China's "As Applied" Claims Related to the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Are without Merit

1. China's Arguments Related to the Interpretation and Application of the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Are without Merit

15. The U.S. first written submission demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" in the second sentence of Article 2.4.2 of the AD Agreement – the "pattern clause" – means a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods.[2] The U.S. first written submission further explains that China's arguments regarding the meaning and application of the "pattern clause" lack merit.[3] Finally, the U.S. first written submission shows that USDOC's determinations in the challenged antidumping investigations (*i.e.*, that there existed a pattern of export prices that differed significantly among different purchasers, regions, or time periods) are not inconsistent with the second sentence of Article 2.4.2.[4]

16. In its statements at the first panel meeting and in its responses to the Panel's questions, China has done nothing to improve its deficient arguments against USDOC's determinations in the challenged antidumping investigations. Instead, China largely repeats arguments it made in its first written submission. Those arguments continue to lack merit. In the following subsections, we address statements and arguments China made during the first panel meeting and in response to the Panel's questions regarding China's arguments about statistical methodology, USDOC's use of weighted averages in the *Nails* test, qualitative aspects, and certain SAS programming errors in the coated paper and OCTG antidumping investigations.

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

17. The U.S. first written submission demonstrates that nothing in the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to utilize the kind of complex statistical methodology for which China argues.[5] In response, China insists that it is "not arguing that the *Anti-Dumping Agreement* compels the adoption of any

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2 *See* U.S. First Written Submission, paras. 36-50.

3 *See* U.S. First Written Submission, paras. 51-83.

4 *See* U.S. First Written Submission, paras. 84-155.

5 *See* U.S. First Written Submission, paras. 62-66, 114-140.

particular statistical method or particular standard deviation threshold or multiple thereof."[6] However, at every turn, the arguments China advances belie that assertion.

18. For example, in response to question 6(c), China argues that the *Nails* test "can only function as a potentially meaningful analytical tool if one assumes that export prices form part of distributions that are single-peaked and symmetric around the mean."[7] China makes the same or similar arguments in response to questions 6(a),[8] 7,[9] and 8.[10] China's arguments, though, 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,[11] 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."[12] 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.[13]

19. China contends that, "to the extent that an investigating authority decides to have recourse to specific statistical tools, it must ensure that the manner in which those tools are employed guarantees a proper determination of the facts and allows an unbiased and objective evaluation of those facts."[14] This observation appears to be self-evident, and, of course, the United States agrees with it, despite China's rhetorically charged suggestion to the contrary.[15] It

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6 China's Responses to the Questions from the Panel following the First Substantive Meeting with the Parties and Third Parties (August 4, 2015) ("China's Responses to the Panel's First Set of Questions"), para. 54; *see also* China's Opening Statement at the First Substantive Meeting of the Panel with the Parties (July 14, 2015) ("China's Opening Statement at the First Panel Meeting"), para. 11 ("China recognizes that an investigating authority is not obliged under the *Anti-Dumping Agreement* to have recourse to any specific statistical tools."); China's Closing Statement at the First Substantive Meeting of the Panel with the Parties (July 16, 2015) ("China's Closing Statement at the First Panel Meeting"), para. 8.

7 China's Responses to the First Set of Panel Questions, para. 49.

8 *See* China's Responses to the First Set of Panel Questions, paras. 34-40.

9 *See* China's Responses to the First Set of Panel Questions, paras. 50-52.

10 *See* China's Responses to the First Set of Panel Questions, paras. 53-57.

11 *See* U.S. First Written Submission, paras. 123 and 125, and note 136.

12 China's Opening Statement at the First Panel Meeting, para. 13.

13 *See* U.S. First Written Submission, paras. 84-155.

14 China's Opening Statement at the First Panel Meeting, para. 12. *See also* China's Responses to the Panel's First Set of Questions, para. 55.

15 *See* China's Opening Statement at the First Panel Meeting, para. 12.

does not follow, however, that USDOC's decision to use the mathematical formula for the standard deviation in connection with its application of the *Nails* test means that USDOC was then obligated to undertake the kind of statistical probability analysis that China discusses.

20. Again, though, that is what China is actually arguing when, for example, China asserts that, "in order to ensure that the available data are subjected to *a proper analysis* and *a proper conclusion* is rendered, the investigating authority must employ tools that are appropriate for the inquiry at hand, and, if it decides to use statistical tools, it must employ them in *a proper manner*, as generally recognized in the field of statistics."[16] China argues that an investigating authority cannot "simply take a tool out of context."[17] For China, it appears that the only "context" in which a standard deviation may be used, and the only "proper analysis" that may be applied under the "pattern clause" is a statistical probability analysis. China suggests no alternative.

21. As the United States has explained, however, there are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake the particular statistical analysis discussed by China, even if the investigating authority chooses to utilize certain concepts from statistics.

22. In support of its position, China refers to the Appellate Body report in *US – Upland Cotton (Article 21.5 – Brazil)*.[18] China suggests that "the improper use of statistical tools by an investigating authority amounts to an 'incoherent treatment' of the data that 'vitiates the conclusion' that can be drawn based on those data."[19] China has selectively quoted from that Appellate Body report. In reality, *US – Upland Cotton (Article 21.5 – Brazil)* is inapposite. In that dispute, the panel was presented with a "class of quantitative evidence" that included three estimates, and the panel, without explanation, disregarded one of the three estimates and relied on the other two.[20] It was this "*internally* incoherent treatment of the same class of quantitative evidence" that the Appellate Body found "vitiate[d] the conclusion" that the panel drew.[21] 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.

23. China's explanation for its invocation of the *US – Upland Cotton (Article 21.5 – Brazil)* Appellate Body report is revealing, though. Once again, China complains about "the improper

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16 China's Opening Statement at the First Panel Meeting, para. 13 (emphasis added).

17 China's Opening Statement at the First Panel Meeting, para. 13.

18 *See* China's Opening Statement at the First Panel Meeting, para. 14.

19 China's Opening Statement at the First Panel Meeting, para. 14.

20 *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 294.

21 *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 294 (emphasis added).

use of statistical tools."[22] Of course, once again, for China, the standard against which the "use of statistical tools" is to be measured is not the terms of the second sentence of Article 2.4.2 of the AD Agreement, but China's own articulation of the statistical probability analysis as it is, in China's view, "generally recognized in the field of statistics."[23] Even as to that measure, though, China appears to have shifted. When questioned by the Panel, China retreats from asserting that its own view about the proper application of statistical probability analysis is "unanimously recognized,"[24] and now suggests only that it is "commonly regarded as sound practice."[25] Whatever the state of statistical science may be, the excerpts from a handful of introductory textbooks that China has provided the Panel to support its contention are inapposite, as they discuss a kind of statistical probability analysis that USDOC did not undertake when it applied the *Nails* test.[26]

24. China's fixation on statistical probability analysis appears to stem from its basic misunderstanding both of what USDOC did in the challenged investigations and of the meaning of "pattern clause" of the second sentence of Article 2.4.2. With respect to what USDOC did in the challenged investigations, China asserts that, "[i]ndependent of what the United States now tells the Panel it intended to do or not to do with the Nails Test, objective scrutiny of the Nails Test allows only one conclusion: 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."[27] China's assertion is wrong, and it is plainly contradicted by what USDOC said *at the time* it made its determinations. USDOC explained that it "is not using the standard deviation measure to make statistical inferences."[28] That is, USDOC explained in its determinations that it was not utilizing statistical probability analysis.

25. With respect to the meaning of the "pattern clause," China argues that, "no matter which analytical tools an investigating authority wishes to apply in order to identify a relevant pricing pattern, *the purpose of its assessment must be to analyze the data to identify unusually low export prices.*"[29] In other words, China's interpretation of the "pattern clause" limits it to identifying

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[22] China's Opening Statement at the First Panel Meeting, para. 14.

[23] China's Opening Statement at the First Panel Meeting, para. 13.

[24] China's Opening Statement at the First Panel Meeting, para. 17.

[25] China's Responses to the Panel's First Set of Questions, para. 52.

[26] *See* China's Responses to the Panel's First Set of Questions, para. 52 and Exhibit CHN-498.

[27] China's Opening Statement at the First Panel Meeting, para. 15.

[28] 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 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").

[29] China's Responses to the Panel's First Set of Questions, para. 56 (emphasis added). *See also*, *id.*, para. 95 (referring to "unusually low" export prices).

random and aberrational outliers,[30] or "unusually low" export prices. This interpretation, however, is incorrect. It finds no support in the text of the "pattern clause" of the second sentence of Article 2.4.2,[31] and it reflects a fundamental misunderstanding of the purpose of the assessment under the "pattern clause."

26. The terms of the second sentence of Article 2.4.2 do not refer to "unusually low export prices." Rather, the second sentence of Article 2.4.2 refers to "a pattern of export prices which differ significantly." As we have shown, a proper interpretation of the terms of the "pattern clause" pursuant to the customary rules of interpretation reveals that an investigating authority is required to seek and find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods.[32] Such an analysis does not entail a search for outliers. China's position is inconsistent with the terms of the "pattern clause."

27. Further, China's position is contrary to the logic of the second sentence of Article 2.4.2. As the Appellate Body has explained, the second sentence of Article 2.4.2 provides a means to "unmask targeted dumping."[33] Contrary to China's argument, dumping may be "targeted" even in a situation where lower-priced sales are not "unusual" or "outliers." Indeed, it may be the case that a particular exporter regularly engages in targeting regions, purchasers, or time periods. In such circumstances, lower prices may not be unusual and may not appear to be outliers at all.

28. A simple hypothetical is illustrative. In this hypothetical, an exporter sells one hundred units of a product (only one model) during the period of investigation. Forty-nine units are sold to Purchaser A, each at a price of $25. Twenty-five units are sold to Purchaser B, each at a price of $75. The remaining twenty-six units are sold to Purchaser C, each at a price of $80. In such a scenario, it can hardly be said that the export prices to Purchaser A are "unusually low." They make up nearly half of the total sales volume during the period of investigation, so there is nothing unusual about them at all. Nevertheless, and without the need to resort to any complex statistical analysis, it is evident that there is a pattern of export prices which differ significantly among the different purchasers. China's conception of "the purpose"[34] of the analysis under the "pattern clause," which leads China to insist on the use of a particular kind of statistical probability analysis, simply is not supported by the text or the logic of the second sentence of Article 2.4.2.

29. Finally, in response to question 5, China suggests that if a pattern "is determined in a manner that is not unbiased and objective and that thus runs afoul of Article 17.6(i)" of the AD Agreement, then "the subsequent comparison of normal value and export price for the prices

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30 *See* China's First Written Submission, paras. 243-244.

31 *See* U.S. First Written Submission, para. 133.

32 *See* U.S. First Written Submission, paras. 36-50.

33 *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

34 China's Responses to the Panel's First Set of Questions, para. 56 (emphasis added). *See also*, *id.*, para. 95 (referring to "unusually low" export prices).

forming part of the pattern cannot possibly be considered to be 'fair' as required by Article 2.4" of the AD Agreement.[35] China's logic is difficult to follow and China offers no explanation for why this "cannot possibly" be the case. Nevertheless, we offer a few observations in response. First, China has not brought any claims under Articles 2.4 or 17.6(i) of the AD Agreement,[36] so any such claims would not be within the Panel's terms of reference. Thus, it is unclear what China's intention is in invoking these provisions.

30. Second, in any event, Article 17.6(i) of the AD Agreement, by its terms, does not impose any obligation on Members. Rather, it establishes a standard of review to be applied by panels when reviewing an investigating authority's determination. For that reason, the panel in *US – Shrimp II (Viet Nam)* rejected an attempt by Vietnam to make a claim of violation under Article 17.6.[37]

31. Third, as with all of its arguments concerning the *Nails* test, when China alludes to Article 17.6(i) of the AD Agreement and suggests that the *Nails* test did not "operate in an objective and unbiased manner,"[38] China means that the *Nails* test did not meet the requirements of statistical probability analysis, as China has articulated them. As explained above, each criticism leveled by China ultimately comes down to a comparison of the *Nails* test to China's proposed statistical probability analysis, but none of China's criticisms establishes that USDOC'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.

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

32. The U.S. first written submission demonstrates that the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement does not require an investigating authority to analyze export sales on an individual basis, as China argues.[39] Additionally, we have shown that USDOC did not act inconsistently with the second sentence of Article 2.4.2 by using weighted averages in its application of the *Nails* test in the challenged antidumping investigations.[40] China continues to make the same arguments it made in its first written submission, and those arguments continue to lack merit.

33. 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 "USDOC's use of weighted-average

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35 China's Responses to the Panel's First Set of Questions, para. 33.

36 *See* China's Panel Request.

37 *See US – Shrimp II (Viet Nam) (Panel)*, para. 7.302.

38 China's Responses to the Panel's First Set of Questions, para. 55.

39 *See* U.S. First Written Submission, paras. 57-61.

40 *See* U.S. First Written Submission, paras. 146-155.

prices for purposes of applying the Nails Test in the three challenged determinations is inconsistent with Article 2.4.2, second sentence."[41] The U.S. first written submission explains that the second sentence of Article 2.4.2 does not establish any such legal requirement.[42] China suggests that its position is supported by the Appellate Body report in *US – Zeroing (Japan)*.[43] China is incorrect.

34. As explained in the U.S. first written submission[44] and in response to question 20(a),[45] 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, to which China refers, 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 "emphasize[d] … that our analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."[46] Thus, in reading the text of Article 2.4.2, the Appellate Body expressly was not making findings of legal interpretation that resulted from an analysis undertaken pursuant to the customary rules of interpretation of public international law.[47]

35. 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 within the meaning of the second sentence of Article 2.4.2. That question was not before the Appellate Body in that appeal. While China

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41 China's Opening Statement at the First Panel Meeting, para. 22.

42 U.S. First Written Submission, para. 58.

43 China's Opening Statement at the First Panel Meeting, para. 21; China's Responses to the Panel's First Set of Questions, paras. 84-85.

44 *See* U.S. First Written Submission, paras. 286-289.

45 *See* U.S. Responses to the Panel's First Set of Questions, para. 38.

46 *US – Zeroing (Japan) (AB)*, para. 136.

47 There is another reason for the Panel to exercise caution when considering whether to draw guidance from any of the statements in paragraph 135 of the Appellate Body report in *US – Zeroing (Japan)*. That paragraph contains an error. The Appellate Body report misquotes the second sentence of Article 2.4.2 when it states that "[t]he emphasis in the second sentence of Article 2.4.2 is on a 'pattern', namely a 'pattern of export prices which *differs* significantly among different purchasers, regions or time periods[]'" (emphasis added). Where the Appellate Body report uses the term "differs," the second sentence of Article 2.4.2 uses the term "differ." The presence of the term "differs" would suggest that the "pattern" is what "differs" from something that is not the "pattern." However, the terms of the second sentence of Article 2.4.2 provide that it is "export prices" that "differ" significantly from other export prices among different purchasers, regions, or time periods. A "pattern" within the meaning of the second sentence of Article 2.4.2 would thus consist of such export prices that differ significantly from each other. The brevity of the Appellate Body's discussion that follows the misquotation makes it difficult to determine whether the Appellate Body's reasoning follows *from* the misquotation and is thus itself also erroneous. It is not necessary for the Panel to resolve that matter, however, since, as we have explained, the discussion in paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report simply is not germane to the interpretive questions before the Panel.

quotes from the Appellate Body report,[48] it offers no explanation for its assertion that the statements it quotes "strongly support China's interpretation."[49] It simply does not follow that the Appellate Body's reading of "the phrase 'individual export transactions' … as referring to the transactions that fall within the relevant pricing pattern"[50] means that the Appellate Body found – or would agree – that an "investigating authority must assess such a pattern by observing the prices of individual export sales transactions"[51] without using weighted averages.

36. 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."[52] However, as we have explained, there is no such "parallelism" in the actual text of the second sentence of Article 2.4.2, so China's proposed reading lacks textual and contextual support.[53]

37. China complains that "[i]t would be incongruous to interpret this text to permit an investigating authority to overlook the individual prices."[54] We have explained that USDOC did not "overlook" any individual prices. All of the individual export prices for U.S. sales reported by each exporter during the period of investigation were incorporated into the calculation of the weighted averages for different purchasers, regions, and time periods.[55]

38. China argues that, "if there were a small number of purchasers (or regions or time periods), the analysis of whether a pattern of different prices exists would be reduced from hundreds or even thousands of observations to a mere handful, making it impossible to draw valid conclusions about relationships in the data."[56] China is incorrect. The relevant pattern to be examined is the pattern of export prices "among" the small number of purchasers. 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.

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48 *See* China's Responses to the Panel's First Set of Questions, paras. 84-85.

49 *See* China's Opening Statement at the First Panel Meeting, para. 21.

50 *US – Zeroing (Japan) (AB)*, para. 135.

51 China's Responses to the Panel's First Set of Questions, para. 85.

52 China's Responses to the Panel's First Set of Questions, para. 86 (emphasis in original).

53 U.S. First Written Submission, para. 58.

54 China's Responses to the Panel's First Set of Questions, para. 86.

55 *See* U.S. First Written Submission, para. 59; *see also* U.S. Reponses to the Panel's First Set of Questions, para. 23.

56 China's Responses to the Panel's First Set of Questions, para. 88.

39. When China argues that the use of weighted averages would make it "impossible to draw valid conclusions about relationships in the data,"[57] China once again reveals that it is seeking to impose statistical probability analysis as the standard against which an investigating authority's examination must be measured. This is confirmed by China's response to question 14, in which the Panel asked about a hypothetical in the U.S. first written submission. China argues that the U.S. example is "flawed" because "[i]f the prices are modified in a way that leads to different average prices per purchaser, the example no longer supports the US proposition that disregarding price variations within the sales to individual purchasers did not affect the calculation of the one-standard deviation-threshold."[58] That, however, was not the U.S. proposition at all. The point of the U.S. hypothetical was to illustrate how using purchaser-specific weighted averages allows the investigating authority to disregard price variation *within* the sales to each purchaser and focus on meaningful price variation *among* (*i.e.*, across) the purchasers, which is what the "pattern clause," by its terms, calls upon an investigating authority to do. China has failed to provide any meaningful response to the U.S. hypothetical or to the valid point that it illustrates.

40. China misses the point of the U.S. hypothetical perhaps because it is so focused on asserting the relevance of its own version of statistical probability analysis. China even argues that the U.S. example "lacks the illustrative power"[59] of the example provided in Exhibit CHN-1. China's example, though, concerns statistical probability analysis, which is not relevant because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

41. China's reliance on its flawed argument that the "pattern clause" requires the use of statistical probability analysis and China's basic misunderstanding of what the "pattern clause" actually requires are made plain later in China's response to question 14. There, China explains that:

> In general terms, the reason underlying the bias that USDOC introduced into the Nails Test by calculating the one-standard-deviation threshold based on weighted-average prices instead of individual export prices can be explained as follows: if prices vary a great deal across transactions *within* every customer but only to a minor extent (or not at all, as in the US example) *across* customers, then computing the standard deviation from average prices across customers necessarily leads to a small value of the standard deviation. Accordingly, a tiny deviation from the average price across all customers might be sufficient for an average price to be classified as unusually low.[60]

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57 China's Responses to the Panel's First Set of Questions, para. 88.

58 China's Responses to the Panel's First Set of Questions, para. 90.

59 China's Responses to the Panel's First Set of Questions, para. 91.

60 China's Responses to the Panel's First Set of Questions, para. 95 (italics in original; underlining added).

Here, once again, China asserts that the purpose of the analysis under the "pattern clause" is to identify export prices that are "unusually low." As explained above, however, China's understanding of the "pattern clause" is fundamentally incorrect. That basic misunderstanding appears to lead China 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 USDOC's determinations in the challenged antidumping investigations.

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

42. In addition to repeating its arguments about statistical methodology and the use of weighted-average export prices, China reiterates its argument that "[v]ariations in prices that can be explained by reference to normal factors in the relevant market are not 'prices which differ significantly', in *qualitative* terms, for purposes of Article 2.4.2."[61] China's proposed interpretation is unsupportable. China claims that USDOC's examination of a "pattern" in the challenged antidumping investigations is inconsistent with the "pattern clause" of Article 2.4.2 of the AD Agreement because USDOC did not examine what China terms "qualitative factors." China's claims continue to lack merit.

43. China explains that it is not arguing that the investigating authority must "study[] an exporter's subjective 'intent' to engage in targeted dumping."[62] The United States welcomes China's agreement that, as we have demonstrated, the "pattern clause" of the second sentence of Article 2.4.2 establishes no such requirement.[63] However, China simply attempts to reframe its original argument to establish that the investigating authority must consider *why* export prices differ significantly among different purchasers, regions, or time periods as part of a subjective inquiry into unspecified "qualitative factors."[64] 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.[65]

44. 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. We further note that certain third parties

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61 China's Opening Statement at the First Panel Meeting, para. 26 (emphasis in original).

62 China's Opening Statement at the First Panel Meeting, para. 29.

63 *See* U.S. First Written Submission, paras. 78-79.

64 China's Opening Statement at the First Panel Meeting, para. 30.

65 *See, e.g.*, China's Responses to the First Set of Panel Questions, paras. 62, 66, 74.

agree that the second sentence of Article 2.4.2 does not require an investigating authority to discern why such patterns arise.[66]

45. As demonstrated in the U.S. first written submission, China's proposed interpretation of the "pattern clause" would read the quantitative dimension out of the term "significantly," necessitating an exclusive focus on China's understanding of the qualitative dimension.[67] The Panel asked China about the U.S. argument and, not surprisingly, China denies that its proposed interpretation would have such an effect.[68] More telling than China's denial, though, are China's arguments in support of its position. For example, China contends that "the question whether numerically large or small price differences are or are not 'significant' in a particular market depends fundamentally on qualities or characteristics of the relevant market in which those numerical measurements are made."[69] China further argues that "quantitative differences that are clearly unconnected with targeted dumping cannot be 'significant{}' in the sense of Article 2.4.2"[70] In other words, in China's view, any numerical difference in export prices can be explained away. Export prices can be found to "differ significantly" only if they are found to differ "significantly" in some unspecified qualitative sense. 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,[71] it is inconsistent with prior Appellate Body findings regarding the meaning of the term "significant."[72]

46. China asserts that "under the US approach, a qualitative assessment can only work to the detriment of a respondent" because it is "uni-directional, in the sense that it may consider either dimension of significance for purposes of affirming that differences are significant; however, it will not consider one of the dimensions of significance if that dimension undermines a finding of

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66 *See, e.g.*, Brazil Third Party Written Submission, para. 8 ("Brazil agrees that there is nothing in the text of the Anti-Dumping Agreement suggesting that the investigating authority is compelled to assess why certain export prices were significantly lower for certain regions, purchasers or time period, or to assess why export prices differ from each other in an investigation or to examine the intention behind price behavior."); EU Third Party Submission, para. 33 ("The reasons for which the dumping might be occurring, and specifically the reasons for the existence of the pattern and the use of the W-T methodology, might be relevant to the explanation to be provided pursuant to the final sentence of Article 2.4.2 of the Anti-Dumping Agreement, but such reasons are not relevant to the question of whether or not a pattern of relatively low priced exports by purchaser, region or time period, has been demonstrated to exist.").

67 *See* U.S. First Written Submission, para. 69.

68 *See* China's Responses to the Panel's First Set of Questions, paras. 70-77.

69 China's Responses to the Panel's First Set of Questions, para. 73.

70 China's Responses to the Panel's First Set of Questions, para. 77.

71 *See* U.S. First Written Submission, paras. 70-73.

72 *See US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (Observing, in the context of Article 6.3(c) of the *Agreement on Subsidies and Countervailing Measures* that "an assessment of whether a lost sale is significant can have both quantitative and qualitative dimensions.").

significance based on the other dimension."[73] China's assertion is baseless. As we explain in the U.S. first written submission, the Appellate Body's discussion of the term "significant" in *US – Large Civil Aircraft (Second Complaint)* supports the proposition that a difference in export prices that is numerically small may nevertheless be qualitatively important. In the context of price differences, it could likewise be the case that a difference in export prices that is numerically large is not "significant," based on a particularized examination of the facts and circumstances of the case. However, 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, though, address *how*, qualitatively, the differences, which were numerically large, were not important or notable.[74]

47. If an interested party presents facts and arguments, or if an investigating authority otherwise becomes aware of evidence during the course of its investigation, that supports the conclusion that differences in export prices that are numerically large nevertheless are qualitatively not important or notable, such that the export prices should be viewed as not differing "significantly," then the investigating authority would be required to take that evidence into account as part of its examination. To the extent that qualitative aspects are relevant in a particular case, USDOC would examine them to discern *how* the export prices differ from each other. This is consistent with the U.S. Statement of Administrative Action, to which China refers,[75] which provides that, "in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[76]

48. China asserts that, in the challenged antidumping investigations, USDOC "mechanically applied the Nails Test and did not provide any explanation as to why prices passing its various thresholds could not arise from market dynamics undistorted by 'targeted dumping'."[77] As we have explained, USDOC properly examined all evidence and arguments on the record in the dispute, and was under no obligation to engage in an additional, open-ended investigation of unspecified "qualitative" factors, such as those involving possible explanations for *why* the export prices may have differed. Additionally, China appears to acknowledge that there was no

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[73] China's Responses to the Panel's First Set of Questions, paras. 71-72 (emphasis removed).

[74] For example, in response to the Panel's questions, China repeats arguments it made in its first written submission about seasonality. *See* China's Responses to the Panel's First Set of Questions, paras. 66-69, 74-77. We explain in the U.S. first written submission that none of the challenged investigations involved "seasonality" and, in any event, the questions China raises about seasonality go to *why* differences may exist between export prices. Answering them would not provide information about *how* the export prices are different, and whether the observed differences are "significant." Thus, such questions are not germane to an application of the "pattern clause." *See* U.S. First Written Submission, paras. 74-75.

[75] China's Responses to the Panel's First Set of Questions, para. 75.

[76] Statement of Administrative Action for the Uruguay Round Agreements Act, located in Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. DOC. 103-316(I), 103d Cong. 2d Sess. (September 27, 1994), p. 843 (Exhibit CHN-96).

[77] China's Responses to the Panel's First Set of Questions, para. 60.

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.[78] 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."[79]

49. Referring to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, China notes that the Appellate Body has found that "investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner,"[80] and China suggests that USDOC was obligated to do more to supplement the administrative records in the challenged investigations. However, China does not and cannot explain just what information would be "relevant" to evaluate China's proposed "qualitative" test that would govern the application of the second sentence of article 2.4.2. Indeed, under China's interpretative approach, both everything – and nothing – might or might not be relevant to its proposed qualitative analysis.

50. The United States further notes that the Appellate Body has found that "the *Anti-Dumping Agreement* assigns a prominent role to interested parties … and contemplates that they will be a primary source of information in all proceedings conducted under that agreement."[81] Indeed, Article 17.5(ii) of the AD Agreement contemplates review by WTO panels based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing member." In the challenged investigations, interested parties had the opportunity to present information that they might have considered relevant. With the exception of BTIC in the steel cylinders investigation, they presented no information whatsoever related to so-called "qualitative factors."

51. Accordingly, for the reasons we have given, the Panel should find that USDOC's decision in the challenged antidumping investigations not to examine why export prices differed significantly was not inconsistent with the "pattern clause" of Article 2.4.2 of the AD Agreement.

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78 *See* China's Responses to the Panel's First Set of Questions, paras. 60-69.

79 Steel Cylinders OI Final I&D Memo, at 32 (Exhibit CHN-66); *see also* U.S. First Written Submission, para. 144.

80 China's Responses to the Panel's First Set of Questions, para. 64 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 344).

81 *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 199; *see also US – Wheat Gluten (AB)*, paras. 53-54.

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

52. The U.S. first written submission and the U.S. responses to the Panel's first set of questions demonstrate that China has failed to establish that certain ministerial errors in USDOC's SAS programming code in the coated paper and OCTG antidumping investigations support a finding by the Panel that USDOC's determinations in those investigations are inconsistent with the AD Agreement.[82] In its responses to the Panel's questions, 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.[83]

53. As explained in the U.S. first written submission and in the U.S. response to question 4(c), while China asserts that the SAS programming errors constitute a breach of the AD Agreement, it does not present arguments that could establish any such breach.[84] In its responses to the Panel's questions, 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.[85] As it does with respect to its statistical arguments, China refers to the Appellate Body report in *US – Upland Cotton (Article 21.5 – Brazil)*, suggesting that the SAS programming errors constitute "incoherent treatment" of the data that "vitiates the conclusion" that can be drawn based on those data.[86] As we explain above, though, there are no parallels between the facts in that dispute 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.[87] In particular, we observe that the Appellate Body found that the WTO panel in *US – Upland Cotton (Article 21.5 – Brazil)* failed to make an "objective assessment of the matter before it, including an objective assessment of the facts of the case," under Article 11 of the DSU.[88] The Appellate Body was not applying the reasoned and adequate explanation standard that it has developed for review of antidumping and countervailing duty determinations by Members' investigating authorities.

54. 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

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82 *See* U.S. First Written Submission, paras. 139-140; U.S. Responses to the Panel's First Set of Questions, paras. 4-8.

83 China's Responses to the Panel's First Set of Questions, para. 21.

84 *See* U.S. First Written Submission, paras. 139-140; U.S. Responses to the Panel's First Set of Questions, paras. 4-8.

85 *See* China's Responses to the Panel's First Set of Questions, paras. 21-30.

86 *See* China's Responses to the Panel's First Set of Questions, paras. 27-28.

87 *See supra*, para. 22.

88 *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 295.

CONNUM in *OCTG* OI and *Coated Paper* OI."[89] 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.[90] China notes that it is "mindful of the 'as applied' nature of the legal challenge at issue" here, but nevertheless observes that "under a different factual pattern, i.e., a different set of price observations, the scope of the group of targeted sales, might have been reduced to the empty set upon correction of the two types of SAS programming errors."[91] Of course, it is uncontroversial that different facts might lead to different outcomes. However, the facts that are relevant for the Panel's analysis of China's "as applied" claims are those in the coated paper and the OCTG antidumping investigations. Under those facts, the results of the investigations, as China has agreed, would not have been any different had the SAS programming errors been corrected.

55. China suggests that "correction of the two types of SAS programming errors, combined with a WTO-consistent understanding of the group of sales to which the exceptional W-T comparison methodology may be applied, should have led USDOC in both *OCTG* OI and *Coated Paper* OI to apply the exceptional W-T comparison methodology to a narrower group of sales than those to which it did."[92] As we have explained,[93] and as we discuss further below,[94] China's understanding of "the group of sales to which the exceptional W-T comparison methodology may be applied" is incorrect. The second sentence of Article 2.4.2 cannot be read as requiring the application of the alternative, average-to-transaction comparison methodology on a model-specific basis. Accordingly, once again, the results of the challenged investigations would not have been any different had the SAS programming errors been corrected.

56. For these reasons, China's challenge of certain SAS programming errors in the coated paper and OCTG antidumping investigations lacks merit.

2. China's Arguments Related to the Interpretation of the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Are without Merit

57. The U.S. first written submission demonstrates that a proper application of the customary rules of interpretation of public international law leads to the conclusion that the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement[95] requires a reasoned and

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89 China's Responses to the Panel's First Set of Questions, para. 24 (emphasis in original).

90 *See* DSU, Article 3.7, second sentence ("The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.").

91 China's Responses to the Panel's First Set of Questions, para. 30.

92 China's Responses to the Panel's First Set of Questions, para. 29.

93 *See* U.S. First Written Submission, para. 208.

94 *See infra*, paras. 73-80.

95 The "explanation clause" sets forth the second condition for utilizing the alternative comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement. The "explanation clause"

adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2.[96]

58. The U.S. first written submission further demonstrates that the explanations that USDOC provided in the challenged antidumping investigations as to why significant differences in export prices cannot be taken into account appropriately by the use of the average-to-average or transaction-to-transaction comparison methodologies are not inconsistent with the "explanation clause" of the second sentence of Article 2.4.2.[97]

59. In its statements at the first panel meeting and in its responses to the Panel's questions, China offers the Panel no compelling reason to find that USDOC's explanations in the challenged antidumping investigations are inconsistent with the "explanation clause" of the second sentence of Article 2.4.2. Below, we address certain arguments China has made subsequent to its first written submission.

a. 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

60. China asserts that USDOC's explanations in the challenged investigations are "excessively short and provide no analysis whatsoever."[98] China's assertion is baseless. We recall that the Appellate Body has found that the second sentence of Article 2.4.2 of the AD Agreement permits Members to use the alternative, average-to-transaction comparison methodology to "unmask targeted dumping."[99] It is logical, then, for an investigating authority, in its effort to comply with the terms of the "explanation clause," 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.

61. 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. Otherwise, it is unclear how an investigating authority could determine which

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provides that an investigating authority may resort to the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

96 *See* U.S. First Written Submission, paras. 156-167.

97 *See* U.S. First Written Submission, paras. 183-198.

98 China's Opening Statement at the First Panel Meeting, para. 31; *see also id.*, para. 32.

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

methodology "takes into account" the "pattern" more "appropriately." It also is unclear what more, beyond such a comparative exercise, would be needed to satisfy the requirements of the "explanation clause."

62. Such a comparative exercise is precisely what USDOC undertook in the challenged antidumping investigations. USDOC, based on information provided by the respondents, determined what the margins of dumping would have been, both using the normal average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology. USDOC compared the results and evaluated the difference in the margins of dumping calculated using the different methodologies.[100] This supported USDOC's conclusion that the average-to-average comparison methodology could not take into account appropriately the pattern of export price differences observed for each respondent. As USDOC explained, the average-to-average comparison methodology "conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group."[101] In this way, USDOC explained why, in the particular circumstances of each investigation, the average-to-average comparison methodology could not take into account appropriately the pattern of export prices that differ significantly.

63. 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.[102] 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.[103] Thus, comparing the results of the application of a normal comparison methodology (without zeroing) and the alternative comparison methodology (with zeroing) to determine whether there is a meaningful difference between them is a logical and informative means of ascertaining whether the normal comparison methodology can take into account appropriately the pattern of significantly differing export prices that has been found and that might be indicative of masked dumping.

64. As explained in the U.S. first written submission,[104] USDOC established that, in the coated paper investigation, the dumping determination for APP China using the normal, average-to-average comparison methodology was negative while the average-to-transaction methodology

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

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

102 *See, e.g.*, China's Opening Statement at the First Panel Meeting, para. 36-37.

103 *See* U.S. First Written Submission, paras. 211-325.

104 *See* U.S. First Written Submission, paras. 183-189.

resulted in an affirmative finding of a dumping at a rate of 7.62 percent.[105] Likewise, in the OCTG investigation, TPCO's margin of dumping increased by approximately [[***]] percent when the average-to-transaction comparison methodology was used.[106] Finally, in the steel cylinders investigation, BTIC's weighted average dumping margin was [[***]] percentage points higher using the average-to-transaction comparison methodology, and the result changed from a finding of no dumping using the average-to-average comparison methodology to an affirmative finding of dumping at a rate of 6.62 percent using the alternative, average-to-transaction comparison methodology.[107] USDOC concluded that these differences were evidence that the average-to-average comparison methodology conceals differences in export prices to the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group.[108]

65. Thus, as we have shown, each of USDOC's explanations in each of the challenged investigations was a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the explanations given by USDOC are not inconsistent with the "explanation clause" of the second sentence of Article 2.4.2.

b. 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

66. The U.S. first written submission demonstrates that an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the second sentence of Article 2.4.2 of the AD Agreement.[109] Accordingly, USDOC did not act inconsistently with the "explanation clause" of the second sentence of Article 2.4.2 when it discussed the average-to-average but not the transaction-to-transaction comparison methodology

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105 *See* Coated Paper OI Program Output for APP China (program run on April 10, 2015), pp. 144-145 (pp. 239-240 of the PDF version of Exhibit USA-18) (BCI); Coated Paper OI Final I&D Memo, pp. 23-24 (Exhibit CHN-64).

106 *See* OCTG OI Program Output for TPCO (program run on April 10, 2015), pp. 63-64 (pp. 139-140 of the PDF version of Exhibit USA-20) (BCI); OCTG OI Final I&D Memo, Comment 2 (p. 10 of the PDF) (Exhibit CHN-77).

107 *See* Steel Cylinders OI Program Output for BTIC (program run on April 10, 2015), pp. 55-56 (pp. 124-125 of the PDF version of Exhibit USA-22) (BCI); Steel Cylinders OI Final I&D Memo, p. 24 (Exhibit CHN-66).

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

109 *See* U.S. First Written Submission, paras. 172-182.

in connection with its explanations of why a normal comparison methodology could not take into account appropriately the pattern of significantly differing export prices that USDOC had found in the challenged investigations.

67. In its statements at the first panel meeting and in its responses to the Panel's questions concerning this issue, China has offered little by way of additional argumentation beyond what it included in its first written submission. As noted above, we have already responded to China's arguments in the U.S. first written submission. China has offered some additional discussion of two Appellate Body reports, though, and we will comment on that discussion here.

68. China suggests that the United States "misreads" the Appellate Body report *US – Softwood Lumber (Article 21.5 – Canada).*[110] China is incorrect. China summarizes the "relevant passage" as follows:

> [T]he Appellate Body addressed, and agreed with, a concern expressed by Canada that, if zeroing were allowed under the T-T comparison methodology, while being disallowed under the W-W comparison methodology, having recourse to one methodology provided in the first sentence of Article 2.4.2 could produce results that are "systematically different" from those that would arise from recourse to the other methodology provided in the first sentence.[111]

The United States agrees with China's summary and we have not suggested that the Appellate Body did anything more when it made that finding in *US – Softwood Lumber (Article 21.5 – Canada)*. Separately, of course, the Appellate Body has found that the average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 is an exception to the comparison methodologies that are to be used "normally."[112] China and the United States appear to agree on that as well.[113]

69. 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 just described, as we have argued,[114] 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. Of

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110 China's Responses to the Panel's First Set of Questions, para. 100; *see also* China's Opening Statement at the First Panel Meeting, para. 33.

111 China's Responses to the Panel's First Set of Questions, para. 101 (discussing *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93).

112 *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *US – Zeroing (Japan) (AB)*, para. 131.

113 *See, e.g.*, China's First Written Submission, para. 123.

114 *See* U.S. First Written Submission, paras. 34, 173-174, 228-236.

course, the Appellate Body has not found that before; it is a question of first impression for the Panel in this dispute.

70. China also discusses the Appellate Body report in *US – Zeroing (Japan)*, suggesting that an Appellate Body observation therein about which the Panel asked the parties[115] "confirms China's position" that an investigating authority's explanation must address both the average-to-average and the transaction-to-transaction comparison methodologies.[116] The United States does not agree that the Appellate Body's observation confirms China's position. We have already commented on the passage from the *US – Zeroing (Japan)* Appellate Body report in response to question 17, and we respectfully refer the Panel to that portion of our responses to the Panel's first set of questions.[117]

71. We do note, however, that China, in an attempt to support its argument, refers to "grammatical convention" and provides to the Panel a dictionary definition of the word "either."[118] 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, though, 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.

3. USDOC's Application of the Alternative Average-to-Transaction Comparison Methodology to All Sales in the Challenged Antidumping Investigations Is Not Inconsistent with Article 2.4.2 of the AD Agreement

72. In its statements and responses to the Panel's questions, China repeats the same arguments it made in its first written submission in support of its claim that the United States has breached the second sentence of Article 2.4.2 of the AD Agreement as a result of USDOC's application of the alternative average-to-transaction comparison methodology to all sales in the challenged antidumping investigations. The U.S. first written submission responds to those arguments and demonstrates that USDOC's application of the alternative, average-to-transaction comparison methodology to all sales in the challenged antidumping investigations is not inconsistent with Article 2.4.2.[119]

73. Here, we offer some further comments on one of China's contentions. 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-

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115 *See* Question 17 from the Panel.

116 China's Responses to the Panel's First Set of Questions, para. 103.

117 *See* U.S. Responses to the Panel's First Set of Questions, paras. 29-34.

118 China's Responses to the Panel's First Set of Questions, para. 105.

119 U.S. First Written Submission, paras. 199-210.

specific, way."[120] As discussed below, China appears to misunderstand USDOC's analysis and also misunderstands the Appellate Body report in *EC – Bed Linen*.

74. China suggests that:

> A fundamental element of the Nails Test, as applied in the three challenged determinations, is that it seeks to find "patterns" by reference to models, as well as by time (in *OCTG* and *Steel Cylinders*) or by customer (in *Coated Paper*). In this way, USDOC identified pricing patterns in respect of some models and not others. Having isolated the pattern in this limited way, USDOC was obliged to apply the exceptional W-T comparison methodology solely to the pattern it had identified.[121]

China is mistaken about the operation of the *Nails* test and, accordingly, its argument rests on a false premise.

75. USDOC did not "seek[] to find 'patterns' by reference to models" in the challenged investigations. Rather, in situations where there were multiple models, or CONNUMs, USDOC segregated data for different models and made price comparisons on a model-specific basis to ensure that it made apples-to-apples comparisons. As USDOC explained in the challenged determinations, "[a]ll price comparisons are on the basis of identical merchandise (*i.e.*, by CONNUM)."[122] That does not mean, however, that USDOC identified "patterns" by model, as China suggests. 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.

76. For example, USDOC explained that it "calculate[d] the standard deviation on a product-specific basis (*i.e.*, CONNUM by CONNUM)."[123] However, USDOC then determined whether the standard deviation test had been passed by assessing whether the share of sales that were more than one standard deviation below the mean "exceed[ed] 33 percent of the total volume of *a respondent's sales of subject merchandise*."[124] In other words, the results of the model-specific

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120 China's Responses to the Panel's First Set of Questions, para. 112.

121 China's Opening Statement at the First Panel Meeting, para. 49; *see also* China's Responses to the Panel's First Set of Questions, paras. 112, 119.

122 Coated Paper OI Final Targeted Dumping Memo, at 2 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, p. 5 (Exhibit CHN-80); *see also* Steel Cylinders OI Final I&D Memo, at 22 (Exhibit CHN-66).

123 Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, p. 6 (Exhibit CHN-80); *see also* Steel Cylinders OI Final I&D Memo, at 22 (Exhibit CHN-66).

124 Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3) (emphasis added); OCTG OI Targeted Dumping Memo, p. 6 (Exhibit CHN-80) (emphasis added); Steel Cylinders OI Final I&D Memo, at 23 (Exhibit CHN-66) (emphasis added).

comparisons were aggregated to make a determination about the respondent's sales of "subject merchandise," *i.e.*, the product under investigation.

77. The same is true with respect to USDOC's application of the "gap test." Again, USDOC "examine[d] all sales of identical merchandise (*i.e.*, by CONNUM)" and then assessed whether "the share of the sales that meets [the gap] test exceeds five percent *of the total sales volume of subject merchandise*."[125] As with the standard deviation test, the results of model-specific comparisons made as part of the "gap test" were aggregated to make a determination about the respondent's sales of "subject merchandise."

78. It is also evident from the ultimate conclusions of USDOC's applications of the *Nails* test that it did not identify patterns by model. Rather, in each of the challenged investigations, USDOC described its determinations concerning allegations that a respondent targeted sales by customer, region, or time period, not by model.[126] China seems to misunderstand what USDOC did in the challenged investigations.

79. China also appears to misunderstand the Appellate Body report in *EC – Bed Linen*, which we discussed in the U.S. first written submission.[127] In *EC – Bed Linen*, the Appellate Body observed that "neither Article 2.4.2, second sentence, nor any other provision of the Anti-Dumping Agreement refers to dumping 'targeted' to certain 'models' or 'types' of the same product under investigation," and further observed that "the European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation."[128] While China correctly describes the context in which the Appellate Body made those observations,[129] *i.e.*, in response to arguments advanced by the EC concerning its use of "model zeroing," China utterly fails to grapple with the import of the Appellate Body's findings. 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,"[130] 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.

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125 Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3) (emphasis added); OCTG OI Targeted Dumping Memo, p. 6 (Exhibit CHN-80) (emphasis added); *see also* Steel Cylinders OI Final I&D Memo, at 23 (Exhibit CHN-66).

126 *See* Coated Paper OI Final Targeted Dumping Memo, p. 3 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, pp. 6-8 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, p. 23 (Exhibit CHN-66).

127 *See* U.S. First Written Submission, para. 208.

128 *EC – Bed Linen (AB)*, para. 62.

129 *See* China's Opening Statement at the First Panel Meeting, para. 48; China's Responses to the Panel's First Set of Questions, para. 118.

130 China's Responses to the Panel's First Set of Questions, para. 119.

80. In any event, as explained above, USDOC did not "assess the existence of relevant pricing patterns on a model-specific basis,"[131] nor did USDOC "identif[y] pricing patterns in respect of some models and not others."[132] China is wrong about what USDOC did in the challenged investigations and China is wrong about what the Appellate Body found in *EC – Bed Linen*. There is no support whatsoever for China's contention that USDOC was obligated to limit the application of the alternative, average-to-transaction comparison methodology to certain models.

4. USDOC's Use of Zeroing in Connection with Its Application of the Alternative, Average-to-Transaction Comparison Methodology in the Challenged Antidumping Investigations Is Not Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement

81. The U.S. first written submission demonstrates that an examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion 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. This conclusion follows from a proper application of the customary rules of interpretation of public international law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes.[133]

82. In its opening statement at the first panel meeting and in response to question 24, China addresses the U.S. arguments related to zeroing.[134] The United States takes the opportunity in this submission to reply to China's new arguments. Where appropriate, rather than repeating arguments made in the U.S. first written submission, we respectfully refer the Panel to the relevant portions of the U.S. first written submission that address China's arguments.

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

83. China contends that the U.S. arguments related to zeroing "have been rejected in numerous reports adopted by the DSB."[135] As explained in the U.S. first written submission, the United States has complied with all previous recommendations and rulings adopted by the WTO Dispute Settlement Body related to zeroing, and the United States does not seek in this dispute to

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131 China's Responses to the Panel's First Set of Questions, para. 119.

132 China's Opening Statement at the First Panel Meeting, para. 49; *see also* China's Responses to the Panel's First Set of Questions, paras. 112, 119.

133 *See* U.S. First Written Submission, paras. 211-316.

134 *See* China's Opening Statement at the First Panel Meeting, paras. 50-55; China's Responses to the Panel's First Set of Questions, paras. 120-130.

135 *See, e.g.*, China's Opening Statement at the First Panel Meeting, paras. 51-52.

re-litigate previous interpretations of the AD Agreement.[136] The U.S. first written submission also establishes that, 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.[137] Indeed, the Appellate Body expressly stated in *US – Stainless Steel (Mexico)* that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2."[138] China's suggestion that the Appellate Body previously has answered the questions before the Panel in this dispute simply is without any foundation, and it is contrary to prior Appellate Body reports.[139]

84. China also argues that the Appellate Body has previously "rejected" the mathematical equivalence argument.[140] 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.[141]

85. 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."[142] 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.

86. As we have explained before, even if an investigating authority uses zeroing in connection with the alternative, average-to-transaction comparison methodology, as it should, there will be situations where the average-to-average and average-to-transaction comparison methodologies yield identical results. If individual export prices, despite differing significantly from each other, nevertheless are all above normal value, then both the average-to-average and average-to-transaction comparison methodologies would lead to a finding of no dumping, or a zero margin of dumping. Alternatively, if all of the export prices are below normal value, and

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136 *See* U.S. First Written Submission, para. 27.

137 *See* U.S. First Written Submission, paras. 213-214.

138 *See US – Stainless Steel (Mexico) (AB)*, para. 127; *see also US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.

139 *See US – Stainless Steel (Mexico) (AB)*, para. 127; *see also US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.

140 China's Opening Statement at the First Panel Meeting, para. 52.

141 *See* U.S. First Written Submission, paras. 276-307.

142 China's Responses to the Panel's First Set of Questions, para. 122; *see also* China's Closing Statement at the First Panel Meeting, para. 13.

thus no "masking" of dumping is occurring, the weighted average margin of dumping calculated under both the average-to-average and average-to-transaction comparison methodologies would be the same. In exceptional situations, however, where there is a pattern of export prices that differ significantly, with higher export prices above normal value and lower export prices below normal value, it is possible, as the Appellate Body has recognized, that dumping may be "masked."[143]

87. The logical extension of the Appellate Body's reasoning that the alternative, average-to-transaction comparison methodology is an exception[144] to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should *not* "lead to results that are systematically different"[145] – is that the alternative comparison methodology *should* "lead to results that are systematically different," *when the conditions for its use have been met*.

88. One of the conditions for the use of the alternative comparison methodology, of course, is that the pattern of export prices identified cannot be taken into account appropriately by one of the normal comparison methodologies. That may be the case in the exceptional situation in which there exists a pattern of export prices that differ significantly, with higher export prices above normal value masking lower export prices below normal value.

89. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all, contrary to the principle of effectiveness, as well as prior findings of the Appellate Body.[146]

90. 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.[147] 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.

91. 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

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143 *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

144 *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97 ("[T]he methodology in the second sentence of Article 2.4.2 is an exception."); *see also US – Zeroing (Japan) (AB)*, para. 131 ("The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which are normally to be used.").

145 *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

146 *See* U.S. First Written Submission, paras. 228-235.

147 *See, e.g.*, China's Responses to the Panel's First Set of Questions, paras. 121-123.

the text of the first sentence of Article 2.4.2 of the AD Agreement. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions."[148] The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis."[149]

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

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

93. The U.S. first written submission demonstrates that, if the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is prohibited, then that comparison methodology will, as a mathematical certainty, in every case, yield a margin of dumping that is identical to the margin of dumping calculated using the average-to-average comparison methodology (also without zeroing). We have referred this as the "mathematical equivalence" argument.[150]

94. The U.S. first written submission demonstrates mathematical equivalence using both hypothetical scenarios and the actual data from the challenged antidumping investigations. We have shown that, even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual results in the challenged antidumping investigations, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results.[151] Likewise, we have demonstrated that mathematical equivalence results when the margins of dumping are calculated using the normal average-to-average and the alternative "mixed" comparison methodologies.[152]

95. 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, then, is not about arithmetic or

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148 *See EC – Bed Linen (AB)*, para. 55.

149 *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

150 *See* U.S. First Written Submission, paras. 237-275.

151 *See* U.S. First Written Submission, paras. 265-273.

152 *See* U.S. First Written Submission, paras. 291-306.

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.

96. China argues that "mathematical equivalence only occurs under a specific set of assumptions."[153] China suggests that "[i]f the assumptions made as part of the US argument – for example, the assumptions pertaining to normal value – are varied, mathematical equivalence does not arise."[154] China attempts to support its contention with the scenarios presented in Exhibit CHN-497.

97. However, as demonstrated in the U.S. first written submission[155] and the U.S. opening statement at the first panel meeting,[156] China's arguments about "assumptions" lack merit. 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.[157] 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."

98. 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.

99. China argues that "Article 2.4.2 does not specify any particular method of calculating weighted average normal value"[158] and "nothing in Article 2.4.2 prevents an investigating authority from dividing the period of investigation into several time periods for purposes of generating weighted average normal values to compare with individual export transactions under

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153 China's Responses to the Panel's First Set of Questions, para. 124.

154 China's Responses to the Panel's First Set of Questions, para. 124.

155 *See* U.S. First Written Submission, paras. 220-222, 286-306.

156 *See* U.S. Opening Statement at the First Panel Meeting, paras. 12-19.

157 *See* Exhibit CHN-497, paras. 9-10 & Table 4; China's Responses to the Panel's First Set of Questions, paras. 127-128.

158 China's Responses to the Panel's First Set of Questions, para. 125.

the W-T comparison methodology."[159] 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. China still has offered no credible reason why an investigating authority would do that. If the same change were made for both the average-to-average and average-to-transaction comparison methodologies, the mathematical result of the two methodologies still would be the same. China has not argued or shown otherwise.

100. Turning to the scenarios presented in Table 4 of Exhibit CHN-497, which China provided to the Panel with its responses to the first set of questions, we note that the United States anticipated China's arguments and, in fact, addressed the premise underlying the scenarios in the U.S. opening statement at the first panel meeting.[160] Each of the scenarios posits that normal value might be calculated on a period-wide basis for the average-to-average comparison methodology and on a different temporal basis (*e.g.*, monthly or quarterly) for the average-to-transaction comparison methodology. Unsurprisingly, the methodologies yield different mathematical results. However, China never provides any explanation for why changing the calculation of normal value would address a pattern of export prices that differ significantly.

101. It is evident from China's own description of the scenarios that they are intended "to show that mathematical equivalence can be avoided."[161] However, while China attempts strenuously to avoid mathematical equivalence, it expends no effort whatsoever 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."[162]

102. The scenarios presented in Table 4 of Exhibit CHN-497 are useful, though, because they support the argument we 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.[163] For example, with respect to OCTG, each of China's scenarios applying the alternative, average-to-transaction comparison methodology yields a result that is somewhat higher than the baseline application of the average-to-average comparison methodology, with the differences ranging from two to eight percentage points. For coated paper, though, the range of outcomes is far wider and more unpredictable, with scenario 4 yielding a result that is less than one percentage point higher than the result of the average-to-average comparison methodology and scenario 3 yielding a result that is more than 15

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159 China's Responses to the Panel's First Set of Questions, para. 126.

160 *See* U.S. Opening Statement at the First Panel Meeting, paras. 16-17.

161 Exhibit CHN-497, Table 4; *see also* China's Responses to the Panel's First Set of Questions, para. 129.

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

163 *See* U.S. Opening Statement at the First Panel Meeting, para. 17.

percentage points higher. More curious, though, is that when scenarios 4 and 5 are applied to the data from the steel cylinders investigation, the result yielded by the average-to-transaction comparison methodology is actually *lower* than the result of the average-to-average comparison methodology, while the opposite is true with respect to OCTG and coated paper. These 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."[164]

103. 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."[165] 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).[166]

104. 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."[167] This does not mean that the outcomes of these two methodologies should be mathematically the *same*. It would be unsurprising to find that the transaction-to-transaction comparison methodology yields results that are different from both the average-to-average and the average-to-transaction comparison methodologies. China's observation does nothing, though, to assist the Panel in reaching an interpretation of the second sentence of Article 2.4.2 that would permit an investigating authority to address a pattern of significantly differing export prices or "unmask targeted dumping."

105. In, sum, contrary to China's argument, nothing in Exhibit CHN-497 allows China to "avoid" the mathematical equivalence argument. China's attempt to undermine the mathematical equivalence argument fails because manipulating normal value under the alternative comparison methodology and leaving it unchanged under the average-to-average comparison methodology would do nothing to address the pattern of significantly different *export prices* or to "unmask targeted dumping."

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

165 China's Opening Statement at the First Panel Meeting, para. 54.

166 *See* U.S. First Written Submission, paras. 237-275.

167 *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

C. China's "As Applied" Claims Related to the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology in the Third Administrative Review of the Antidumping Order on PET Film Lack Merit

106. The U.S. first written submission demonstrates that China's claims that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by using zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in the third administrative review of the antidumping order on PET film from China lack merit.[168]

107. In its statements at the first panel meeting and in its responses to the Panel's questions, China continues to argue that prior Appellate Body findings establish that zeroing is "never permissible" in administrative reviews.[169] China also contends that recourse to the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement is "only available in original investigations."[170] With both of these lines of argument, China is incorrect.

108. China notes that the United States acknowledged in the U.S. first written submission that "the Appellate Body has found previously that the use of zeroing in administrative reviews, including in connection with the use of an average-to-transaction methodology, is inconsistent 'as such' with the {*Anti-Dumping Agreement*}."[171] In China's view, "[t]his is where the matter should end."[172] China's view is wrong. As we have explained, 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.[173] As with investigations, the permissibility of using zeroing in administrative reviews when applying the alternative, average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are present is an issue of first impression for the Panel.

109. China argues that "recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations" and "even if the use of zeroing were permitted in original investigations in connection with applying the W-T comparison methodology under Article 2.4.2, second sentence . . . such permission would not extend to the

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168 *See* U.S. First Written Submission, paras. 318-325.

169 China's Opening Statement at the First Panel Meeting, para. 56.

170 China's Responses to the Panel's First Set of Questions, para. 135.

171 China's Opening Statement at the First Panel Meeting, para. 59.

172 China's Opening Statement at the First Panel Meeting, para. 59.

173 *See US – Stainless Steel (Mexico) (AB)*, para. 127; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.

duty assessment phase governed by Article 9.3" of the AD Agreement.[174] China supports its arguments by referring to the panel report in *US – Zeroing (EC)*, which, China explains, "concluded that 'Article 2.4.2 applies to the phase of the 'original investigation', that is the investigation within the meaning of Article 5 of the {*Anti-Dumping*} *Agreement*, as opposed to subsequent phases of duty assessment and review'."[175] China asserts that the panel's finding "was adopted by the DSB without further modification."[176] China misreads the Appellate Body report in *US – Zeroing (EC)* and misunderstands the implications of the *US – Zeroing (EC)* panel's reasoning.

110. China's reading of the Appellate Body report in *US – Zeroing (EC)* is untenable. In that dispute, the Appellate Body reversed the panel's finding that zeroing is permissible in administrative reviews.[177] During the course of the appeal, the EC argued that the panel's interpretation of the term "during the investigation phase" in Article 2.4.2 of the AD Agreement was wrong, and the United States argued that the panel's interpretation was correct. The Appellate Body did not address the matter directly, reasoning that doing so was not necessary to resolve the dispute.[178] However, while it opted not to resolve the issue of the applicability of Article 2.4.2 to administrative reviews, the Appellate Body nevertheless stated expressly that the panel's findings in paragraphs 7.223 and 8.1(d) of the panel report "should not be considered to have been endorsed by the Appellate Body."[179] Those paragraphs of the *US – Zeroing (EC)* panel report contain the panel's conclusion that the United States did not act inconsistently with Article 2.4.2 of the AD Agreement when it used zeroing in the challenged administrative reviews, and that finding was premised on the panel's interpretation of the term "during the investigation phase."[180]

111. Additionally, in reversing the panel's finding relating to the use of zeroing in administrative reviews, the Appellate Body specifically reversed the panel's finding in paragraph 7.288 of the panel report that the United States did not act inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[181] It is clear from reading paragraph 7.288 of the panel report and the two paragraphs preceding it that the reasoning underlying the panel's finding in paragraph 7.288 included the panel's finding that Article 2.4.2 does not apply in administrative reviews. Indeed, in paragraph 7.287, the panel cites to paragraph 7.223, wherein

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174 China's Opening Statement at the First Panel Meeting, para. 65.

175 China's Opening Statement at the First Panel Meeting, para. 64 (*quoting US – Zeroing (EC) (Panel)*, para. 7.220).

176 China's Opening Statement at the First Panel Meeting, para. 64.

177 *See US – Zeroing (EC) (AB)*, para. 135.

178 *See US – Zeroing (EC) (AB)*, para. 164.

179 *US – Zeroing (EC) (AB)*, para. 164.

180 *See US – Zeroing (EC) (Panel)*, paras. 7.220-7.223.

181 *US – Zeroing (EC) (AB)*, para. 135.

it made that finding. The implication of the Appellate Body's reversal of paragraph 7.288 is that paragraph 7.223, on which the finding in paragraph 7.288 was expressly founded, also should be understood to have been set aside.

112. In sum, it is evident from the Appellate Body's clear statement that the Appellate Body did not endorse the panel's legal reasoning concerning the term "during the investigation phase" in Article 2.4.2, and, of course, the panel report in *US – Zeroing (EC)* must be read together with the Appellate Body report in that dispute, which the DSB also adopted.

113. In any event, even accepting for the sake of argument the proposition that Article 2.4.2 applies only to the phase of the "original investigation," (*i.e.*, the investigation within the meaning of Article 5 of the AD Agreement, as opposed to subsequent phases of duty assessment and review), it does not follow, as China also argues, 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.[182] China's argument is not supported by the text of Articles 2.4.2 and 9.3 of the AD Agreement or by logic.

114. 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." Article 2.4.2 of the AD Agreement is, of course, part of Article 2. A margin of dumping established pursuant to the second sentence of Article 2.4.2 is self-evidently a margin of dumping established under Article 2, and thus an antidumping duty in the amount of such a margin of dumping would be not be inconsistent with Article 9.3.

115. If an investigating authority decides, in an administrative review, to apply the comparison methodologies as they are set forth in Article 2.4.2, nothing in Article 2.4.2 or Article 9.3 prohibits the investigating authority from doing so according to the terms of Article 2.4.2, including the terms of the second sentence of Article 2.4.2. It would be an incongruous result if an investigating authority determined a margin of dumping by applying the alternative, average-to-transaction comparison methodology, consistent with the terms of the second sentence of Article 2.4.2, but that margin of dumping was nevertheless found to be inconsistent with Article 9.3. 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.

116. It is logical, though, that the comparison methodologies described in Article 2.4.2, if an investigating authority opts to use them, should operate in the same manner whether in an original investigation or in an administrative review. The Appellate Body itself reasoned this way when it found in *US – Stainless Steel (Mexico)* that "a reading of Article 9.3 of the *Anti-Dumping Agreement* that permits simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations that applies under

[182] China's Opening Statement at the First Panel Meeting, para. 65.

the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*."[183] The Appellate Body was concerned by the possibility that "zeroing would be introduced although it is not possible in original investigations."[184] No concern is raised, however, if the same comparison methodology is applied in both investigations and reviews. If zeroing is permissible in original investigations when used in connection with the alternative, average-to-transaction comparison methodology when the requisite conditions of the second sentence of Article 2.4.2 are satisfied – and we have demonstrated that it must be – then it should be permissible under the same circumstances in administrative reviews, *i.e.*, when the conditions for the use of the exceptional comparison methodology have been established.

117. Accordingly, the Panel should find that USDOC's use of zeroing in assessing duties in the PET film third administrative review in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement is not inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

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

118. The United States explained in its first written submission that aspects of China's claims relating to the Use of Adverse Facts Available Norm ("Adverse Facts Available Norm") are inconsistent with Article 6.2 of the DSU. Since then, China has continued to ignore DSU requirements by impermissibly seeking findings on new measures that are outside the scope of this dispute. Moreover, China has also acted in contravention of the Panel's Working Procedures by presenting arguments in its responses to Panel questions that should have been properly presented no later than China's first written submission. As demonstrated below, the Panel should find that these new measures and arguments are not properly before the Panel – and thus the Panel should not make findings on these issues in this dispute.

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

119. China introduced six new antidumping determinations during the course of the first substantive meeting: *PET Film* AR5, *Furniture* AR9, *OTR Tires* AR5, *Diamond Sawblades* AR4, *Solar* AR1 and *Wood Flooring* AR2. As the United States explained in its response to Panel Question 3, the six new determinations China introduced during the first substantive meeting are in fact "new measures" that are not within the Panel's terms of reference and cannot be challenged in this dispute. In particular, 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.

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183 *US – Stainless Steel (Mexico) (AB)*, para. 109.

184 *US – Stainless Steel (Mexico) (AB)*, para. 109.

120. Article 4.4, second sentence, provides:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.[185]

Article 6.2 of the DSU provides in pertinent part:

> The request for the establishment of a panel … shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[186]

In its response to the Panel's questions, China has still not explained how these new measures could form part of "the matter referred to the DSB by China in document WT/DS471/5 & Corr.1"[187] (*i.e.*, in the panel request), which the Panel is to examine pursuant to DSU Article 7.1, and "the matter before it" for purposes of its objective examination pursuant to DSU Article 11, in light of the foregoing requirements in the DSU. Instead, China's Responses to the Panel's Questions assert that it is seeking findings under the same provisions it invoked in its first written submission,[188] and that arguments China made in its first written submission *may* apply in whole or part to these new determinations.[189] This contention is misplaced and irrelevant with respect to whether these measures can be considered part of "the matter" referred to the Panel for examination under the DSU for two reasons.

121. First, China fails to recognize that under the DSU, the concept – and need to identify – "measures" is discrete from the concept and need to identify the requisite "legal basis of the complaint."[190] This is apparent on the face of the relevant provisions of the DSU, and the same has been noted by the Appellate Body:

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185 Emphasis added.

186 Emphasis added.

187 WT/DS471/6.

188 China's Responses to the Panel's First Set of Questions (Question 2), para. 7("China's claims in this regard are based on the same arguments as are made in relation to the 32 challenged determinations addressed in China's First Written Submission. That is to say, in China's view, these determinations violate Articles 6.10, 9.2 and 9.4, second sentence, for the same reasons as China describes in its First Written Submission with respect to the original 32 challenged determinations.").

189 *Id*. at para. 10 ("China also confirms that 2 of these 4 additional challenged reviews – *Solar* AR1 and *Wood Flooring* AR2 – are inconsistent with Articles 6.1, 6.8, 9.4 and Annex II for all the same reasons as the 26 challenged determinations addressed in China's First Written Submission.") (emphasis original), para. 13 ("With respect to two reviews identified in the Panel Question – OTR Tires AR5 and Diamond Sawblades AR4 – China argues that there are violations of Articles 6.1, 6.8, 9.4 and Annex II on the basis of a more limited set of arguments.").

190 *EC – Selected Customs Matters (AB)*, para. 130 ("The 'specific measure' to be identified in a panel request is the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation

> There are, therefore, two distinct requirements, namely identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (or the claims). Together, they comprise the 'matter referred to the DSB', which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[191]

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.

122. Second, 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 in fact new measures that involve different facts.[192] Specifically, the reason that the arguments may vary reflects that the determinations involve particular issues that arose in the context of the specified review period – which as the United States has already explained, is not coterminous with any other proceeding listed in China's Panel Request.[193] Indeed, that the legal arguments vary also goes to the fact the legal claims are not consonant. Thus, even the legal theory for these determinations is inconsistent with the legal theory that China has presented for the rest of the determinations – and only serves to emphasize that these are distinct and new measures. For these reasons and those previously presented, these measures fall outside the scope of this dispute.

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

123. Separate and apart from the new measures, China has presented extensive arguments that properly belonged in its first written submission. Paragraph 6 of the Panel's Working Procedures provides as follows:

> Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

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contained in a covered agreement. In other words, the measure at issue is what is being challenged by the complaining Member. In contrast, the legal basis of the complaint, namely the 'claim' pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated.")

191 *US – Carbon Steel (AB)*, para. 125.

192 The United States notes it does not agree with the factual characterization put forward by China with respect to these determinations and will discuss it disagreement further below in Section VIII.

193 United States' Response to Panel Question 3, para. 5.

Thus, the Panel has made clear that the parties were required to present their principal arguments in their respective first written submissions. In China's case, this meant that all arguments that went to establishing its *prima facie* case were to have been made there.

124. In response to the Panel's Questions, China has provided answers that exceed 340 pages, the bulk of which is an attempt by China to make its *prima facie* case with respect to its claims against the Single Rate Presumption Norm and the Adverse Facts Available Norm. In particular, the United States notes the following evidence and arguments all could and should have been presented in its first written submission:

- Evidence attempting to show that Chinese exporters in any of the challenged proceedings, or generally, are required to pass a separate rate test as a condition for obtaining an individual dumping margin and duty rate;[194]
- How China defines an "adverse fact" with respect to USDOC's selection of facts available;[195]
- Arguments relating to the content of the alleged process that forms part of the alleged Adverse Facts Available Norm;[196]
- Evidence and arguments attempting to show that that Norm was "applied" in each of the challenged 26 determinations;[197]
- Arguments relating to which record evidence in the challenged 26 determinations USDOC allegedly failed to take into account when determining the rate for the PRC-wide entity;[198]
- Arguments concerning what constitutes an "individual examination" in the context of Article 9.4;[199]
- Arguments relating to what record evidence in the challenged 26 determinations the USDOC allegedly should have applied as comparators;[200] and

194 China's Responses to Panel Questions 32 & 44.

195 China's Response to Panel Question 65.

196 China's Response to Panel Question 67(a).

197 China's Response to Panel Question 78.

198 China's Response to Panel Question 80.

199 China's Response to Panel Question 87.

200 China's Response to Panel Question 84.

- Evidence and arguments through various visual aids provided by China to explain the alleged content and operation of the alleged norms of general and prospective application.[201]

125. There is not one reason any of the foregoing could not have been presented in China's first written submission.[202] The Dispute Settlement Body established the panel for this dispute on March 26, 2014. China's first written submission was not due until March 6, 2015. China thus had nearly an entire year to prepare its first written submission. Neither has China presented any rationale for why it should be exceptionally permitted to put forward evidence and argument to make out its primary case at this late stage of the proceeding. Rather, China appears to have simply delegated the requirement to review the evidence and ascertain potential arguments to the Panel.[203]

126. Conversely, the prejudice to the United States is very real. As paragraph 6 of the Working Procedures implies, the United States' principal opportunity to address China's arguments and evidence was in its first written submission and at the first panel meeting. By providing this purported argumentation and evidence at this late stage, the United States has limited opportunities to respond.

127. A previous panel has similarly been faced with a situation in which China has provided evidence and arguments going to its primary case well beyond its first submission, or even at the first panel meeting. Specifically, the panel in *EC – Fasteners* noted the following:

> We note that the way in which China has pursued this claim in this dispute is far from ideal. We are particularly troubled by the fact that the claim was not developed at all in China's first written submission. In that sense, we share the European Union's due process concerns. It seems to us that, by failing to put forward a fuller explanation of and argument in support of its claim with respect to the Indian producer's questionnaire response at the first opportunity, that is, in the first written submission, China left the European Union in a difficult position in attempting to respond to a claim that was unclear. Indeed, this lack of clarity led us to pose questions to China in this regard, and China subsequently provided, in its second written submission and its answer to our question, a sufficiently clear argument in support of its claim to allow the European Union an adequate opportunity to respond, as it did, up to its final submission, with comments on China's answers to questions from the Panel concerning this claim. . . . .

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201 *See* China's Visual Aids NME1-NME5.

202 *Thailand – Cigarettes (AB)*, para. 149 ("We also recall that panel proceedings consist of two main stages, the first of which involves each party setting out its 'case in chief, including a full presentation of the facts on the basis of submission of supporting evidence', and the second designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties.").

203 *See e.g.*, *US – Shrimp (Thailand) (AB)*, para. 300 ("It is well established that the party asserting the affirmative of a claim or defence bears the burden of establishing both the legal and factual elements of that claim or defence. It is also well accepted that a panel cannot make a *prima facie* case for a party who bears that burden.")

> We would, however, urge complaining parties to make every effort to pursue their claims with the fullest possible exposition of their arguments in their first written submissions.[204]

The situation here is more prejudicial than in the *EC – Fasteners* dispute. As evidenced by China's lengthy response to the Panel's Questions, 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)[205] 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).[206] Accordingly, the United States respectfully requests the Panel to reject China's attempt to make out its claims with evidence and argumentation that properly belonged in its first written submission.[207]

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

128. 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 do in fact exist.[208] As the United States has shown in its prior written and oral

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204 *EC – Fasteners*, para. 7.522.

205 Article 12.4 of the DSU provides that:

> In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

206 DSU Article 12.6 provides:

> Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously.

Paragraph 4 of Appendix 3 of the DSU provides:

> Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

207 *See also China – Rare Earths*, para. 7.27 ("In sum, the Panel believes that the relevant exhibits were submitted too late; they could have been submitted earlier and in a manner consistent with due process.").

208 *US – Zeroing (EC) (AB)*, para. 198; *see also* para. 196 ("We agree with the United States that a panel must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document. If a panel were to do so, it would act

submissions, China has merely – and only – pointed to situations where similar facts have led to similar results.[209] Thus, 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.[210] China's additional arguments at the first panel meeting and in its responses to the Panel's questions following the Panel Meeting have not remedied this failure. In particular, once China's evidence is examined with the requisite "particular rigour,"[211] it is clear that China has not carried its high burden. With respect to both alleged norms, China does not "clearly establish"[212] – as it must – that there exists general and prospective norms that govern USDOC's conduct.[213] Rather, China's additional evidence and arguments relate, if at all, to what USDOC has done in previous antidumping proceedings or what actions may have been within its discretion under U.S. law at a particular time – in other words, past conduct. China does not show the existence of norms that constrain or otherwise 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, as evidenced by its subsequent revisions to the norm's alleged content in the course of these proceedings. Consequently, China's as-such challenges to these alleged measures must fail, as China has not established the existence of the supposed norms it seeks to challenge.

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

129. As China implicitly acknowledges, what it alleges to be a Single Rate Presumption norm is substantively different than the one that the complaining Member raised in the *US – Shrimp II (Viet Nam)* dispute. In this dispute, China defines an alleged norm as encompassing a second element that was completely absent in *US – Shrimp II (Viet Nam)*: namely, China alleges that the supposed norm includes a Separate Rate Test whereby USDOC examines the relationship between a particular legal entity and the Chinese government.[214] Remarkably, as discussed

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inconsistently with its obligations under Article 11 of the DSU to "make an objective assessment of the matter" before it.").

209 *See e.g.*, U.S. Opening Statement at the First Panel Meeting, para. 46.

210 *US – Export Restraints*, para. 8.126.

211 *US – Zeroing (EC) (AB)*, para. 198.

212 *US – Zeroing (EC) (AB)*, para. 198.

213 In order to establish the existence of a norm of general and prospective application, China must clearly establish (1) that the rule or norm embodied in that measure is attributable to the responding Member; (2) the precise content of the rule or norm; and (3) that the rule or norm has general and prospective application. *US – Zeroing (EC) (AB)*, para. 198.

214 *See e.g.*, China's First Written Submission, para. 318, 322, 330; China's Responses to the Panel's First Set of Questions (Question 30(a)), para. 149; U.S. Reponses to the Panel's First Set of Questions (Question 30(a)), para. 57.

below, China does not elaborate, or even identify, what evidence specifically relates to the general and prospective nature of the Separate Rate Test element of China's alleged norm.

130. China as the complainant in this dispute is entitled to frame the challenged measure as it sees fit. Here, China has alleged that an unwritten measure, the Single Rate Presumption, is a norm of general and prospective application that is substantively broader than the one at issue in *US – Shrimp II (Viet Nam)*. China is not entitled to simply rely on the findings in *US – Shrimp II (Viet Nam)* to argue that the existence of its *broader* norm has been proven; not only are the alleged measures different, requiring the demonstration of different facts, but in any event it would be legal error for the Panel to simply adopt the findings by a previous panel and not carry out its own objective assessment under DSU Article 11.[215] China, therefore, bears the burden of demonstrating through argumentation and evidence in this dispute that the *full scope* of the norm it alleges exists. A failure to prove the scope of the alleged measures means nothing less than that China has failed to establish the measure itself – and thus no findings can be made with respect to it. Accordingly, the United States addresses first the deficiencies with the evidence generally and then proceeds to explain why the evidence is particularly unsuited to demonstrating the general and prospective nature of an alleged Separate Rate Test element of the alleged norm.

1. The Evidence Generally

131. In response to a Panel Question 30(b), China has asserted the following constitutes all of the pieces of evidence that support the existence and nature of the alleged Single Rate Presumption norm:

(1) Policy Bulletin 05.1;

(2) Chapter 10 of USDOC's Antidumping Manual;

(3) Part of the records in the proceedings that were at issue in *US – Shrimp II*;

(4) Rulings by US courts;

(5) Tabulated statements from 38 challenged determinations; and

(6) Statements from other sampled determinations.[216]

In the following subsections, the United States will address each one of these arguments, and show that the evidence[217] proffered by China does not establish that the alleged norm that China

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[215] *US – Shrimp (Viet Nam) I*, para. 7.112 fn.163 (finding that "the factual findings of the[] prior panels and the Appellate Body [do not] alleviate Viet Nam's burden of establishing, before us, that the U.S. zeroing methodology is a norm of general and prospective application.").

[216] China's Responses to the Panel's First Set of Questions (Question 30(b)), paras. 152-154.

[217] It is telling that although in its Panel Request China alleged that the so-called Single Rate Presumption "is applied pursuant to…the regulation set forth in 19 C.F.R. § 351.107(d)," China has abandoned this assertion in its submissions. *See* Panel Request (WT/DS471/5), para. 14. Thus, China no longer claims a written measures

labels as "the Single Rate Presumption" exists.[218] China's purported evidence does not – because it cannot – show that any alleged Single Rate Presumption has any type of general and prospective application, let alone legally binding effect. The crux of the weakness of China's arguments, as demonstrated below with respect to each piece or category of evidence, is that the very nature of the purported evidence has no bearing on what USDOC may or may not do in the future with respect to a given situation.[219]

132. Before proceeding to address the individual pieces of evidence, the United States notes one broad defect in China's reasoning is that China has not explained why the referenced statements have general and prospective application. This point applies in particular to China's characterization of statements in Policy Bulletin 05.1 and the Antidumping Manual. Rather than engage with specific text in those instruments, China simply urges the Panel to automatically follow the finding in *US – Shrimp II (Viet Nam)* that such instruments are probative evidence to support finding the existence of an unwritten norm.[220] The United States urges the Panel to carefully consider the analysis of the panel in *US – Shrimp II (Viet Nam)*, as to why the Antidumping Manual is probative evidence:

> We believe that if a non-mandatory instrument can be found to be a measure of general and prospective application it can a fortiori constitute probative evidence of the existence of an unwritten measure of general and prospective application. Hence, we consider that the Antidumping Manual constitutes relevant and probative evidence of the existence of a norm of general and prospective application.[221]

This statement reveals a critical failing in the *US – Shrimp II* (*Viet Nam*) panel's analysis. To be sure, many types of documents – as a theoretical matter – might be used as evidence either to support an argument regarding the existence of an unwritten norm, or for that matter, to refute the alleged existence of an unwritten norm. The key issue, rather, is precisely what does the evidence indicate? The evidence itself must be scrutinized to ensure it is "solid" and can "clearly establish" general and prospective application.[222] The *US – Shrimp II* (*Viet Nam*) panel made no such assessment with respect to the Antidumping Manual, as evidenced by its cursory

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compels the alleged Single Rate Presumption to be applied on a general or prospective basis. Although the United States agrees that an instrument need not be binding to be general and prospective, it is intuitive the scenarios in which a non-binding instrument is general and prospective are generally rare.

218 China's Opening Statement at the First Panel Meeting, para. 79.

219 *See Argentina – Import Licensing*, para. 6.431 ("Evidence on the record suggests that these commitments will continue to be required, unless and until the policy is repealed or modified. By way of example, the Argentine Secretary of Domestic Trade expressed in an official press release in late 2013 that the policy of "managed trade" would continue to be applied in the future as per the instructions from the President of Argentina.").

220 China's First Written Submission, para. 330, quoting *US – Shrimp II (Viet Nam)*, para. 7.115.

221 *US – Shrimp II (Viet Nam)*, para. 7.109.

222 *US – Zeroing (EC) (AB)*, para. 198.

examination. To the contrary, it did precisely what the Appellate Body counseled against, which was to lightly infer the existence of a norm.[223] By failing to explain why the statements from documents such as Policy Bulletin 05.1 or the Antidumping Manual have general and prospective application, China is simply seeking for this Panel to make a similar error in its analysis. With that point in mind, the United States proceeds to address each piece of evidence.

a. Policy Bulletin 05.1

133. The first piece of evidence that China relies upon is a statement taken from Policy Bulletin 05.1. That statement found in the "Background" section, however, does not establish the existence of a rule that has independent operational effect or otherwise directs USDOC's future conduct, but rather describes what has occurred in prior USDOC determinations:

> In an NME antidumping investigation, the Department presumes that all companies within the NME country are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both de jure and de facto governmental control over its export activities. See e.g., Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 FR 19026, 19027 (April 30, 1996). If an NME entity demonstrates this independence with respect to its export activities, it is eligible for a rate that is separate from the NME-wide rate.[224]

As will be discussed below, this summary of prior determinations does not support a finding that there exists an alleged Single Rate Presumption with general and prospective application. In particular, this text cannot be relied on for such a finding for three reasons, none of which China has effectively addressed.

i. <u>The statement from Policy Bulletin 05.1 does not establish that the alleged Single Rate Presumption has normative character</u>

134. First, the statement cited above does not demonstrate that the alleged Single Rate Presumption has the "normative" character that China attempts to imbue upon it.[225] Specifically, China mischaracterizes the statement by describing it as "USDOC's statement of policy."[226] In considering the concept of "normative," the Appellate Body's analysis from *US – Zeroing (Japan)* is instructive:

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223 *Id*., para. 196.

224 China's First Written Submission, para. 324, citing Import Administration Policy Bulletin, No. 05.1 (Exhibit CHN-109).

225 China's First Written Submission, paras. 323-326.

226 China's First Written Submission, para. 325.

> In order for a measure to have the "normative value" necessary to render it susceptible of being challenged as such, the measure must meet certain requirements. Its content must be clear and it must be understood by those to whom it will apply that it will be applied generally and prospectively. We also concur with the observation of the panel in *US – Zeroing (EC)* that a finding regarding the WTO-inconsistency of a norm as such must be based on *solid evidence* enabling a panel to determine the precise content of the norm and the *future conduct to which it will necessarily give rise*. It stands to reason that a measure can only have these properties if it has a *legal basis* and that a measure is unlikely to be capable of being challenged as such in WTO dispute settlement if it is not *grounded in the relevant domestic legal framework*. However, this does not mean that the measure must necessarily be in the nature of legislation or regulation.[227]

In particular, the United States emphasizes that the Appellate Body correctly found that "solid evidence" must allow the panel to determine that the future conduct will "necessarily" occur.[228] That is not the case here.

135. As the United States has explained previously, the excerpt from Policy Bulletin 05.1 invoked by China is not from the section of the document that purports to be the actual "Statement of Policy."[229] Rather, the statement is in a section titled "Background" and thus lacks the purported normative character that China ascribes to it.[230] Because of this failing, China's attempt to equate Policy Bulletin 05.1 with the Sunset Policy Bulletin at issue in *US –OCTG Sunset Reviews* is misplaced.[231] In *US – OCTG Sunset Reviews*, Argentina challenged the Sunset Policy Bulletin ("SPB") itself as a measure.[232] As the Appellate Body noted:

> It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance.[233]

In contrast, in this dispute China is not challenging Policy Bulletin 05.1 itself or the Statement of Policy contained within it. Instead, China is drawing from a background section describing USDOC's conduct in prior USDOC determinations. In doing so, China urges this Panel to

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227 *US – Zeroing (Japan) (AB)*, para 7.48 (emphasis added).

228 *Id.*

229 U.S. Reponses to the Panel's First Set of Questions (Question 30(b)), para. 59.

230 China's First Written Submission, para. 323 ("USDOC policy bulletins, including Policy Bulletin 05.1, have a normative character and are themselves amenable to challenge, 'as such,' in WTO proceedings.")

231 China's First Written Submission, para. 323.

232 *US – OCTG Sunset Reviews*, para. 3.1(3).

233 *US – OCTG Sunset Reviews (AB)*, para. 187.

incorrectly treat such statements as no different than the actual policy being announced – and then further extrapolate from that statement the existence of an alleged Single Rate Presumption. China has provided no convincing reason why the Panel should not take into account the clearly demarcated structure of the document.

136. In this respect, it bears emphasis why the language China references in Policy Bulletin 05.1 is not similarly situated to that in the SPB. As the language of Policy Bulletin 05.1 makes clear itself, the "Statement of Policy" is *not* the language China quotes, but a new application process for separate rates and a new position on combination rates. For example, China, in response to Panel Question 31 provides only the following language, taken out of context, to assert the alleged Single Rate Presumption is general and prospective in nature[234]:

> This practice will be effective for all NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy. This practice only applies to antidumping investigations.[235]

But this statement is not in reference to the language quoted by China in the Background section as it relates to USDOC's past conduct in certain determinations. Instead it applies, as the previous sentences make clear, to what is being announced in the Statement of Policy, which is that USDOC has created a new application form and a new process for separate rates:

> The Department's application is designed to be a more thorough approach to evaluating a firm's eligibility for separate rate status. It is meant to clarify and streamline the separate rates process for both the Department and for respondents.[236]

137. The language provided by itself in the context of China's arguments might give the mistaken impression that China's excerpted language has general and prospective application. However, the language when put next to the adjoining sentences – and thus providing a more complete context – makes clear that what, if anything, may happen in the future is a particular procedure concerning a separate rate application. Thus, contrary to China's assertions, there is no statement in Policy Bulletin 05.1 that the alleged Single Rate Presumption norm will apply generally and prospectively.

138. Perhaps anticipating this point, China also asserts in its response to Panel's Question 31 that the very existence of Policy Bulletin 05.1 confirms the separate existence of a Separate Rate Test element of the norm alleged by China. As China puts it, "{t}here would be no need for a Policy Bulletin dealing with the application of the Separate Rate Test if USDOC did not apply the Single Rate Presumption as a norm of general and prospective application."[237] Putting aside

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234 China's Responses to the Panel's First Set of Questions (Question 31), para. 164.

235 Exhibit CHN-109, p. 6.

236 *Id.*, p. 6.

237 China's Responses to the Panel's First Set of Questions (Question 31), para. 163.

that this argument did not occur to China in its first written submission, it is a complete *non-sequitur*. An authority can specify the particular paperwork that will be used for a particular process. That does not mean the authority has committed itself to employing that process or any other. It simply highlights the authority has prepared for the exercise of such discretion. The statement itself thus does not support finding that a so-called Single Rate Presumption has general and prospective application.

139. Moreover, as discussed in response to Panel Question 30(b) and (c), the panel in *US – Shrimp II (Viet Nam)* failed to address this key aspect of Policy Bulletin 05.1, *i.e.*, did not explain why the various statements in each section of Policy Bulletin 05.1 should be put on equal terms with respect to establishing the general and prospective nature of the alleged norm at issue. As discussed above, a thorough examination of the structure of Policy Bulletin 05.1 calls into question the relevance and probative value of that evidence in establishing a so-called Single Rate Presumption. Thus, to the extent China relies on the *US – Shrimp II (Viet Nam)* panel's findings to establish that the statement from Policy Bulletin 05.1 supports its claims, such reliance is misplaced.

ii. The statement itself does not provide for general and prospective application

140. The second reason the language does not support China's contention regarding the existence of an alleged Single Rate Presumption norm is that the language itself does not prove anything. In other words, even if the language were to be considered as imbued with normative character or otherwise authoritative, the language fails to move China closer to meeting its heavy burden. As the Appellate Body's prior analysis makes clear, China bears the burden of providing the argumentation and evidence that "clearly establish{es}" the existence of the alleged norm. China, however, has abdicated any attempt to actually parse the language and defers the task to the Panel. As demonstrated below, such an examination demonstrates why China's argument is misplaced.

141. As an initial matter, a majority of the determinations that China challenges in this dispute are administrative reviews – and China seeks to define the alleged norm as being applicable to both investigations and reviews. The language China quotes from in Policy Bulletin 05.1, however, is clearly limited to *investigations*. Specifically, the excerpt begins with "[i]n an NME antidumping investigation." Even the portion of Policy Bulletin 05.1 concerning the procedures that China conflates with the Single Rate Presumption is clear that it "only applies to antidumping investigations."[238]

142. More critically though, China has not explained what words in the proffered excerpt will "necessarily give rise"[239] to the alleged Single Rate Presumption. To the extent China relies on the language noting the "Department presumes", that language does not necessarily speak to any

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238 Exhibit CHN-109, p. 6. Additionally, those procedures are to apply only to investigations initiated on or after April 5, 2005 – and thus have no bearing on certain investigations which China challenges in this dispute, such as Retail Bags OI, Furniture OI, and Shrimp OI.

239 *US – Zeroing (Japan) (AB)*, para 7.48.

future or general conduct that will invariably happen. The use of the present tense confirms that, at most, the USDOC is describing conduct in the past up to the present. There is no text in the excerpt from Policy Bulletin 05.1 provided by China that indicates that the USDOC's conduct will continue invariably into the future.

iii. The statement from Policy Bulletin 05.1 would not have general and prospective effect in the U.S. legal framework

143. As the Appellate Body has explained, for a measure to have general and prospective application, it will need to be grounded in the domestic legal framework of a Member.[240] As an initial matter, China has failed to demonstrate Policy Bulletin 05.1, in and of itself, has the requisite legal basis in the U.S. system. China simply alleges that policy bulletins broadly have normative character but fails to explain why.[241] In the U.S. legal system, a U.S. statute, the Administrative Procedure Act, requires substantive agency rules to undergo a process of notice and comment.[242] Documents like Policy Bulletin 05.1 are not required to go through such a process and lack legally binding force.[243] Indeed, the fact that Policy Bulletin 05.1 speaks directly to an application process rather than a substantive rule confirms this point. Thus, the statement referenced by China in the Background section of Policy Bulletin 05.1 lacks a "legal basis" in the U.S. system not only on the basis of the text itself, but also because Policy Bulletin 05.1 *cannot* be deemed an authoritative source of U.S. law. In other words, China has an obligation to explain how the Single Rate Presumption is rooted in the U.S. legal system, including with respect to its general and prospective effect. China fails to do so by simply noting the statements exists in Policy Bulletin 05.1. China points to no other basis for how the referenced statement is grounded in the U.S. legal framework.

144. In short, China cannot rely on the excerpt from Policy Bulletin 05.1 to prove the existence of the alleged Single Rate Presumption norm. Rather than "solid evidence," it is deficient for multiple reasons, including the fact that it does not ascribe the requisite normative character, does not provide for general and prospective application on its face, and has no basis in the U.S. legal system to provide for general and prospective effects.

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240 *US – Zeroing (Japan) (AB)*, para 7.48 ("It stands to reason that a measure can only have these properties if it has a *legal basis* and that a measure is unlikely to be capable of being challenged as such in WTO dispute settlement if it is not *grounded in the relevant domestic legal framework*.") (emphasis added).

241 China's First Written Submission, para. 323.

242 Administrative Procedure Act, 5 U.S.C. § 553 (Exhibit US-106).

243 *United States Magnesium LLC v. United States*, 31 C.I.T. 988, 991 (Ct. Int'l Trade 2007) ("in that regard the relevant policy bulletin, while meriting 'respect,' lacks the force of law to 'legally' bind Commerce on its face.") (Exhibit USA-107).

b. Antidumping Manual

i. The referenced statements do not support general and prospective application

145. China relies on three sentences from the Antidumping Manual to assert the existence of the norm:

> [1] In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are essential operating units of a single, government-wide entity and thus, should receive a single antidumping duty rate (i.e., an NME-wide rate).[244]
>
> [2] Those exporters that do not or cannot demonstrate that they are separate from the government-wide entity receive the NME-wide rate".[245]
>
> [3] As noted above, the Department's practice is to assign separate rates only to exporters that have demonstrated their independence from *de jure* and *de facto* government control over their export activities.[246]

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.[247] The text in each of the sentences, at best, speaks about what has happened in the past and what is happening at the moment, not what it is expected to happen in the future, let alone what invariably will happen in the future.

146. China asserts these statements serve "as a *justification* and a *motivation* for the decision in the instant investigation or review."[248] China's assertion is misplaced. The use of this present tense language in a particular proceeding may illustrate justification for conduct in that particular proceeding. In other words, it is present tense because USDOC is explaining at that moment its decision. Justification, however, does not speak to general and prospective application. With respect to motivation, the cited statements, including the use of the present tense, do not in any way evince in any respect future and general application.

147. Moreover, these statements cannot be viewed as a general and prospective pronouncement on USDOC's conduct. The Antidumping Manual, as the United States has previously explained, contains an explicit disclaimer on the very first page that it "is for the

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244 China's First Written Submission, para. 327, quoting USDOC Antidumping Manual, Chapter 10 **(**Exhibit CHN-23), p. 3.

245 *Id.*

246 *Id.*, quoting USDOC Antidumping Manual, Chapter 10 (Exhibit CHN-23), p. 5.

247 *US – Zeroing (Japan) (AB)*, para 7.48.

248 China, First Oral Statement, para. 85 (emphasis original).

internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish DOC practice."[249] Indeed, it is noteworthy that certain practices described in the Antidumping Manual may still appear in the document, although the practice has changed entirely.[250] Thus, given that the practices described in the Antidumping Manual are subject to – and do – change, it would be inappropriate to rely on the Antidumping Manual as evidence of a norm of general and prospective application.

148. Besides the disclaimer, the United States notes that USDOC, nearly 10 years ago, had separately, explicitly, and publicly stated that the Antidumping Manual is not meant to be relied upon by the public:

> The Antidumping Manual was created as a tool for our analysts to use in order to further their understanding and application of the Uruguay Round Agreements Act. It was never intended to be a definitive guide for the staff, nor was it meant to be a "how-to" manual for the general public. We note that the manual in most respects continues to be accurate; however, we agree that it should be updated to reflect changes in IA practice.[251]

This memorandum was in response to a recommendation in a report that USDOC should update the manual in place at that particular time. As the memorandum makes clear, no member of the public should have any expectations regarding Commerce's conduct on the basis of the Antidumping Manual.

149. China attempts to avoid these points by turning the clear disclaimer in the Antidumping Manual on its head by claiming the reference to "guidance" in the disclaimer somehow turn the Antidumping Manual into precisely the type of evidence that supports the existence of a norm.[252] China is mistaken for two reasons.

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249 Antidumping Manual, p.1 (Exhibit USA-28).

250 *See, e.g.*, Antidumping Manual, Chapter 10 (Exhibit CHN-23), p. 14 ("{T}he Department values the NME producer's labor input by reference to a regression-based wage rate that effectively reflects data from a number of countries, rather than a single country."). Despite this description of USDOC's labor wage rate methodology in the Antidumping Manual, USDOC has subsequently changed this practice. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092, 36092 (June 21, 2011) (Exhibit USA-110) ("{T}he Department has determined that the single surrogate-country approach is best. In addition, the Department has decided to use International Labor Organization ("ILO") Yearbook Chapter 6A as its primary source of labor cost data in NME antidumping proceedings.")

251 Memorandum for Jill Gross from Linda Moye Cheatham (March 15, 2005) (excerpt) (Exhibit USA-108). Available online at https://www.oig.doc.gov/oigpublications/ipe-16952.pdf. The United States notes this piece of evidence was not before the panel in *US – Shrimp II (Viet Nam)*.

252 China's Opening Statement at the First Panel Meeting, para. 82; China's Responses to the Panel's First Set of Questions (Question 70), paras. 406-407.

ii. The Antidumping Manual is not guidance

150. First, the Antidumping Manual contrary to China's claims is not normative.[253] China mistakenly relies on the statement in the Antidumping Manual that it is for "internal training and guidance." But the use of the term "guidance" in the Antidumping Manual cannot, contrary to China's argument, put that document on the same footing as the USDOC document (the SPB) found to be a measure in a prior dispute.

151. China's error is that the term "guidance" does not lend itself to only one definition, which is administrative guidance. In some instances the term "guidance" is akin to "administration" as "in management of an organization or effort."[254] The Appellate Body found the SPB to constitute this type of guidance, *i.e.*, administrative guidance, because it sets forth how an organization, USDOC, would manage itself in specific circumstances. In particular, in language the Appellate Body cited in finding the SPB to be administrative guidance, the SPB states:

> This policy bulletin proposes guidance regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.[255]

Thus, the SPB set out that it would "complement" statutory and regulatory provisions by providing guidance on how certain "methodological or analytical issues" would be dealt with in "the conduct of sunset reviews."

152. However, in other instances the term "guidance" is understood as akin to "education", in which case appropriate synonyms include "training," "learning," "schooling," and "edification."[256] With respect to the Antidumping Manual, the proper context is ascertained by recognizing the term "guidance" is being used in conjunction with the word "training." With that context, it becomes clear that the correct interpretation of guidance in the AD manual is to provide education or training rather than administrative guidance. To the extent there is any doubt whether the Antidumping Manual might create "expectations among the public and among private actors," it is foreclosed by the fact that the disclaimer explicitly notes it is for "internal

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253 *Id*.

254 Thesaurus.com, entry for "guidance," Roget's 21st Century Thesaurus, Third Edition Copyright © 2013 by the Philip Lief Group, available at >http://www.thesaurus.com/browse/guidance/< (last accessed August 26, 2015) (Exhibit USA-109).

255 *US – OCTG Sunset Reviews (AB)*, para. 187, n. 258.

256 Thesaurus.com, entry for "guidance," Roget's 21st Century Thesaurus, Third Edition Copyright © 2013 by the Philip Lief Group, available at >http://www.thesaurus.com/browse/guidance/< (last accessed August 26, 2015) (Exhibit USA-109).

training" and that it "cannot be cited to establish DOC practice."[257] In short, China cannot make the leap that, because a different reference to "guidance" in a different USDOC document examined in a different dispute meant "administrative guidance", then every time any document uses the same term it must have the exact same meaning. Thus, China is mistaken when it claims statements in the Antidumping Manual have normative character simply because the Antidumping Manual contains the word "guidance" in its disclaimer.

153. Second, the disputes China relies upon for its contention that "the Antidumping Manual, has, on several occasions, been cited as evidence of the existence of general and prospective norms that may be challenged, as such, in WTO proceedings,"[258] actually serve to undermine its arguments in this context. As discussed in response to Panel Question 30(c), China's reliance on *US – Shrimp II (Viet Nam)* for this proposition is misplaced because of key errors in the panel's analysis.[259] In addition, China relies on disputes involving USDOC's past so-called "zeroing methodology". It may be recalled that in past cases the United States' methodology for assessing antidumping duties, which pre-dated its 2006, 2007, and 2012 modifications,[260] has been found to constitute a norm of general and prospective application. The prior methodology for assessing antidumping duties has been described as an essentially "passive" methodology which requires USDOC to "exclu[de] from the numerator of weighted average dumping margins of results of comparisons in which export prices are above the normal value", and is invariably applied in every case.[261]

154. In this context, the panel in *US – Stainless Steel (Mexico)* examined evidence stemming from the Antidumping Manual "which indicate{d} that the USDOC had to follow the Standard Computer Programme consistently in investigations," and such evidence "also demonstrates that these Procedures had general and prospective application."[262] According to the panel, "{t}his shows that the Model Zeroing Procedures went beyond mere repetition of a certain methodology to specific cases and had become a 'deliberate policy'."[263] But, as the United States has explained, the alleged Single Rate Presumption at issue differs in several material respects from

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257 Antidumping Manual, p.1 (Exhibit USA-28).

258 *See* China's Response to Panel Questions, para. 406 and fn 585.

259 *See* U.S. Reponses to the Panel's First Set of Questions, paras. 58-69.

260 *See* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (December 27, 2006) (Exhibit CHN-71); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3,783 (January 26, 2007) (Exhibit USA-30); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8,101 (February 14, 2012) (Exhibit CHN-25).

261 *US – Zeroing (Japan)*, para. 7.50-7.54.

262 *US – Stainless Steel (Mexico) (panel)*, para. 7.40.

263 *US – Stainless Steel (Mexico) (panel)*, para. 7.40 (internal footnotes omitted).

this other methodology, because, for instance USDOC's treatment of Chinese companies is not required in all cases, nor does it go beyond mere repetition in specific cases.[264]

155. China also relies on a statement that USDOC made before the panel in *US – Zeroing (EC), i.e.*, that "{f}or purposes of this dispute, the United States does not contest the {EC's} assertion that the {Antidumping Manual} is a 'measure' for purposes of a WTO dispute."[265] As an initial matter, China ignores the qualifying language of that statement which limits the United States' statement on whether the Antidumping Manual is a measure in that dispute, to that dispute. Regardless, China does not allege here that the Antidumping Manual itself as the alleged norm. Rather, China argues that the Antidumping Manual provides relevant and probative evidence that the alleged Single Rate Presumption is a norm of general and prospective application. As demonstrated above though, China has failed to do so by actually explaining and demonstrating the significance of the Antidumping Manual and the specific statements it references, particularly with respect to the alleged norm's general and prospective application.

c. Records at Issue in *US – Shrimp II (Viet Nam)*

156. In its first written submission, China makes no argumentation with respect to the particular administrative reviews that were at issue in the *US – Shrimp II (Viet Nam)* dispute. However, in response to Question 30(b), China notes that some of this evidence is "partially available to this Panel, because the final determination in the sixth administrative review challenged by Viet Nam are included with China's sample of NME determinations as Exhibit CHN-365."[266] Because China has failed to provide argumentation regarding this evidence, the Panel should reject China's implicit invitation to take up the task.[267]

d. Rulings by U.S. Courts

157. China asserts that court statements, "which reflect norms applied by USDOC, serve to create expectations and provide guidance regarding the ongoing and general application of the norm in cases involving a country deemed by USDOC to be an NME."[268] China's position is nothing more than a tautology. A court statement may, or may not, "reflect norms applied by USDOC." No shortcuts are available here – the actual court statements must be examined to determine whether or not they support an allegation regarding the existence of a supposed norm.

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[264] *See* U.S. First Written Submission, paras. 344-345.

[265] *See* China's Response to Panel Questions, fn. 585 (citing *US – Zeroing (EC) (AB)*, fn. 308).

[266] China's Responses to the Panel's First Set of Questions (Question 30(b)), para. 153.

[267] *See e.g., EC – Hormones (AB)*, para. 98; *Canada – Dairy 21.5 (AB)*, para 66. ("we have consistently held that, as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a prima facie case by presenting sufficient evidence to raise a presumption in favour of its claim."); *US – Gambling (AB)*, paras. 138-140.

[268] China's Responses to the Panel's First Set of Questions (Question 68(a)), para. 388.

158. Here, the language referenced from the various court decisions do not support the existence of a norm of general and prospective effect.[269] China relies principally on the following two statements from U.S. courts in support of finding the alleged Single Rate Presumption norm[270]:

- Before 1991, Commerce used the combination of individual rates and an all others rate for antidumping investigations of imports not only from market economy countries, but also from countries with nonmarket economies (''NMEs'') such as China. In 1991, however, Commerce reversed course and decided that individual rates were not appropriate in an NME setting. … Instead, Commerce determined that NME exporters would be subject to a single, countrywide antidumping duty rate unless they could demonstrate legal, financial, and economic independence from the Chinese government (referred to by Commerce as ''the NME entity'').

- After Sigma, Commerce has continued to apply this set of presumptions to all respondents subject to AD duty orders on merchandise from NME-designated countries, and Sigma has continued to be cited as controlling authority for judicial affirmation of Commerce's practice in this regard … Accordingly, it appears that the issue of Commerce's reliance upon a presumption of government control for respondents from NME-designated countries is settled (unless the Court of Appeals chooses to revisit it).

159. These statements, on their face, do not support a finding that there exists a norm of general and prospective application. Indeed, the first statement, the excerpt from the Federal Circuit's decision in *Transcom*, explicitly notes that USDOC had *reversed* it prior practice.[271] The very fact that a reversal or modification occurred undermines the notion of general and prospective application. These statements simply note, at most, that USDOC has done something previously, and then done something different at a subsequent time.

160. The statements also note that it is well settled under U.S. law that USDOC may undertake such actions. This type of observation, however, provides no support for China's allegations regarding the supposed existence of an alleged norm – particularly because they do not show general and prospective application. 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. Thus, the court statements provided by China actually demonstrate that

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269 In the interests of brevity, the United States references back its response to Panel Question 34 on this point as well.

270 China's First Written Submission, para. 333, citing *Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2002) **(**Exhibit CHN-130**)**, p. 1373 (Fed. Cir. 2001) and *Jiangsu Changbao Steel Tube Co., Ltd. V. United States*, 884 F.Supp.2d 1295, 1311-1312 (Ct. Int'l Trade 2012) (Exhibit CHN-123).

271 *Compare US – Zeroing (EC) (AB)*, para. 201 ("In addition, we note that the Panel had before it the United States' recognition that it had been 'unable to identify any instance where [the] USDOC had given a credit for non-dumped sales'"). (brackets original)

USDOC has *discretion* but not that that discretion will invariably be applied a particular way in the future. Indeed, the very existence of such discretion undermines the notion that a norm of general and prospective application that affects Commerce's behavior exists.

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

161. The United States addresses China's provision of the tabulated statements and the statements from other sampled determinations together because they suffer from a common deficiency: they summarize, at most, what has happened in the past; they do not prove that USDOC has adopted an unwritten norm governing what will happen generally and prospectively. Indeed, the Appellate Body in sustaining an allegation of an unwritten norm has explicitly noted that the evidence that supported such a finding "consisted of considerably more than a string of cases, or repeat action."[272] But 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.

162. In this respect, the United States provides one example (Coated Paper) from Table SRP. As with other entries, there is a quote that purports to be evidence of the alleged Single Rate Presumption.

"In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate."	Coated Paper OI Final Determination (Exhibit CHN-12), p. 59220.

China does not explain in its submission what the Panel should take from this quote or any other that purportedly proves general and prospective application of the alleged norm. If China is arguing that the general and prospective nature can be inferred because the language is repeated across multiple antidumping proceedings, the argument is deficient not only because this simply proves repetition, but also because it ignores the most basic reason for why such a quote may exist in a determination: it explains the immediate situation in the determination. Indeed, the very next paragraph after this quote proceeds as follows:

[272] *US – Zeroing (EC) (AB)*, para. 204; *see also US – Zeroing (Japan) (AB)*, para. 84 ("Moreover, the Panel observed that the evidence before it "shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases.").

> In the *Preliminary Determination*, we found that the four mandatory respondents (*i.e.*, GE, GHS (and their affiliates, NAPP and NBZH), Tianzhang, and IP Paperboard/IP Cartonboard), and the separate-rate respondent Chenming, demonstrated their eligibility for separate-rate status. For the final determination, we continue to find that the evidence placed on the record of this investigation by GE, GHS (their affiliates, NAPP and NBZH), and Chenming demonstrates both a *de jure* and *de facto* absence of government control, with respect to their respective exports of the merchandise under investigation, and, thus are eligible for separate-rate status.[273]

In other words, the quote China provides may explain the immediate treatment of certain respondents in that particular proceeding – and is not an opinion on what may generally occur in future proceedings. Thus, these pieces of evidence, like the rest, cannot substantiate the existence of the norm.

2. The Evidence With Respect to the Separate Rate Test

163. As demonstrated above, the evidence proffered by China to establish the alleged norm of general and prospective application is broadly deficient. However, it is relatively clear at least that China submits this evidence in support of finding the first element of its alleged Single Presumption Norm. Specifically, in response to Panel Question 30, China has identified this evidence as addressing the same attribute of the Single Rate Presumption that was at issue in *US – Shrimp II (Viet Nam)*. But as China implicitly concedes in that question 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 (at least) two elements, the latter involving a Separate Rate Test. However, China has not identified in its submissions what, if any evidence, China is putting forward to establish the general and prospective nature of this second element. Because China cannot prove the scope of its own alleged norm, then that norm cannot be sustained for the purposes of this dispute.

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

164. In its first written submission, China proffers the following description of an alleged unwritten measure, which China calls the Use of Adverse Facts Available Norm ("Adverse Facts Available Norm"):

> Under this norm, whenever USDOC finds non-cooperation by the NME-wide entity, it follows a process that is designed to select *adverse* information, i.e., information resulting in high rates, from amongst the available secondary source information. USDOC does so regardless of the basis for the finding of non-cooperation, which frequently is based on presumptions rather than facts.[274]

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273 Exhibit CHN-12.

274 China's First Written Submission, para. 404 (emphasis original); *see also* China's Opening Statement at the First Panel Meeting, para. 109 ("USDOC systematically selects facts that are adverse to the interests of the fictional

This statement highlights three critical defects with China's arguments regarding the supposed existence of an "Adverse Facts Available Norm."

165. First, China itself uses the term "whenever" in describing the norm. China thus appears to acknowledge that the prior analysis of panels and the Appellate Body is that the norm must "invariably apply." Yet, China has failed to demonstrate that the norm applies invariably. Indeed, it is telling that in describing one aspect of the norm, China appears to acknowledge derogation:

> {P}ursuant to the norm, USDOC selects adverse facts from the universe of secondary source information on the basis of the "procedural circumstance"[275] of non-cooperation alone – a circumstance that is, moreover, <u>frequently</u> based on *presumption* rather than fact.[276]

Thus, while China recognizes at the outset that a norm must apply "whenever," its own description of the purported norm is lacking in that regard.

166. Second, China has failed to specify what constitutes "adverse information" or "adverse facts." As the United States has explained, information is simply that: information. For example, the price an exporter charges for a particular good is not adverse or favorable; it is simply the price. When the necessary information is missing – in this example, the relevant exporter's pricing data – an investigating authority must choose from among other record information and must of course make an inference in selecting among such information.[277] Notably, China asserts that it is not challenging the ability of an investigating authority to make such an inference,[278] but claims that the investigating authority may not select "adverse" information.

167. China's position is circular, and without logical foundation. In the absence of necessary data, whether other data are "adverse" or not is unknowable. Indeed, whatever replacement data is selected, it is possible that a comparison with the (unknown) actual data would reveal that the replacement data has led to margins that were either *higher or lower* than the margins that would have resulted from use of the (unknown) actual data. In short, China has failed to explain how "adverse information" could be identified and constitute part of a so-called norm of selecting such "adverse information." As demonstrated below, the failure of China to provide such specification renders the alleged norm too imprecise to sustain.

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entity and all of the respondents grouped into it. China refers to this as the "Use of Adverse Facts Available" norm.").

275 *US – Carbon Steel (India)*, para. 4.422.

276 China's First Written Submission, para. 640 (emphasis added).

277 U.S. First Written Submission para. 458.

278 China's First Written Submission, para. 399.

168. Third, China's reference to the "process" employed by USDOC is problematic.[279] The term "process" is of course exceptionally – and unreasonably – broad. China has failed to identify the discrete conduct that is required by the alleged norm, other than to claim it leads to the already uncertain notion of "adverse facts."[280] Indeed, the fact that one of China's principal pieces of evidence in favor of the existence of this alleged norm is simply a tabulation of rates afforded to the China-government entity illustrates that China's issue is not with any particular conduct, but simply with the outcome of certain determinations.[281]

169. In considering these deficiencies, the United States reiterates that the Appellate Body has explained that a party seeking to prove the existence of an unwritten norm of general and prospective application must establish the "precise content" of that norm.[282] Accordingly, a party's whose identification of the content of an alleged norm leaves ambiguity and uncertainty has failed to carry its burden of demonstrating "precise content." Here, China was required under the Working Procedures to present in its first written submission "the facts of the case and its arguments"[283] – and thus set forth in that submission the precise content of the alleged norm. As was evident from some of the Panel's Advance Questions,[284] China's articulation of the purported Adverse Facts Available norm was not precise, but rather ambiguous as to critical aspects as to what constituted the alleged conduct by USDOC. Since then, China has submitted a visual aid to try and substantiate the content of its purported Adverse Facts Available Norm for the Panel. China's failure to articulate the content of the alleged Adverse Facts Available Norm in its first written submission is sufficient for the Panel to find that China did not make out a *prima facie* case related to the purported norm. However, as demonstrated below, even in light of the subsequent "visual aid" and China's responses to the Panel's questions, China has not established the precise content of the norm.

1. China Still Has Not Articulated What Constitutes an "Adverse Fact"

170. In the section of its first written submission that purports to set forth the precise content of the Adverse Facts Available Norm,[285] China states repeatedly that the alleged norm concerns

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279 *See also* China's Opening Statement at the First Panel Meeting, para. 110 ("However, pursuant to the Use of Adverse Facts Available norm, USDOC follows a process designed to select facts that are *adverse* to the NME-wide entity and the respondents included within it.")

280 China's Opening Statement at the First Panel Meeting, para. 117 ("By choosing *adverse facts* and not the *best* facts, USDOC's process runs counter to Article 6.8 and Annex II.") (emphasis original).

281 See Annex 4 to China's First Written Submission.

282 *US – Zeroing (AB)*, para. 198.

283 Working Procedures, para. 6.

284 Panel Advance Question 28 ("Could China please explain how it describes the notion of "adverse facts available"? In particular, how does one determine if a certain fact used as facts available is "adverse" to the interests of the exporter concerned? What would be the appropriate point of comparison in this regard? …").

285 China's First Written Submission, paras. 436-442.

USDOC's use of "adverse facts."[286] But nowhere in that section, or elsewhere in its first written submission, does China actually set forth what actually constitutes an "adverse fact." China does not remedy this deficiency in any of its subsequent submissions, including in its oral statements, its provision of visual aids concerning the Adverse Facts Available Norm, or its responses to the Panel Questions.

171. China's response to Panel Question 65, which specifically asks China to elucidate on how one determines whether a fact is adverse, is telling. Rather than plainly state what criteria turn a fact adverse or not, China sidesteps the question by asserting that USDOC "itself describes it selection process as one that aims to find 'adverse' facts available."[287] China cannot try to sidestep this issue because it carries the burden of establishing the precise content of the norm; it cannot try to place it upon the United States to try and infer what China's complaint may be.

172. Moreover, this assertion is misplaced because the United States has no notion of what would constitute "adverse information" of the type China references in its submission.[288] As the United States has explained, the term "adverse facts available" under U.S. law is simply a descriptor that under the relevant U.S. statute, USDOC may use "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[289] This proposition is wholly unremarkable and indeed a reflection of the last sentence of paragraph 7, Annex II of the AD Agreement. Indeed, based on China's first written submission, it appears China has no concern with the fact that an investigating authority may employ adverse inferences.[290] Nor could it. The Appellate Body has found such inferences are indeed an inherent task for investigating authorities and that the U.S. instruments that authorize such inferences to be consistent with the United States' WTO obligations.[291] Thus, China's articulation of "adverse facts" is impermissibly vague in trying to ascertain the content of the purported norm – and thus precludes a finding that it in fact even exists.

2. China Still Has Not Articulated What Conduct by USDOC is Part of the Alleged Norm

173. China's subsequent responses to the Panel Questions do not provide any further clarification as to the precise conduct that constitutes the alleged norm. Specifically, China makes the following statements in response to Panel Question 64:

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286 *See e.g.*, China's First Written Submission, para. 432 ("The Use of Adverse Facts Available norm is based on the framework in US domestic law which regulates the use of facts available and *adverse* facts available for producers/exporters in US anti-dumping proceedings").

287 China's Response to Panel Question 65, para. 346.

288 China's First Written Submission, para. 448.

289 *See* United States' Response to Panel Question 66.

290 China's First Written Submission, para. 399.

291 *US- Carbon Steel (India) (AB)*, para. 4.469.

> [1] … China notes that the question whether or not USDOC successfully corroborates an originally-selected facts available rate is not, in China's view, relevant to determining whether the Use of Adverse Facts Available norm is WTO-inconsistent.[292]
>
> [2] … China notes that the question whether or not the record in any sampled determination contained more than one rate is not, in China's view, relevant to determining whether the Use of Adverse Facts Available norm is WTO-inconsistent.[293]

In short, China, per its first written submission, complains generically of a "process" employed by USDOC in selecting information,[294] but, as clarified in its response to the Panel's Question, this process does not encompass the specific mechanism by which USDOC determines the information to use and is not concerned with what available information may be on the record that could be selected. Under these circumstances, it is impossible to envision any conduct that relates to the selection of information, supposedly adverse or not, that falls with China's alleged norm.

174. The visual aid proffered by China provide no further insight. First, the United States understands Visual Aid NME3 to address how the Panel could find for China in the event that the Panel found a norm to exist or not.[295] As an initial matter, China's claim is predicated on the existence of the Adverse Facts Available norm. Its absence defeats China's claim. China cannot at this stage claim the Panel can otherwise examine the consistency of the determinations with Article 6.8 and Annex III. Critically though, missing in this visual aid is any indicia as to the substance of the norm itself. Indeed, the left side of the flowchart, which the United States understands to apply in the event the alleged norm exists, presents three purported arguments:

- Argument 1: Does USDOC, as a result of the Use of Adverse Facts Available norm, select adverse facts rather than undertaking a process to select reasonable replacements for missing facts using the best information available in order to render an accurate determination?

- Argument 2: Does USDOC, as a result of the Use of Adverse Facts Available norm, select a facts available rate for NME-wide entities based on the (frequently presumed) procedural circumstance of non-cooperation alone?

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292 China's Response to Panel Question 64(a), para. 316.

293 China's Response to Panel Question 64(b), para. 321.

294 *See e.g.*, China's Opening Statement at the First Panel Meeting, para. 110.

295 Exhibit CHN-496.

- Argument 3: Does USDOC, as a result of the Use of Adverse Facts Available norm, select Adverse Facts Available in circumstances when it has not requested the necessary information?[296]

Missing from each and every argument[297] is any guidance as to what conduct actually comprises the Adverse Facts Available norm. China's failure to relate back these arguments to the substance of the norm only further illustrates that China's concern rests not with conduct, but with rates it finds unfavorable. Accordingly, China has failed to clearly establish the precise content of the alleged Adverse Facts Available Norm.

175. Furthermore, as discussed in detail below in Section IX, China's second and third "arguments" appear related to USDOC's *resort to facts available*, not simply the *selection of facts available*, which, China purports, is the subject of the alleged Adverse Facts Available norm. The fact that China's claims and arguments with respect to the alleged Use of Adverse Facts Available norm consistently confuse these two separate and distinct actions (*i.e.*, the finding of non-cooperation which is the trigger condition for the alleged norm, and the subsequent norm), further demonstrates China's failure to identify with the requisite precision and clarity the content and scope of the alleged norm.[298]

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

176. As discussed above, China's failure to identify the precise content of the alleged Adverse Facts Available norm precludes a finding that it even exists. In any event, the United States also explained in its first written submission why China could not establish the existence of an alleged Adverse Facts Available Norm with general and prospective application and continues to reference those arguments.[299] In addition, here the United States will respond to one argument made in China's Response to Panel Question 66 concerning the Antidumping Manual. The United States explained above, with respect to the alleged Single Rate Presumption, why the Antidumping Manual is not valid evidence in support of the existence of a norm.[300] The statements in the Antidumping Manual referenced by China with respect to the purported Adverse Facts Available Norm are unpersuasive for similar reasons. Specifically, China argues

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296 *Id.*

297 As discussed in the United States' response to panel questions, although China refers to these claims as "arguments", these claims are not an analysis or demonstration of why particular provisions have been breached, *i.e.*, arguments, but rather, these are claims broadly asserting that Article 6.8 and Annex II of the AD Agreement have been breached by the United States. *See* United States' Response to Panel Questions, paras. 185-187.

298 *See* U.S. First Written Submission paras. 417-419, 493-502; United States' Response to Panel Questions, paras. 185-194.

299 U.S. First Written Submission, paras. 410-419.

300 *See* Section IV.A.1.b.

that the following statements support China's contentions that USDOC "seeks out and selects *adverse* facts when it deems an NME-wide entity to be non-cooperative."[301]

- "[I]f, for example, some exporters that are part of the NME-wide entity do not respond to the antidumping questionnaire", [then adverse facts available will be used.]

- "In many cases, the Department concludes that some part of the NME-wide entity has not cooperated in the proceeding because those that have responded do not account for all imports of subject merchandise".

- "Occasionally, the NME-wide rate may be changed through an administrative review. This happens when 1) the Department is reviewing the NME entity because the Department is reviewing an exporter that is part of the NME entity, and 2) one of the calculated margins for a respondent is higher than the current NME-wide rate."

On the very face of these statements, the United States does not understand how China can assert that they are a basis to claim that USDOC "seeks" adverse facts. In any event, as the United States has explained, the term "adverse facts available" in the U.S. domestic legal system does not mean that USDOC is seeking purportedly "adverse information," but may use an adverse inference in selecting from among the different evidence on the record. The statements do not speak – at all – 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 that invariably will lead to certain conduct. Thus, China still has failed to demonstrate that the alleged Adverse Facts Available norm has general and prospective application.

177. Thus, China's alleged norms of general and prospective application cannot be established. China's evidence does not meet the high burden of establishing that either the Single Rate Presumption norm or Adverse Facts Available norm has general and prospective effect, which would require evidence showing the norm would be applied invariably in particular circumstances. And with respect to the Adverse Facts Available norm, China, despite repeated attempts, has failed to specify the precise content of the norm. Accordingly, China's failure to properly establish the measures precludes any findings concerning them.

[301] China's Responses to the Panel's First Set of Questions, para. 410.

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"[302]

A. Introduction

178. As demonstrated above, China has not established that the alleged Single Rate Presumption is a rule or norm of general and prospective application.[303] China's failure to establish the existence of the alleged measure precludes any findings concerning the purported Single Rate Presumption. But even aside from China's failure to demonstrate that the measure exists, China has also failed to establish that the alleged Single Rate Presumption breaches any obligations under the AD Agreement. In particular, China's arguments are misplaced for three reasons.

179. *First*, China's arguments continue to ignore that an investigating authority may, consistent with the AD Agreement, treat nominally distinct legal entities as a single exporter, where appropriate.[304] Instead, China's arguments rest on an incorrect premise that the Panel must evaluate whether USDOC's actions with respect to each individual company within the China-government entity is consistent with Articles 6.10 and 9.2 of the AD Agreement. That is the wrong frame of reference, focusing on USDOC's purported treatment of separate components that make up a whole (*i.e.*, the exporters that comprise the China-government entity) rather than focusing on USDOC's treatment of the whole, in the aggregate. Consistent with Articles 6.10 and 9.2 of the AD Agreement, USDOC treats the China-government entity *itself* as a "known exporter or producer" and the named "supplier … of the product concerned" , and thus assigns a single rate to the entity. Thus, the Panel should not evaluate USDOC's actions with respect to the legally-distinct companies within the China-government entity because USDOC considered these companies to be part of the China-government entity and treated them accordingly under Articles 6.10 and 9.2. Nor has China presented any argument that the rate assigned to the China-government entity is inconsistent with Articles 6.10 and 9.2.

180. *Second*, China has failed to put forward a *prima facie* case. Specifically, China has failed to demonstrate through argumentation and evidence how the alleged Single Rate Presumption precluded (or would preclude) any individual producers/exporters who are grouped within the

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302 China argues that USDOC applied the alleged Single Rate Presumption in the six new challenged determinations "for the reasons identified in China's First Written Submission": (1) Diamond Sawblades AR4, (2) Furniture AR9, (3) PET Film AR5, (4) Solar AR1, (5) Tires AR5, and (6) Wood Flooring AR2. *See* China's Response to Panel Questions, paras. 6-8. As discussed in the United States' Response to Panel Question 3 and above in Section III, the United States objects to China's inclusion of these new challenged determinations because such determinations are outside of the panel's terms of reference. However, to the extent the Panel finds that China's Article 6.10 and 9.2 claims with respect to these six new challenged determinations are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

303 *See* Section IV.A above.

304 *EC – Fasteners (AB)*, paras. 376, 382; *Korea – Certain Paper*, para. 7.161 ("Thus, we consider that, when read in context, Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations.")

entity from receiving an individual margin of dumping. Instead, China has simply tried to argue that the present dispute is precisely the same as *EC – Fasteners* and *US – Shrimp II (Viet Nam)* and on that basis alone compels the same result.[305] The United States has repeatedly explained why the Panel as a legal matter may not simply import findings from another dispute to resolve the present one.[306] And the facts of the present dispute are different, including that the USDOC's Separate Rate Application explicitly addresses the relationship between Chinese firms and the Chinese government. Thus the analysis in those disputes is inapposite.

181. *Finally*, to the extent the Panel finds that the analyses in *EC – Fasteners* and *US – Shrimp II (Viet Nam)* address similar issues, the United States has explained why the analysis in each of those disputes is misplaced and should not be extended any further. China, rather than try to engage with the deficiencies in the analysis, continues to simply parrot them without any elucidation as to why the analysis is correct and persuasive.

B. China's Arguments With Respect To Articles 6.10 And 9.2 Of The AD Agreement Fail to Address That USDOC May Treat Nominally Distinct Respondents as a Single Entity

182. As the United States has explained in prior submissions, China's claims fail to recognize that the critical issue in the provisions that it invokes is that not every legal entity is necessarily a distinct exporter or producer under the AD Agreement. To the contrary, where warranted, these provisions permit investigating authorities to treat the export activity of multiple companies as the pricing behavior of a single entity.[307] Therefore, China's arguments that the companies within the China-government entity were denied an individual margin in accordance with Article 6.10 or the appropriate duty in accordance with Article 9.2[308] are misplaced because they ignore the fundamental reality that these companies were considered part of the same single China-government entity, and the entity was determined to be the "known" exporter or producer, and was named. As China has made clear in its response to panel questions, China's challenge is narrowed specifically to its claim that "each of the respondents included within the PRC-wide entity is an 'exporter or producer' in the sense of provisions such as Articles 6.10 and 9.4."[309]

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[305] *See e.g.*, China's First Oral Opening Statement, paras. 90-93, 93 ("The Panel should follow the approach in *EC –Fasteners* and *US – Shrimp II (Viet Nam)* and dismiss the United States' attempt to create exceptions to the requirement to determine individual rates for Chinese respondents that find no support in the covered agreements.")

[306] *See e.g.*, U.S. Reponses to the Panel's First Set of Questions (Question 30(c)), para. 61.

[307] *See* U.S. First Written Submission Section V.D; U.S. Reponses to the Panel's First Set of Questions, paras. 88-96, 101.

[308] *See, e.g.*, China's Response to Panel Questions, para. 145 ("The Single Rate Presumption violates Article 6.10 because USDOC does not determine an individual margin of dumping for each of the known producers/exporters who are grouped into the single NME-wide entity by means of the presumption.")

[309] *See id.*, para. 296; *see also id.*, para. 297 (clarifying that any of its arguments and references with respect to the "'PRC-wide entity' can also be generally understood as references to the individual respondents included within that fictional entity.")

Thus, China makes no arguments – at all – that the margin and duty assigned to the *China-government entity* is inconsistent with Articles 6.10 and 9.2.[310]

183. But in asking the Panel to evaluate whether individual companies were denied their rights pursuant to Articles 6.10 and 9.2, China is posing the wrong question. The relevant inquiry is whether the rate assigned to the China-government entity is consistent with Articles 6.10 and 9.2. Under this proper evaluation, 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.

184. Indeed, the Appellate Body in *EC – Fasteners* expressly found that a single rate could be determined for certain exporters provided circumstances for such treatment existed, and that the resulting rate for the entity could be properly evaluated pursuant to Articles 6.10 and 9.2:

> In our view, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* do not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*.[311]

The logical corollary of this finding is that 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 pursuant to Articles 6.10 and 9.2.

185. Thus, China's attempts to rely on *EC – Fasteners*[312] to avoid this interpretation is misplaced because it ignores the Appellate Body's ultimate conclusion in that case that "if the State instructs or materially influences the behavior of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single margin and duty could be assigned to that single exporter."[313] Thus, according to the Appellate Body, and contrary to China's argument, neither Article 6.10 nor Article 9.2 "preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter."[314]

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310 *See, e.g.*, China's Opening Statement at the First Panel Meeting, para. 73 ("{T}here is no dispute that…an individual rate was determined for the PRC-wide entity in all challenged investigations and most challenged reviews.")

311 *EC – Fasteners (AB)*, para. 376 (emphasis added).

312 China's First Written Submission, para. 359 (citing *EC – Fasteners (AB)*, para. 339).

313 *EC – Fasteners (AB)*, para. 376.

314 *Id.*

C. 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

186. China claims that the alleged Single Rate Presumption applies in all cases, investigations and reviews, involving nonmarket economy (NME) countries, including the 32 challenged proceedings, USDOC's application of the alleged Single Rate Presumption is inconsistent with Articles 6.10 and 9.2. For instance, China contends that:

> [t]he Single Rate Presumption violates Article 6.10 because USDOC does not determine an individual margin of dumping for each of the known producers/exporters who are grouped into the single NME-wide entity by means of the presumption. Instead, in order to qualify for an individual margin, all producers/exporters from China, or any other country deemed to be an NME by USDOC, must rebut the presumption that they are part of the single NME-wide entity by demonstrating that they satisfy USDOC's Separate Rate Test.[315]

But China does not explain for those cases in which the China-government entity is not under review (Shrimp AR9, Tires AR3, OCTG AR1, Retail Bags AR4, PET Film AR3, and PET Film AR4),[316] how the alleged Single Rate Presumption precludes individual producers/exporters who are grouped within the entity from receiving an individual margin of dumping.[317] Aside from its cursory statement that its claims extend to "those reviews where the PRC-wide entity itself was not subject to review",[318] China has not demonstrated how in these specific circumstances the application of the alleged Single Rate Presumption results in a breach of the United States' obligations under Articles 6.10 and 9.2.

187. Nor does China establish that:

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315 *See* China's Response to Panel Questions, para. 145 (emphasis added).

316 In two (PET Film AR5 and Furniture AR9) of the six new challenged determinations raised by China at the panel hearing, the China-government entity was not under review.

317 *See* China's Response to Panel Question 44, in which China purports to review "the relevant language and findings of each of the 38 (32+6) challenged determinations" but fails to identify the relevant language and findings of Shrimp AR9, Tires AR3, OCTG AR1, Retail Bags AR4, PET Film AR3, and PET Film AR4 (as well as PET Film AR5 and Furniture AR9). Nor do the excerpts in China's Table SRP of Annex II to China's First Written Submission identify the relevant language and findings of these reviews. *See* United States' Response to Panel Questions, paras. 113-114, 118-119 (citing Exhibit CHN-476 and Exhibit CHN-476 (revised)).

318 *See* China's First Written Submission, para. 379. China's accompanying footnote to this statement incorrectly states that "{i}n all the challenged reviews, except for Shrimp AR9, USDOC considered the PRC-wide entity to be subject to review and thus, determined a dumping rate for the PRC-wide entity, whenever a company for which a review was requested did not qualify for a separate rate." *Id.*, fn 420.

> [b]ased on the Single Rate Presumption, USDOC, *in each determination*, included all Chinese producers/exporters that failed to satisfy the Separate Rate Test in a fictional PRC-wide entity. *In each of the challenged determinations* the single dumping rate assigned to all producers/exporters within this fictional entity was different from (and higher than) the rate determined for the non-individually investigated separate rate respondents.[319]

To do so would require China to actually engage with the record evidence in each of those proceedings and tie the evidence to its arguments. China has not done so.

188. China also does not explain how in these reviews "{t}he Single Rate Presumption violates Article 9.2 because USDOC does not name each of the exporters/producers that are grouped into the single NME-wide entity for purposes of imposing anti-dumping duties and thereby fails to apply to them individual duties and duties in the appropriate amounts."[320] Thus, China does not, because it cannot, establish that in these reviews in which the China-government entity was not under review the alleged Single Rate Presumption is inconsistent with Articles 6.10 and 9.2.

189. Moreover, although China recognizes USDOC's change in practice in which the China-government entity is no longer subject to review absent a specific request or upon USDOC's self-initiation,[321] China does not explain how the application of the alleged Single Rate Presumption results in an as such inconsistency with Articles 6.10 and 9.2 in light of this change in practice.

190. Additionally, as discussed in the United States' first written submission, 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. In particular, China has not shown that the alleged single rate presumption, if applied in investigations, results in an inconsistency with Article 9.2, nor has China addressed the United States' specific arguments on this issue.[322] Therefore, the Panel should find that China has not established its *prima facie case* that the alleged Single Rate Presumption is inconsistent with Article 9.2 in these challenged investigations.

191. In considering this point, it bears emphasis that China has not addressed U.S. arguments concerning USDOC's Separate Rate Application and Separate Rate Certification. Specifically, as noted in the U.S. first written submission and its response to Panel Question 32, USDOC asks a company to provide information that goes to whether the company's export activities are controlled by the Chinese Government.[323] The questions asked by USDOC go to factors that the

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319 *See* China's First Written Submission, para. 345.

320 *See* China's Response to Panel Questions, para. 146.

321 *See* China's First Written Submission, para 379, fn 420.

322 *See* U.S. First Written Submission paras. 358-360.

323 U.S. First Written Submission paras. 382-383.

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." In other words, China's arguments – and its reliance on *EC – Fasteners* – is misplaced for at least two reasons.

192. First, in light of the application and certification, China's failure to put forward the requisite evidence means that is unclear whether evidence gathered from the Single Rate Test was relied upon, and not any presumption. 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.[324] China bears the burden of proving otherwise. Second, China does not address whether the very existence of a proper mechanism to ascertain state control over a firm's export activities may in turn justify a presumption for a party that fails to utilize the mechanism. In other words, considering there is a valid mechanism by which respondents independent of the Chinese government can demonstrate their independence, China has failed to address why an investigating authority is precluded from making an inference of a lack of independence when an enterprise declines to avail itself of a mechanism to demonstrate its independence.

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

193. China continues to rely principally on *EC – Fasteners* and *US – Shrimp II (Viet Nam)* to argue that USDOC has no basis for its treatment of Chinese firms as part of a China-government entity. As explained above, this reliance is misplaced because the factual circumstances – such as USDOC's Separate Rate Application and Separate Rate Certification – are materially different than the IT Test that was found inconsistent with the EU's obligations in *EC – Fasteners*.

194. In any event, the United States has already explained why the analysis is *EC – Fasteners* and *US – Shrimp II (Viet Nam)* is misplaced because China's Accession Protocol and the Working Party Report provide both a legal and factual basis for USDOC's treatment of Chinese companies.[325] China's arguments to the contrary are unconvincing.

195. 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. In particular, the United States has shown that Paragraph 15 of the Protocol, which supports USDOC's decision to calculate normal value based on an NME methodology, cannot be read in a vacuum. Rather, Paragraph 15, 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. These same provisions likewise provide the basis for USDOC's understanding that the GOC exerts

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[324] *See generally* U.S. Response to Panel Question 36.

[325] *See e.g.*, U.S. Reponses to the Panel's First Set of Questions (Question 40), paras. 106-110.

control or material influence over export price and output decisions of companies within China.[326]

196. For instance, as discussed in the U.S. first written submission, during the accession process, Members expressed concerns in the Working Party Report about how the fact that China had not yet transitioned to a market economy would affect the conduct of antidumping and countervailing duty investigations and the application of the AD and SCM Agreement.[327] As a result, the Working Party Report as incorporated into China's Accession Protocol allows Members to calculate the normal value for the like product destined for consumption in China based on a NME methodology through Paragraph 15. However, it would be incorrect to assume that the concerns raised by Members with respect to the impact of the Chinese government on its economy began and ended with the determination of cost and price comparability. Such a reading would ignore the descriptions of China's economy in the Working Party Report which indicated that China *planned* to develop an economy where the State continued to play a predominant role.[328] This would also disregard Members' expressed concerns about the significant level of influence of the Government of China on its economy and how such influence could affect trade remedy proceedings, not just with respect to cost and price comparisons in antidumping duty proceedings,[329] but beyond.[330]

197. To date, China has addressed only the relevance of Paragraph 15 of the Protocol, and limits its arguments to the plain meaning of that provision, without addressing the relevance of the provision in its proper context, and in light of relevant provisions of the Working Party

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326 *See* U.S. First Written Submission Section V.1.c; U.S. Reponses to the Panel's First Set of Questions, paras. 89, 103, 106-110.

327 *See* Working Party Report, para. 150 (Exhibit USA-34) ("Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.")

328 *See, e.g.*, *id.*, paras. 171-176 (Exhibit USA-34).

329 *See, e.g.*, *id.*, paras. 147-152 (Exhibit USA-34).

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

Report noted above.[331] In this respect, China again relies on the Appellate Body's findings in *EC – Fasteners*, which also just focused on Paragraph 15 of the Protocol, and the panel's findings in *US – Shrimp II (Viet Nam)*, in which the panel reviewed a different Member's accession documents.[332] But as the United States has demonstrated, those disputes are inapposite here as they involve not only different facts (including non-identical measures), but differing legal arguments as well.[333] Moreover, to the extent China argues that these distinctions do not limit the applicability of the legal conclusions of the Appellate Body in *EC – Fasteners* and the *US – Shrimp II (Viet Nam)* panel to the instant dispute, the United States has demonstrated that those conclusions appear to result in irreconcilable discrepancies which call into question the persuasiveness of extending any analysis from those decisions into the instant dispute.[334]

198. The United States draws the Panel's attention to one point in particular: By deciding to disregard the Accession Protocol (and by apparently not even considering the Working Party Report) as support for the European Union's measure, the Appellate Body in *EC – Fasteners* adopted the seemingly untenable position that there are *no* factual circumstances that could establish the basis for a presumption, because – according to the Appellate Body – the presumption, in the first instance, must have legal underpinnings in the Agreement. But this finding is called into question by the Appellate Body's acknowledgment that the economic structure of a Member may establish that the State and certain companies are sufficiently related to constitute a single entity. Under this interpretation, where, as here, there is a factual predicate (the Accession Protocol and Working Party Report) for such a presumption with respect to China, the Appellate Body's finding must equally apply.

199. Thus, contrary to China's arguments,[335] the United States has demonstrated that there is not just a legal basis, but a factual basis for the presumption as well. Indeed, aside from the Protocol and Working Party Report, cases such as *Tires AR5* and *Diamond Sawblades AR4* which are discussed in further detail below demonstrate that the presumption is not without grounding in fact, considering USDOC's findings in those cases that certain companies were indeed subject to control of the Chinese government in their export activities.

200. In sum, the United States has demonstrated that there exists a legal and factual basis for its treatment of Chinese companies, and China has failed to provide any argument or evidence,

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331 *See* China's Responses to the Panel's First Set of Questions, paras. 177-184.

332 *See id.*, paras. 180-182.

333 *See* U.S. Reponses to the Panel's First Set of Questions, paras. 57, 61-69, 97-105. China fails to address key differences between the measures at issue in *EC – Fasteners* and the instant dispute. *Compare* U.S. Reponses to the Panel's First Set of Questions, paras. 97-105 *with* China's Responses to the Panel's First Set of Questions, paras. 172-173.

334 *See id.*, paras. 106-110.

335 *See* China's Responses to the Panel's First Set of Questions, para. 295 ("In China's view, the "PRC-wide entity" is a fictional entity whose existence is presumed by USDOC without factual basis.")

beyond its wholesale adoption of *EC – Fasteners* and the *US – Shrimp II (Viet Nam)*, that such treatment is inconsistent with Articles 6.10 and 9.2 the AD Agreement.

VI. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

201. Put plainly, China's arguments fail for one simple reason. 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 determinations 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, and did not receive a rate, China has not explained how Article 9.4 is implicated. Nor has China explained, for those few determinations in which USDOC assigned the China-government entity a rate from a previous proceeding, how Article 9.4 is implicated. The United States explains this more fulsomely below.

202. As an initial matter, it is important to recall the exact structure and scope of the relevant AD provisions that are implicated by China's Article 9.4 claims, before turning to China's claims. First, the first sentence of Article 6.10 provides that the investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation{,}" unless the investigating authority has limited its examination within the meaning of the second sentence of Article 6.10. This examination may be limited based on either (1) a reasonable number of interested parties or products through the use of sampling, or (2) the largest percentage of the volume of exports which can reasonably be investigated. The United States refers to the result of either of these methods as limiting examination (as opposed to "sampling").[336]

203. As discussed in the U.S. first written submission and the response to Panel questions, when the investigating authority has limited its examination pursuant to Article 6.10 second sentence, Article 9.4 provides that "any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed the weighted average margin of dumping established with respect to the selected exporters or producers." Both China and the United States refer to this as the "first obligation"[337] which provides for a "ceiling" or maximum limit on the rate to be applied to those exporters or producers that have not been included in the examination.[338] China argues that in the 26 challenged determinations USDOC acted inconsistently with Article 9.4's first obligation in assigning a rate to the China-government entity, and/or its constituent members, based on facts available, which was higher than the rate

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[336] *See also* United States' Response to Panel Questions, para. 125 (clarifying the Panel's use of the term "sampling").

[337] *See* China's First Written Submission, para. 364 ("The *first* obligation concerns the ceiling rate for the level of duties that may be applied to non-selected exporters or producers.) (emphasis in original); United States' Response to Panel Questions, para. 131.

[338] *See* U.S. First Written Submission paras. 396-398 (citing *US – Hot-Rolled Steel (AB)*, para. 116 and *US – Zeroing (EC) (21.5) (AB)*, paras. 449, 451-453, 459).

assigned to the cooperative companies that were not included in the examination but that received a rate separate from the China-government entity.[339]

204. Next, the second sentence of Article 9.4 requires:

> The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

Both China and the United States refer to this as the "second obligation".[340] Importantly, in order for this obligation to arise, the prerequisite conditions of Article 6.10.2 must be met:

> In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

China argues that the alleged Single Rate Presumption is both as such and as applied in 32 challenged proceedings inconsistent with Article 9.4's second obligation. In particular, China argues that the alleged Single Rate Presumption is "as such" inconsistent with Article 9.4 because it "*precludes* a producer/exporter included within the NME-wide entity from benefiting from an individual rate, even where the producer/exporter *provides* the necessary information described in the final sentence of Article 9.4 and where the number of exporters or producers is not so large that individual examinations would be unduly burdensome on the authorities and would prevent timely completion of the investigation, in the sense of Article 6.10.2."[341]

205. Before addressing China's specific claims with respect to the two obligations under Article 9.4, the United States addresses certain overarching issues.

206. First, an important threshold question for China's Article 9.4 claims is whether the China-government entity was "not included in the examination". If the Panel finds that the

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339 China's First Written Submission, para. 364 ("The *first* obligation concerns the ceiling rate for the level of duties that may be applied to non-selected exporters or producers. This obligation is discussed further below in connection with China's claims regarding application of the NME-wide methodology in various segments of the 13 challenged proceedings.") (emphasis in original).

340 *See* China's First Written Submission, para. 365 ("*Second*, the final sentence of Article 9.4 establishes an obligation to apply individual duties to any non-sampled producer/exporter "who has provided the necessary information" for calculation of an individual margin of dumping as contemplated by Article 6.10.2.") (emphasis in original); United States' Response to Panel Questions, para. 132.

341 China's First Written Submission, para. 385 (emphasis in the original).

China-government entity was included in the examination in a given instance, then China's Article 9.4 claims must fail. The United States discusses the implications of this finding in further detail below with respect to each of China's Article 9.4 claims, but suffice it to say, the United States agrees with China that whether the China-government entity is included in the examination or not is a fact-specific inquiry that must be established for each of the challenged determinations.[342] To the extent China continues to argue that it does not have to establish these facts, but rather, it is the task of the Panel to make the "legal characterization" of whether the China-government entity is included in the examination on its own initiative,[343] the United States disagrees.[344]

207. Second, China appears to continue to confuse the concepts of the treatment of the separate components that make up a whole (*i.e.*, the exporters that comprise the China-government entity) rather than focusing on the treatment of the whole China-government entity, in the aggregate. For instance, with respect to the *second obligation*, China alleges that the Single Rate Presumption prevents individual exporters within the China-government entity from receiving their rightful rate because those exporters that would meet the requirements of Article 6.10.2 and 9.4 second sentence would not receive an individual rate unless additional conditions are met.[345] Under this claim, according to China, it is immaterial whether the China-government entity *itself* was subject to individual examination within the meaning of Article 9.4.[346] But that is the wrong frame of reference; as China is well-aware, USDOC treats the China-government entity itself as the exporter at issue and assigns a single rate to the entity. Thus, as the United States explained above, China's claims with respect to the Single Rate Presumption under Article 9.4, like its claims under Article 6.10 and 9.2, do not reflect the reality of USDOC's determinations, which examined the China-government entity, and not the individual

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342 *See* e.g., China's Responses to the Panel's First Set of Questions, paras. 260, 860-869.

343 *See* China's Opening Statement, para. 128 ("{T}he question whether the PRC-wide entity was 'not included in the examination' in the sense of Article 9.4 *is a matter of legal characterization to be resolved by the Panel* by applying that provision of the Agreement to the facts of each challenged determination.") (emphasis added); *id.*, para. 131 ("*[T]o the extent the Panel finds*, in relation to any relevant challenged determination, that the PRC-wide entity was not individually examined, the rates selected for the PRC-wide entity are subject to the discipline of Article 9.4.") (emphasis added).

344 *See* U.S. Reponses to the Panel's First Set of Questions, para. 129 (quoting China's Opening Statement, para. 131).

345 *See* China's Responses to the Panel's First Set of Questions, para. 259 ("China's claim under Article 9.4 against the Single Rate Presumption, as such, relates to the fact that USDOC will not examine the distinct respondents included in the fictional entity that are not selected as mandatory respondents, even if they submit voluntary responses, unless additional conditions are met.")

346 *See* China's Responses to the Panel's First Set of Questions, para. 259 ("The claim does not turn on whether or not the fictional entity *itself* was subject to individual examination.") (emphasis in original); *id.*, para. 266 ("As explained in response to Panel Question 46, the question as to whether the *PRC-wide entity* has been 'sampled' or otherwise 'included in the examination' is of limited relevance for China's claims against the Single Rate Presumption under Article 9.4 of the *Anti-Dumping Agreement*. Instead, with respect to this claim, the relevant question is whether the *individual respondents* included within the PRC-wide entity were included within the 'examination'.")

components of the entity.[347] Therefore, as USDOC correctly considered these companies to be part of the China-government entity and treated them accordingly, there is no basis for the Panel to further evaluate USDOC's actions with respect to the legally-distinct companies within the China-government entity (and whether they appropriately received individual treatment). Indeed, China has not alleged in this proceeding that any specific Chinese respondent was incorrectly included within the China government entity.

208. Furthermore, with respect to the *first obligation* of Article 9.4, at first glance China appears to facially recognize that the Panel should evaluate USDOC's treatment of the China-government entity as a whole, rather than simply evaluating the treatment of the individual companies. However, as discussed in further detail below, although China refers to the China-government entity as a whole, what China is really referring to is that the Panel must evaluate whether each of the individual components of the entity are under examination, before reaching the issue of whether the entity itself is under examination. Again, this is incorrect – although the China-government entity may be under examination by virtue of the treatment of its individual members, the overarching principle is that there is a single rate assigned to the entity, and so the Panel must evaluate whether the entity is under examination (not each of its distinct parts).

209. In any event, according to China, the Panel should first consider whether the China-government entity "was ultimately not 'included in the examination' in the sense of Article 9.4{,}"[348] before turning to the second question of "whether the rate assigned to the PRC-wide entity, and *all* of the respondents deemed to comprise it, complied with the disciplines of Article 9.4." The United States agrees with China that the correct evaluation for the Panel is to first examine whether *the China-government entity as a whole* is "not included in the examination". If the Panel finds that the China-government entity *was included in the examination*, then the Panel will not reach the second question of whether the rate applied to the China-government entity as a whole, or to the individual components of the entity, complies with Article 9.4.

210. Assuming, *arguendo* that the Panel decided to consider and does find that the China-government entity was not included in the examination and the ceiling of Article 9.4 is applicable, then, as discussed above, the appropriate evaluation for the Panel is whether the rate assigned to the China-government entity complies with Article 9.4. Contrary to China's arguments, the rate at issue is assigned to the China-government entity, not the components of that entity as distinct exporters within the entity. Therefore, the Panel would evaluate whether the rate assigned to the entity is consistent with Article 9.4 as that is reflective of USDOC's determinations.

211. Third, an important distinction must be drawn between those companies that form part of the pool of respondents from which USDOC selects companies for individual examination for purposes of the second sentence of Article 6.10, and those companies that have effectively removed themselves from this selection pool by failing to cooperate at the early stage of the proceeding by failing to respond to a request for quantity and value information. As the United

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[347] *See also* Section V.C. above (discussing China's similar claims with respect to the Single Rate Presumption and Articles 6.10 and 9.2).

[348] China's Responses to the Panel's First Set of Questions, para. 869.

States has explained, this information assists USDOC in determining which companies should be selected for individual examination. Thus, as both a legal and practical matter, if the investigating authority seeks quantity and value information from a company related to its task of limiting its examination for purposes of the second sentence of Article 6.10, and that party refuses to provide such requested, necessary information, the investigating authority may make its determination on the basis of facts available pursuant to Article 6.8.

212. Contrary to China's reading of these provisions, where a party has failed to cooperate, it is not entitled to the same rate as a party that did cooperate. The practical result of China's interpretation would mean that there would be no incentive for parties to cooperate at an initial stage of the investigation. For instance, a party that did not wish to risk being selected for individual examination – because, perhaps, it is dumping at a high level – could simply not respond and be guaranteed a rate no higher than that of those companies that did cooperate with the investigation. This would effectively render paragraph 7 of Annex II of the AD Agreement, which explicitly notes that a non-cooperative party could face results less favorable than cooperative parties, a nullity.[349]

213. With these points in mind, we turn now to China's Article 9.4 claims. To follow along with the order in which China raises its claims, we address the second obligation before turning to China's claims with respect to the first obligation.

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

214. As demonstrated above, China has not established that the alleged Single Rate Presumption is a measure which embodies a rule or norm of general and prospective application.[350] Thus, there is no basis to make findings in relation to a measure that does not exist. However, even aside from China's failure to establish the existence of the alleged unwritten measure it has attempted to challenge, China has also failed to demonstrate that USDOC acted inconsistently with Article 9.4. Below, the United States addresses China's "as

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[349] *See China – Broiler Products*, para. 7.306 fn. 501 ("In our view, in the case of a failure by an interested party to provide some initial information necessary for the determination of a producer's margin of dumping, the authority is justified in replacing other information that it cannot collect as a result of that failure, even if it did not specifically request the other information. Such information initially required may include the producer's contact details and information necessary for the authority to decide on sampling."); *US – Shrimp (Viet Nam) I*, para. 7.263 ("Regarding Viet Nam's argument that the Article 6.8 facts available mechanism does not apply in respect of non-selected respondents, we note that the first sentence of Article 6.8 envisages the use of facts available in cases of non-cooperation by "any" interested party. The reference to non-cooperation by "any" interested party suggests that Article 6.8 is of broad application. There is nothing in the text of Article 6.8 to suggest that the facts available mechanism only applies in respect of non-cooperation by a limited category of interested parties. In particular, there is no indication in the text to suggest that, in cases of limited examination (under Article 6.10), Article 6.8 only allows the use of facts available in respect of those interested parties that were selected for individual examination, as alleged by Viet Nam.")

[350] *See* Section III.A. above.

such" claim, as well as its "as applied claims" with respect to the 32 challenged determinations.[351]

215. As discussed above, China's Article 9.4 challenge to the alleged Single Rate Presumption concerns only the second obligation in this provision – "to apply individual duties to any non-sampled producer/exporter 'who has provided the necessary information' for calculation of an individual margin of dumping as contemplated by Article 6.10.2."[352] In particular, China argues that the alleged Single Rate Presumption is "as such" inconsistent with Article 9.4 because it "*precludes* a producer/exporter included within the NME-wide entity from benefiting from an individual rate, even where the producer/exporter *provides* the necessary information described in the final sentence of Article 9.4 and where the number of exporters or producers is not so large that individual examinations would be unduly burdensome on the authorities and would prevent timely completion of the investigation, in the sense of Article 6.10.2."[353]

216. As an initial matter, as discussed above in Section VI, a fundamental flaw in China's as such claim is that, according to China, because of the application of the alleged Single Rate Presumption in all cases, investigations and reviews, involving NME countries, the USDOC acts inconsistently with the second obligation of Article 9.4. Thus, under its own description of the alleged measure, China must show that in all NME cases – no matter the circumstances – the alleged Single Rate Presumption results in an inconsistency with this obligation. But as demonstrated below, China does not, because it cannot, make such a showing.

217. There are two critical defects to China's "as such" claim. First, as discussed above, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. China insists that, for purposes of its as such claims in this respect, it is immaterial whether the China-government entity is included in the examination, because China seeks to challenge not the treatment of the China-government entity, but the treatment of the companies within the China-government entity.[354] As established above, China is wrong when it claims that

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351 China argues that USDOC applied the alleged Single Rate Presumption in the six new challenged determinations "for the reasons identified in China's First Written Submission": (1) Diamond Sawblades AR4, (2) Furniture AR9, (3) PET Film AR5, (4) Solar AR1, (5) Tires AR5, and (6) Wood Flooring AR2. *See* China's Response to Panel Questions, paras. 6-8. As discussed above in Section III, the United States objects to China's inclusion of these new challenged determinations because such determinations are outside of the panel's terms of reference. However, to the extent the Panel finds that China's Article 9.4 claims with respect to these six new challenged determinations are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

352 China's First Written Submission, paras. 365-367, 384-385.

353 China's First Written Submission, paras. 384-385 (emphasis in the original).

354 *See* China's Responses to the Panel's First Set of Questions, para. 259 ("The claim does not turn on whether or not the fictional entity *itself* was subject to individual examination.") (emphasis in original); *id.*, para. 266 ("As explained in response to Panel Question 46, the question as to whether the *PRC-wide entity* has been 'sampled' or otherwise 'included in the examination' is of limited relevance for China's claims against the Single Rate Presumption under Article 9.4 of the *Anti-Dumping Agreement*. Instead, with respect to this claim, the relevant question is whether the *individual respondents* included within the PRC-wide entity were included within the 'examination'.")

whether the China-government entity was included in the examination is irrelevant. Indeed, this is the *precise question* that must be answered before reaching the merits of China's claim. For instance, if the China-government entity was under examination, then Article 9.4's second obligation does not apply, and China's claim fails.

218. Moreover, as noted above, because of the *specific nature* of China's as such claim (*i.e.*, USDOC's application of the alleged Single Rate Presumption is inconsistent with the second obligation of Article 9.4 in all NME cases – no matter the circumstances), for China to succeed on its claim, China must demonstrate that the China-government entity is not under examination in all NME cases. But as briefly mentioned above, and as discussed in more detail below, 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. For instance, 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, and did not receive a rate, China has not explained how Article 9.4 is implicated. Nor has China explained, for those few determinations in which USDOC assigned the China-government entity a rate from a previous proceeding, how Article 9.4 is implicated.

219. 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, which quite plainly only applies to those companies not included in the examination. According to China, the alleged Single Rate Presumption is "as such" inconsistent with Article 9.4 because it *precludes* certain companies from receiving an individual rate where they otherwise would have received an individual rate under these provisions.

220. As an initial matter, as discussed above, the correct inquiry for the Panel is whether the China-government entity, not the companies within the entity, is treated inconsistently with Article 9.4's second obligation. Setting that aside, 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. Rather, certain prerequisite conditions must be satisfied before a company is eligible for an individual rate:

> (1) That the company submitted the necessary information for a calculation of a dumping margin in time for that information to be considered during the course of the proceeding, and
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> (2) The number of companies was not so large that individual examinations would be unduly burdensome as to prevent the timely completion of the proceeding.

Thus, without these prerequisite conditions having been met, a company that is not included in the examination that seeks an individual rate will not be entitled to an individual rate, *irrespective* of the alleged Single Rate Presumption.

221. In fact, despite China resting its claim on a scenario in which companies that were not included in the examination that met the requirements of Article 6.10.2 and the last sentence of Article 9.4 were precluded from receiving an individual rate, China does not point to a single example, in any of the challenged determinations, where there exists such a company that has met these requirements, and that company was denied a rate determined in accordance with Article 9.4.[355] But according to China – like the issue of whether the China-government entity is under examination – this too is irrelevant to its claim:

> {I}t is the mere existence of the requirement to pass the Separate Rate Test as a pre-requisite to receiving individual examination that causes the violation, not the denial of requests for individual examination in particular cases. Indeed, the Single Rate Presumption creates the expectation among Chinese exporters that, once they have been included within the PRC-wide entity, USDOC will not grant them an individual rate even if they submit all of the necessary information to calculate a margin of dumping.[356]

As demonstrated above, the fundamental flaw in China's claim is that it assumes that, without the alleged Single Rate Presumption and corresponding Separate Rate Test, companies that would otherwise have access to individual rates *would be denied that access*. But as noted above, because of the specific nature of China's as such claim, this argument reveals a fundamental flaw in China's claim. That is, for there to be an inconsistency with Article 9.4's second obligation China must demonstrate that *in all NME cases* the Single Rate Presumption precludes companies from receiving an individual rate. But China has not done so.

222. To demonstrate this point, the United States provides an example of a proceeding in which USDOC has been faced with the situation in which an exporter included in the China-government entity sought individual examination within the meaning of Article 6.10.2. For example, in *1,1,1,2-Tetrafluroethane from China*, USDOC received a request for voluntary treatment from Aerospace Communications Holdings, Co. Ltd. ("Aerospace"), as well as a timely response to the dumping questionnaire from Aerospace. However, USDOC ultimately determined that it did not have the time or resources to examine any voluntary respondents, and thus, Aerospace did not receive an individual rate for this reason. Separately, USDOC determined that Aerospace did not demonstrate that its export activities were independent from the China government.[357] Thus, contrary to China's assertions, Aerospace was not prevented

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355 *See* China's Responses to the Panel's First Set of Questions, paras. 271-274.

356 *See* China's Responses to the Panel's First Set of Questions, para. 272.

357 *1,1,1,2-Tetrafluroethane From the People's Republic of China: Antidumping Duty Investigation, Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 79 Fed. Reg. 30817 (May 29, 2014) (Exhibit USA-111) and Preliminary Determination Memorandum at 4, 14 (Exhibit USA-112) ("[T]he Department determined not to select any voluntary respondents because selecting any additional company for individual examination would be unduly burdensome and would inhibit the timely completion of this investigation.") ("the Department preliminarily determines that Aerospace did not demonstrate an absence of de facto government control. Specifically, Aerospace's controlling Board members are also on the Board of its largest single owner China Aerospace Science & Industry Corp. ("CASIC"), a 100%-owned SASAC entity, and evidence shows that members of CASIC's board of directors actively participate in the day-to-day operations of Aerospace."), unchanged in

from receiving an individual rate because of its inclusion in the China-government entity. Rather, despite its efforts to seek an individual rate, the preconditions for Aerospace being eligible to receive an individual rate under Article 6.10.2 were not met, irrespective of its status within the China-government entity.

223. China does not explain how the alleged Single Rate Presumption gives rise to a violation of Article 9.4's second obligation in this type of case. Nor has China explained how the alleged Single Rate Presumption gives rise to a violation of Article 9.4's second obligation in any of the 32 challenged proceedings.

224. Specifically, the United States draws the Panel's attention to those reviews in which the China-government entity was not under review: Shrimp AR9, Tires AR3, OCTG AR1, Retail Bags AR4, PET Film AR3, and PET Film AR4.[358] China has not demonstrated how in these specific circumstances the application of the alleged Single Rate Presumption in these reviews results in a breach of the United States' obligations under Article 9.4.

225. In short, because of the fact-specific nature of Article 9.4's second obligation, and because of the nature of China's as such claim – that the Single Rate Presumption results in an inconsistency with this obligation in all NME cases, no matter the circumstances – China's as such claim must fail. For the same reasons discussed above, China's as applied claims must fail as well. Likewise, China's mere assertion that "{i}t is impossible to know how many companies from within the PRC-wide entity might have sought individual margins, had USDOC not imposed a requirement first to prove separate rate status{}"[359] does not carry its burden to demonstrate that the alleged Single Rate Presumption is as such or as applied inconsistent with Article 9.4's second obligation.

B. China Has Failed To Establish That USDOC Acted Inconsistently With The First Obligation Of Article 9.4 In The 26 Challenged Determinations[360]

226. China's remaining Article 9.4 arguments must fail as well. China argues that USDOC acts inconsistently with Article 9.4's first obligation concerning the "ceiling rate for the level of

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1,1,1,2-Tetrafluroethane From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 79 Fed. Reg. 62597 (Oct. 20, 2014) (Exhibit USA-113).

358 To the extent the Panel finds that China's Article 9.4 claims with respect to PET Film AR5 and Furniture AR9 are within the Panel's terms of reference (see Section III above), those claims are without merit for the reasons discussed herein.

359 China's Response to Panel Questions, para. 274.

360 These determinations are (1) Aluminum Extrusions OI, (2) Coated Paper OI, (3) Diamond Sawblades OI, (4) Furniture OI, (5) OCTG OI, (6) PET Film OI, (7) Retail Bags OI, (8) Ribbons OI, (9) Shrimp OI, (10) Solar OI, (11) Steel Cylinders OI, (12) Tires OI, (13) Wood Flooring OI, (14) Aluminum Extrusions AR1, (15) Aluminum Extrusions AR2, (16) Diamond Sawblades AR1, (17) Diamond Sawblades AR2, (18) Diamond Sawblades AR4, (19) Furniture AR7, (20) Furniture AR8, (21) Retail Bags AR3, (22) Ribbons AR1, (23) Ribbons AR3, (24) Shrimp AR7, (25) Shrimp AR8, and (26) Wood Flooring AR1. China also raises similar claims in four of the six new challenged determinations: (1) Diamond Sawblades AR4, (2) Solar AR1, (3) Tires AR5, and (4) Wood Flooring AR2. *See* China's Response to Panel Questions, para. 9. As discussed above in Section III, the United States objects to China's inclusion of these new challenged determinations because such determinations are outside of the

duties that may be applied to non-selected exporters or producers" in 26 challenged determinations.[361] However, as discussed in further detail below, in 19 of the challenged determinations, the China-government entity was under examination and received its own rate pursuant to Article 6.8.[362] China has therefore failed to show that the China-government entity was not included in the examination in each of these proceedings. 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.[363] Thus, China has failed to establish that the rate applied to the China-government entity is inconsistent with Article 9.4 in these 26 proceedings.[364]

227. As an initial matter, contrary to the premise of China's arguments, the pertinent issue is USDOC's treatment of the China-government entity *as a whole*, rather than simply the treatment of the individual companies. Although China sometimes refers to the China-government entity as a whole, what China is really referring to is that the Panel must evaluate whether each of the individual components of the entity are under examination, before reaching the issue of whether the entity itself is under examination. These arguments are flawed. The United States has already established that because there is a basis for USDOC's treatment of companies as part of the China-government entity, and that there is likewise a basis to give the entity a single rate, China's arguments in this respect must fail.

228. In addition, China's Article 9.4 arguments rely heavily on China's similar faulty arguments with respect to Article 6.8 and Annex II(1), namely, that USDOC was required to send a dumping questionnaire to each member of the China-government entity in order for the

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panel's terms of reference. However, to the extent the Panel finds that China's Article 9.4 claims with respect to the four new challenged determinations are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

361 China's First Written Submission, para. 364.

362 These determinations are (1) Aluminum Extrusions OI, (2) Coated Paper OI, (3) Diamond Sawblades OI, (4) Furniture OI, (5) OCTG OI, (6) PET Film OI, (7) Retail Bags OI, (8) Ribbons OI, (9) Shrimp OI, (10) Solar OI, (11) Steel Cylinders OI, (12) Tires OI, (13) Wood Flooring OI, (14) Aluminum Extrusions AR1, (15) Aluminum Extrusions AR2, (16) Furniture AR7, (17) Ribbons AR3, (18) Shrimp AR7, and (19) Shrimp AR8 (hereinafter referred to as the "19 challenged determinations" or "19 determinations"). To the extent the Panel finds that China's Article 9.4 claims with respect to Solar AR1 are within the Panel's terms of reference, those claims are without merit for the same reasons discussed herein with respect to these 19 challenged determinations.

363 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 (hereinafter referred to as the "7 challenged determinations" or the "7 determinations"). To the extent the Panel finds that China's Article 9.4 claims with respect to Wood Flooring AR2 and Diamond Sawblades AR4 are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein with respect to these 7 challenged determinations.

364 The United States demonstrates below that, to the extent Tires AR5 is found within the panel's terms of reference, China has failed to establish its *prima facie* case that the rate applied to the China-government entity in that review is inconsistent with Article 9.4.

China-government entity to be under examination.[365] We direct the Panel to our discussion in Section VI above which demonstrates the errors in China's arguments.

229. Next, it appears that China argues that the only way in which the China-government entity may be "included in the examination" for purposes of Article 6.10 second sentence and Article 9.4 first sentence is if it was selected for individual examination, as USDOC generally selects mandatory respondents for individual examination.[366] Thus, according to China, because the China-government entity was not specifically selected as a mandatory respondent, this means that the entity was not under examination in each proceeding. But as discussed above, China ignores the facts at issue in several of the challenged determinations. That is, there is a distinction between those companies that form part of the pool of respondents from which USDOC selects companies for individual examination for purposes of the second sentence of Article 6.10, and those companies that have effectively removed themselves from this selection pool by failing to cooperate at the early stage of the proceeding by responding to a request for quantity and value information.

230. As the United States has explained, those companies that have removed themselves from this selection pool and are found non-cooperative will be assigned a rate on the basis of facts available pursuant to Article 6.8. But China simply ignores this reality, and advocates that such noncooperation must be overlooked and those companies that do not respond to an initial request for information cannot be "included in the examination" and must receive a rate pursuant to Article 9.4. With this in mind, China's arguments that the China-government entity was not under examination in those proceedings in which USDOC found the entity non-cooperative based on the failure of one or more companies within the entity to respond to a request for quantity and value information must fail.[367] The China-government entity was under examination in these proceedings by virtue of the fact that the entity received its own rate based on facts available.

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365 *See, e.g* China's Responses to the Panel's First Set of Questions, paras. 859, 861, 863, 865, 870-872, 875, 877, 878, 882, 884, 887-889.

366 *See* China's Responses to the Panel's First Set of Questions, para. 263 ("In China's view, the word 'examination' refers to the process of determining an individual margin of dumping for a producer/exporter. The terms 'sampling' and 'selection' refer to the initial step through which individual respondents are chosen or not chosen for individual examination, in cases where the authority decides to limit the examination under the second sentence of Article 6.10. In such cases, respondents that are *not* sampled are *not* included in the examination, unless they voluntarily provide the necessary information under Article 6.10.2 and the second sentence of Article 9.4 and the authority accepts their voluntary response.")

367 This applies to 12 investigations (Aluminum Extrusions OI, Coated Paper OI, OCTG OI, Ribbons OI, Solar OI, Steel Cylinders OI, Tires OI, Wood Flooring OI, Diamond Sawblades OI, Shrimp OI, Furniture OI, and Retail Bags OI) and 1 review (Ribbons AR3). To the extent the Panel finds that China's Article 9.4 claims with respect to Solar AR1 are within the Panel's terms of reference, those claims are without merit for these same reasons. Additionally, with respect to Diamond Sawblades OI, Furniture OI, and Shrimp OI, the recourse to facts available was also based in part on the failure of the Chinese government to respond to requests for information. *See* United States' First Written Submission, Section VII.D; United States' Response to Panel Questions, para. 149.

231. Similarly, in those proceedings in which a member of the China-government entity was selected for individual examination failed to cooperate, and received a rate based on facts available, the China-government entity was under examination. [368] China again argues, incorrectly, that only those mandatory respondents that were included within the China-government entity were under examination.[369] But this merely repeats the same incorrect premise put forth above – that USDOC is required under the AD Agreement to make a distinction between a non-cooperative constituent of the entity and the non-cooperation of the entity as whole. Under China's logic, a respondent could claim that it has been cooperative even if certain employees withheld relevant information. Moreover, as the United States has established, in such proceedings the China-government entity was subject to examination by virtue of the fact that a company within the China-government entity was subject to individual examination.[370]

232. Finally, with respect to the seven (7) reviews in which USDOC applied the prior rate for the China-government entity,[371] during these reviews, the China-government entity was "subject to review" by virtue of the fact that certain companies that were subject to review (*i.e.*, USDOC received a timely request for review of the company, and initiated a review with respect to that company) did not submit or complete a separate rate application or separate rate certification as necessary, and were thus found to be part of the China-government entity.[372] USDOC applied the same rate that had previously been assigned to the entity. In other words, USDOC applied the previously-determined rate of the China-government entity for a previous time period to entries covered by these later reviews, and USDOC was under no obligation to apply a different rate for final assessment purposes. [373]

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368 This applies to 8 investigations (Aluminum Extrusions OI, Diamond Sawblades OI, Coated Paper OI, Furniture OI, OCTG OI, PET Film OI, Ribbons OI, and Retail Bags OI) and 5 reviews (Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, and Shrimp AR8). With respect to Tires AR5, to the extent the Panel finds that measure is appropriately within its terms of reference, as discussed above, we disagree with China that the Panel must evaluate whether each component of the entity was under examination. *See* China's Response to Panel Questions, para. 882. Thus, in this review, the entity was under examination by virtue of the fact that a mandatory respondent, Double Coin, was under individual examination. Additionally, with respect to Diamond Sawblades OI and Furniture OI, the recourse to facts available was also based in part on the failure of the Chinese government to respond to requests for information. *See* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 149.

369 *See* China's Responses to the Panel's First Set of Questions, para. 871-872.

370 *See* U.S. Reponses to the Panel's First Set of Questions, para. 318.

371 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. To the extent the Panel finds that China's Article 9.4 claims with respect to Wood Flooring AR2 and Diamond Sawblades AR4 are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

372 *See generally* United States' Response to Panel Question 56.

373 Furthermore, as established below in Section VIII, the rate applied to the China-government entity in these reviews is not a facts available rate because it is not based on the interested party's refusal to give access to, or otherwise provide, necessary information during the reviews.

VII. THE UNITED STATES HAS DEMONSTRATED THAT A SINGLE DUMPING MARGIN AND SINGLE RATE WAS APPROPRIATE FOR THE CHINA-GOVERNMENT ENTITY

233. China insists that "it remains unclear why a single rate 'must' be…determined {for the China-government entity.}"[374] But as the United States has explained, investigating authorities are permitted to treat the export activity of multiple companies within a nonmarket economy, such as China, as the pricing behavior of a single entity, *i.e.*, the China-government entity, where there is a sufficient basis for such treatment. It follows from this treatment that, to avoid a potential scenario in which the China-government entity shifts its exports through the producer/exporter of the China-government entity which is assigned the lowest rate, an investigating authority must apply the same antidumping duty rate to all of the China-government entity's exports. Otherwise, companies within the China-government entity would have no incentive to cooperate and respond to requests for information, and the investigating authority would be left with information from the only companies within the China-government entity that did cooperate.[375]

234. This idea that it is appropriate to assign the China-government entity a single rate, and that it would be inappropriate to assign different parts of the single entity varying rates, is affirmed by the panel's findings in *Korea – Certain Paper* and the Appellate Body' in *EC – Fasteners*. For instance, in *Korea – Certain Paper*, the panel drew approvingly from Article 9.5 of the AD Agreement which provides that so-called new shippers must demonstrate that they are not related to any prior exporter or producer. According to the panel, in this context:

> {T}he mere existence of a relationship to an exporter or producer already subject to anti-dumping duties is sufficient to disqualify an entity from entitlement to an individual margin of dumping. The logic of Article 9.5 would appear to be *that to allow related companies to obtain individual rates could undermine the efficiency of the existing duties*.[376]

The panel went on to discuss other provisions of the AD Agreement which contemplate that "relationships between legally distinct entities *may impact behavior* and are thus relevant to the application of the rules of the Agreement."[377] Importantly, the panel also recognized that "evidence of actual coordination of domestic or export sales" was not required to demonstrate whether separate entities may be treated as a single exporter or producer, as other circumstances could allow such treatment, such as "where the structural and commercial relationship between

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374 *See* China's Closing Statement at the First Panel Meeting, para. 19.

375 *See* U.S. First Written Submission paras. 430, 508.

376 *Korea – Certain Paper*, para. 7.159 (emphasis added).

377 *Id.*, para. 7.160 (emphasis added).

the companies in question is sufficiently close to be considered as a single exporter or producer."[378]

235. Likewise, the Appellate Body in *EC – Fasteners*, drawing approvingly from *Korea – Certain Paper*, also recognized that "where it could be determined that particular exporters that are related constitute a single supplier, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* would nonetheless *require the determination of an individual dumping margin for the single entity*."[379] Thus, the Appellate Body has expressly recognized that under Articles 6.10 and 9.2 an investigating authority may assign multiple entities an individual margin where there is a sufficient basis to treat those entities as a single exporter.

236. In light of the above, China errs in considering that USDOC has no basis for its "premise" to consider the behavior of all parts of the China-government entity in evaluating the entity's cooperation[380]. In particular, as the United States has demonstrated, USDOC is not required to consider *only* the information provided by just one producer/exporter within the China-government entity, but rather, it must consider the information provided by all companies within the China-government entity subject to the particular investigation or review at issue. Likewise, if companies within the China-government entity do not provide requested information, the investigating authority must determine what this means for the China-government entity. Thus, China's repeated assertion that USDOC "presumed" that the noncooperation of one or more members of the China-government "extended" to all members of the entity[381] is misleading because such an assertion overlooks that the entity must be evaluated as a whole, and one cooperative element of the entity cannot save the entire entity from being found non-cooperative.

VIII. CHINA HAS NOT DEMONSTRATED THAT USDOC WAS REQUIRED TO SEND A DUMPING QUESTIONNAIRE TO ALL MEMBERS OF THE CHINA-GOVERNMENT ENTITY PURSUANT TO ARTICLES 6.1 AND 6.8 AND ANNEX II OF THE AD AGREEMENT IN 26 OF THE CHALLENGED DETERMINATIONS[382]

237. 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. At the outset, the United

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[378] *Id.*, para. 7.162.

[379] *EC – Fasteners (AB)*, para. 383 (emphasis added).

[380] *See* China's Closing Statement at the First Panel Meeting, para. 19.

[381] *See* China's Opening Statement at the First Panel Meeting, para. 98.

[382] These determinations are (1) Aluminum Extrusions OI, (2) Coated Paper OI, (3) Diamond Sawblades OI, (4) Furniture OI, (5) OCTG OI, (6) PET Film OI, (7) Retail Bags OI, (8) Ribbons OI, (9) Shrimp OI, (10) Solar OI, (11) Steel Cylinders OI, (12) Tires OI, (13) Wood Flooring OI, (14) Aluminum Extrusions AR1, (15) Aluminum Extrusions AR2, (16) Diamond Sawblades AR1, (17) Diamond Sawblades AR2, (18) Diamond Sawblades AR4, (19) Furniture AR7, (20) Furniture AR8, (21) Retail Bags AR3, (22) Ribbons AR1, (23) Ribbons AR3, (24) Shrimp AR7, (25) Shrimp AR8, and (26) Wood Flooring AR1 (hereinafter, we refer to these as "the 26 challenged determinations" or "the 26 determinations"). China also raises similar claims with respect to four of the six new challenged determinations: (1) Diamond Sawblades AR4, (2) Solar AR1, (3) Tires AR5, and (4) Wood Flooring

States recalls the facts that are not in dispute for the 26 challenged determinations for which China raises claims with respect to Articles 6.1 and 6.8 and Annex II of the AD Agreement. That is, both China and the United States agree that USDOC: (1) notified members of the China-government entity of USDOC's request for quantity and value information in certain of these determinations; (2) notified members of the China-government entity of USDOC's request for information to determine a dumping calculation in certain of these determinations; (3) notified the Chinese government of requests for information in certain of these determinations; and (4) in all of these challenged determinations, notified members of the China-government entity of the information required to obtain a separate rate.[383] Yet, despite these numerous requests for information, many of which went unanswered, China's claims focus instead on the information that was not requested.

238. In so doing, China obfuscates the underlying realities of these determinations. For instance, rather than acknowledging that the China-government entity failed to cooperate by failing to respond to (in some instances, repeated) requests for information in certain determinations, China seeks to shift the focus to the information that was not requested, while ignoring the valid requests for information that went unanswered. In addition, China fails to acknowledge that in all challenged determinations certain companies failed to provide information to demonstrate that the Chinese government did not materially influence their export decisions or otherwise participating in the proceeding at issue, despite having notice of the information required.[384] Rather than acknowledge these realities, China places the blame on USDOC for not seeking the "correct" information, or "more" information. The Panel should reject these claims because China has failed to explain why the AD Agreement requires investigating authorities to adopt China's notion of such information and its significance.

239. China's specific argument which permeates its Articles 6.1 and 6.8 and Annex II claims 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, and this failure to do so in each

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AR2 (hereinafter, we refer to these as "the four new challenged determinations"). *See* China's Response to Panel Questions, para. 9. As discussed above in Section III, the United States objects to China's inclusion of these new challenged determinations because such determinations are outside of the panel's terms of reference. However, to the extent the Panel finds that China's Articles 6.1 and 6.8 and Annex II(1) claims with respect to the four new challenged determinations are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

383 *See* China's Response to Panel Questions, paras. 275-278; United States' Response to Panel Questions, para. 140. The same is true with respect to the four new challenged determinations. For instance, in all of the four new challenged determinations, USDOC notified members of the China-government entity of the information required to obtain a separate rate. In addition, in Solar AR1, USDOC notified members of the China-government entity of USDOC's request for quantity and value information.

384 China also argues that "producers/exporters who had not previously received a separate rate and for whom no review has been requested (or for whom the review has been rescinded) receive no opportunity to rebut the Single Rate Presumption{,}" however, China overlooks the obvious point that these companies were fully aware of their opportunity to seek a review of their rate and status, and chose not to do so. *See* China's Response to Panel Questions, para. 171. In addition, although China repeatedly asserts that USDOC denied Chinese exporters and producers "a full opportunity for the defence of their interests in a particular case{,}" China's Opening Statement, para. 68, China fails to establish that USDOC was required to take any additional action.

of the challenged determinations results in breaches of these provisions. As the United States has demonstrated, and as discussed in further detail below, nothing in the AD Agreement requires that the only way USDOC can determine a rate for the China-government entity is by sending a dumping questionnaire to each and every part of the entity. This is true especially where the entity has demonstrated a failure to cooperate.

240. China appears to recognize that there are limits to which entities must be sent a dumping questionnaire and/or assigned an individual margin.[385] According to China, where an investigating authority has limited its examination pursuant to the second sentence of Article 6.10, there are only two types of margins – those for mandatory respondents (which may be based on Article 2.4 or Article 6.8), and those for all other companies not selected for examination (which may only be based on Article 9.4). However, this interpretation plainly ignores the situation at issue in several of the challenged determinations. That is, where members of the China-government entity failed to provide requested information pertaining to quantity and value, and thus USDOC was prevented from including such companies in the pool of companies eligible for respondent selection. According to China, this failure to cooperate at this early stage of the proceeding is of no moment, and essentially must be ignored.

241. At the same time however, China appears to recognize a difference between what it refers to as "genuine" noncooperation (*i.e.*, "non-cooperation in the form of non-provision of information by respondents who were informed of the information that is required to make a determination{}") and "presumed" noncooperation.[386] For the former category of noncooperation, "China does not dispute that there is a material difference between respondents who receive the 'all others' rate and such a non-cooperating respondent."[387] Setting aside for the moment China's mistaken interpretation of Article 6.8 as being limited only to the very specific instance of a respondent's failure to respond to a dumping questionnaire,[388] USDOC does not "presume" noncooperation of the China-government entity, but rather, makes a finding of noncooperation based on the facts and circumstances of the proceeding, *i.e.*, based on the failure of one or more members of the China-government entity to respond to a request for information. Thus, by acknowledging that companies that fail to cooperate must be treated differently than companies that do cooperate, China undercuts its own argument that the China-government entity must receive the same rate as the cooperative "all others" companies.

A. *EC – Fasteners* Is Inapposite to the Present Dispute

242. As the United States has demonstrated, China's arguments appear to rely on a mistaken interpretation of *EC – Fasteners* rather than any textual examination of the AD Agreement. In

385 *See* China's Response to Panel Questions, paras, 288-292.

386 *See* China's Response to Panel Questions, paras. 360-361.

387 *See* China's Response to Panel Questions, para. 360.

388 *See* U.S. First Written Submission paras. 421-428.

particular, China relies on a single statement drawn from *EC – Fasteners* which China misconstrues:

> only a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for the single entity that is composed of several legally distinct exporters.[389]

But China has failed to address the points raised by the United States in its first written submission that the Appellate Body was reviewing a different Member's measure in the context of Articles 6.10 and 9.2, and these distinctions must be taken into account.[390]

243. For instance, the United States noted that in that case the Appellate Body was reviewing the European Union's regulation under which the European Union calculates a single margin for the NME-government entity.[391] If cooperating members of the NME-government entity account for close to 100 percent of all exports from the country, the export price of the margin assigned to the NME-government entity will be based on a weighted average of the actual price of all export transactions reported by these exporters.[392] Alternatively, if cooperating members of the NME-government entity account for significantly less than 100 percent of all exports from the country, the margin will be based on facts available.[393] Under such circumstances, the Appellate Body determined that the European Union's regulation was inconsistent with Articles 6.10 and 9.2.[394]

244. But the Appellate Body's findings, which were based expressly on part of the European Union's distinctions between significant and non-significant cooperation of the members of the NME-government entity, would not apply in cases in which an investigating authority – such as USDOC – does not have such distinctions. For instance, the investigating authority may find that there are *no* cooperative companies within the NME-government entity. In such instances, nothing in the Appellate Body's statement precludes the use of facts available to determine a rate for the NME-government entity. Moreover, an investigating authority may find that certain companies within the NME-government entity have failed to cooperate by failing to respond to an initial request for quantity and value information or failing to provide requested information pertaining to the actual calculation of a dumping margin. In each instance, the investigating authority may also find that such a failure has significantly impeded the proceeding.

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389 *See, e.g.*, China's First Written Submission, para. 526 (citing *EC – Fasteners (AB)*, para. 384); China's Responses to the Panel's First Set of Questions, para. 305 (citing *EC – Fasteners (AB)*, para. 384).

390 *See* U.S. First Written Submission paras. 437-438, 512, 568-569.

391 *EC – Fasteners (AB)*, para. 383 (internal footnotes omitted).

392 *Id.* at para. 383 fn. 537.

393 *Id.* at para. 383.

394 *Id.* at para. 384.

Alternatively, the government itself may have failed to cooperate by failing to respond to a request for necessary information.

245. In short, the Appellate Body in *EC – Fasteners* did not foreclose the possibility that an investigating authority may need to rely on facts available pursuant to Article 6.8 if it did not have the necessary information to calculate a dumping margin for the NME-government entity because of the non-cooperation of *all* or *nearly all* companies within the NME-government entity.[395] Nor does the analysis in *EC – Fasteners* stand for the proposition that, where there is such noncooperation, the investigating authority is still required to blindly ignore the noncooperation and continue to seek further information from the NME-government entity by sending each member of the China-government entity a dumping questionnaire.

246. China has addressed none of these points. Thus, contrary to China's repeated use of this statement, the Appellate Body was not reviewing the claims China raises here with respect to Article 6.1 – *i.e.*, whether an investigating authority failed to notify parties "of the information which the authorities require" or provide "ample opportunity to present in writing" all relevant evidence. Nor was the Appellate Body reviewing claims with respect to Article 6.8 and Annex II. Therefore, the Appellate Body's statements in the context of that dispute, in reviewing a different Member's measure under completely different provisions of the AD Agreement, are of no relevance to China's claims under Articles 6.1 and 6.8 and Annex II. Nor do they establish that there is only one WTO-consistent manner in which an investigating authority may determine a single margin for an NME-government entity, especially in light of noncooperation of the entity. For these reasons, China's numerous claims and arguments related to Articles 6.1 and 6.8 and Annex II, paragraphs (1) and (7) that rely on this mistaken interpretation of the analysis in *EC – Fasteners* must fail.[396]

B. China's Article 6.1 Claims With Respect to the 26 Challenged Determinations Are Legally And Factually Deficient[397]

247. As the United States has explained, 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 bleeds in to its substantive obligations with respect to the content of the information required for a certain determination.[398] But as the United States has explained, the *substantive* issue of which information is required for a particular determination is addressed

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395 *See id.* (finding the European Union's regulation which allowed for facts available to "fully cooperative" companies if those companies account for "significantly less" than 100 percent of all exports from the country inconsistent with Article 9.2).

396 *See, e.g.*, China's Responses to the Panel's First Set of Questions, paras. 305, 312-314, 413, 678, 741, 854, and 856; China's First Written Submission, para. 526.

397 To the extent the Panel finds that China's Article 6.1 claims with respect to the four new challenged determinations are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

398 *See* China's Responses to the Panel's First Set of Questions, paras. 308-315.

elsewhere in the AD Agreement.[399] Thus, China's arguments that USDOC's failure to send a dumping questionnaire to each member of the China-government entity in the 26 challenged determinations results in a violation of Article 6.1 are unfounded.[400]

248. In this respect, China's argument that the United States "conten{ds} that Article 6.1 only obliges an authority to give notice of the information that it *subjectively* has decided it 'requires'"[401] misses the point entirely. In particular, it is undisputed that an investigating authority determines what information it needs in a given circumstance, and Article 6.1 reflects that understanding when it references "the information which the authorities require". Thus, China appears to be confusing the *procedural issue* of proper notification of a request for information which the authorities require with the *substantive issue* of whether the investigating authority is seeking the correct information for a given determination.

249. The United States does not disagree that where, for instance, an investigating authority seeks to calculate a dumping margin for a company based on that company's pricing data, that Article 6.1 requires the investigating authority to notify the respondent of the information required to make such a determination, *i.e.*, through a dumping questionnaire. The United States' position is that the content, or substance of the request is governed by another provision of the AD Agreement, *i.e.*, Article 2.4. For instance, if the dumping questionnaire consisted of four parts, and the investigating authority failed to provide all parts to the respondent, Article 6.1's procedural protections may be relevant. However, the investigating authority's initial determination of what information to include in the dumping questionnaire to assist it in its dumping calculation is appropriately governed by Article 2.4, not Article 6.1. Likewise, if the United States sought incorrect information to calculate a dumping margin, this would perhaps raise issues under Article 2.4, but not a procedural notice provision such as Article 6.1.

250. Thus, the United States does not disagree with China that Article 6.1 requires that "if an authority is to determine a rate for a respondent, then that respondent has a right to be informed of the information that the authority requires to make that determination, and have an opportunity to provide it."[402] Where the United States disagrees with China is its reading of Article 6.1 which transforms the provision from one of procedural notice into a substantive command on what information must be requested. In particular, China's interpretation ignores that Article 6.1 refers to not just the very specific, limited situation in which an investigating authority has selected a company for individual examination and sends that company a dumping questionnaire.[403] Article 6.1 requires an investigating authority to notify parties of the

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399 *See* U.S. First Written Submission paras. 557-561.

400 Indeed, further confirmation that Article 6.1 concerns notice of information is found by looking at Article 6.1.1 which explicitly provides for a 30 day period to respond to questionnaires. As recognized by one panel, this subpart concerns procedural protections if a questionnaire is sent out, not what type of questionnaire must be sent out. *See Argentina — Poultry Anti-Dumping Duties*, para. 7.14.

401 China's Response to Panel Questions, para. 309.

402 China's Responses to the Panel's First Set of Questions, para. 308.

403 *See* U.S. First Written Submission paras. 562-564.

information required for *any* determination throughout the course of a proceeding, such as a request for quantity and value information to assist in respondent selection, or a request for information to aid in evaluating whether a company is entitled to an individual rate.

251. China also ignores the relevance of a party's failure to cooperate, for instance, by failing to provide requested information outside of a specific request for information related to the calculation of a dumping margin. As the United States has demonstrated, Article 6.1 must be read in conjunction with Article 6.8 and Annex II. Under this reading, a party's right to receive a request for information or to provide information will legitimately cease to exist at some point where the party has not cooperated.[404]

252. In addition, China's reliance on *US – Hot-Rolled Steel* for its contention that Article 6.1 requires USDOC to send a dumping questionnaire to each member of the China-government entity[405] is misplaced. Contrary to China's arguments, that dispute did not involve a situation in which USDOC failed to "ask a legally distinct respondent included within a single entity directly for necessary information{.}"[406] Rather, that dispute involved companies that were merely affiliated, not companies which constituted a single exporter or producer for purposes of assigning a single margin.[407]

253. Thus, China is incorrect that there is only *one* WTO-consistent manner in which USDOC can determine a dumping margin for the China-government entity, and that a failure to seek a dumping questionnaire response from every member of the China-government entity results in an Article 6.1-inconsistency.[408] Such arguments are merely a continuation of China's faulty interpretation of *EC – Fasteners* described above. Contrary to China's contention, nothing in the AD Agreement or WTO case law supports China's arguments that there is such a limitation on USDOC's determination of a dumping margin for the China-government entity.

254. As discussed in further detail below, with respect to 19 of the challenged determinations,[409] the fundamental flaw in China's arguments is that, according to China,

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404 U.S. First Written Submission paras. 563-570. *See also US – OCTG Sunset Reviews (AB)*, para. 241.

405 China's Responses to the Panel's First Set of Questions, para. 306.

406 China's Responses to the Panel's First Set of Questions, para. 306.

407 *See US – Hot-Rolled Steel (Japan) (AB)*, paras. 97-106. In that dispute, the Appellate Body disagreed with USODC's recourse to facts available with respect to an exporter's sales to an affiliated U.S. company because the affiliate (who was a petitioner in the proceeding) refused to provide such information.

408 China's Responses to the Panel's First Set of Questions, para. 312 ("{I}n *none* of these determinations did USDOC seek the information that was required to determine the PRC-wide entity rate. To recall, a proper determination of an *individual* rate for the PRC-wide entity (including all of the producers/exporters included within it) would have required USDOC to collect information on normal value, export price and due allowances in respect of the *entire* PRC-wide entity (*i.e., all* of the producers/exporters included within it).") (footnotes omitted).

409 These determinations are (1) Aluminum Extrusions OI, (2) Coated Paper OI, (3) Diamond Sawblades OI, (4) Furniture OI, (5) OCTG OI, (6) PET Film OI, (7) Retail Bags OI, (8) Ribbons OI, (9) Shrimp OI, (10) Solar OI, (11) Steel Cylinders OI, (12) Tires OI, (13) Wood Flooring OI, (14) Aluminum Extrusions AR1, (15) Aluminum Extrusions AR2, (16) Furniture AR7, (17) Ribbons AR3, (18) Shrimp AR7, and (19) Shrimp AR8 (hereinafter

regardless of the entity's failure to cooperate, USDOC must still send a dumping questionnaire to each and every single member of the entity. But China has not demonstrated that USDOC's failure to do so in these challenged determinations results in an inconsistency with Article 6.1, because China has not demonstrated that such actions were required, especially where the entity had already demonstrated non-cooperation. China fails to consider that Article 6.1 must be read in conjunction with Article 6.8 and Annex II, that is, if a party fails to cooperate, its rights to receive requests for information or to provide information must legitimately cease to exist at some point.

255. Furthermore, with respect to seven (7) of the challenged determinations,[410] USDOC did not seek to calculate a rate for the China-government entity, but merely applied the rate that had previously been determined in a prior proceeding for the entity. China has not explained how USDOC could have acted inconsistently with Article 6.1 in these 7 reviews. Indeed, China's objection relates solely to the way in which USDOC determined the rate to be applied to the entity, *i.e.*, USDOC allegedly should have calculated a rate for the entity after issuing dumping questionnaires to every member of the entity. But as established above, China has not demonstrated that such action was required in these 7 reviews. In any event, China's claim in this respect against the method by which USDOC determined a rate for the China-government entity is not an issue addressed by Article 6.1.

256. With respect to two of the new challenged determinations, Tires AR5 and Diamond Sawblades AR4, China merely asserts that "USDOC failed to give notice of the information that is required to calculate a margin of dumping for the PRC-wide entity in these reviews, and, on this basis, acted contrary to Article 6.1."[411] But aside from this conclusory assertion, China does not explain how the facts of these individual reviews, which differ from the other determinations noted above, result in an inconsistency with Article 6.1. Thus, even assuming *arguendo* the Panel finds that these two reviews are within its terms of reference,[412] China has failed to establish that USDOC acted inconsistently with Article 6.1 in these two reviews. In any event, it appears China's objection relates solely to the way in which USDOC determined the rate to be applied to the China-government entity in these 2 reviews, *i.e.*, USDOC allegedly should have calculated a rate for the entity after issuing dumping questionnaires to every member of the entity. But as established above, China has not demonstrated that such action was required by

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referred to as the "19 challenged determinations" or "19 determinations"). These arguments apply equally to Solar AR1, one of the new challenged determinations, to the extent the Panel finds that review within its terms of reference.

410 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 (hereinafter referred to as the "7 challenged determinations" or the "7 determinations"). These arguments apply equally to Wood Flooring AR2, one of the new challenged determinations, to the extent the Panel finds that review within its terms of reference.

411 China's Response to Panel Question 2 (b), para. 19; *see also* China's Opening Statement, para. 134 (referencing these two reviews, and arguing "USDOC determined a rate for the PRC-wide entity….in a manner that did not accord with Article{} 6.1…because, in both reviews, USDOC found that the PRC-wide entity had been fully cooperative, i.e., had not failed to provide any requested information.")

412 *See* Section III.

the AD Agreement in these two reviews. Nor has China explained how its claim in this respect against the method by which USDOC determined a rate for the China-government entity is an issue addressed by Article 6.1.

257. Finally, with respect to the 26 challenged determinations,[413] China ignores that companies within the China-government entity could seek to provide voluntary responses to the dumping questionnaire, and none availed themselves of this opportunity.[414] This fact alone defeats China's claims with respect to the second obligation of Article 6.1 to allow parties "ample opportunity to present in writing all evidence which they consider relevant{.}"

C. China Has Not Demonstrated That USDOC Resorted To Facts Available In The 7 Challenged Determinations[415]

258. China's contention with respect to the 7 challenged determinations that "USDOC continued to presume non-cooperation as the basis for continued application of the facts available rate assigned during a previous phase of the proceeding{}"[416] is incorrect in several respects. As an initial matter, the record is undisputed that USDOC did *not* make a finding of noncooperation in these 7 reviews.[417] China points to no evidence to the contrary, but argues that, despite the lack of such "an express finding of non-cooperation{,}"[418] where USDOC applies a prior rate that was based on facts available, it "effectively continues to *presume* that the NME-wide entity, and all of the producers/exporters included within that fictional entity, failed to cooperate to the best of their abilities."[419]

259. But as the United States has explained, and 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

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413 This argument applies equally to the four new challenged determinations.

414 *See* China's Responses to the Panel's First Set of Questions, para. 271; U.S. Reponses to the Panel's First Set of Questions, para. 139.

415 To the extent the Panel finds that China's Article 6.8 and Annex II(1) claims with respect to Wood Flooring AR2 are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

416 *See* China's Response to Panel Questions, paras. 283-284 (citing Diamond Sawblades AR1, Diamond Sawblades AR2, Diamond Sawblades AR3, Furniture AR8, Retail Bags AR3, Ribbons AR1, and Wood Flooring AR1). China also cites to Wood Flooring AR2, a new challenged determination which is outside of the Panel's terms of reference.

417 Additionally, USDOC did not make a finding of noncooperation in Wood Flooring AR2.

418 *See* China's Response to Panel Questions, para. 283 ("USDOC did not make an express finding of non-cooperation by the PRC-wide entity in the instant review.")

419 *See* China's First Written Submission, para. 489 (emphasis in original); *id.*, paras. 632-637; China's Response to Panel Questions, para. 487 ("{I}n substance, USDOC *did* apply a facts available rate to the PRC-wide entity in these 7 reviews. Indeed, by 're-applying' the previously determined adverse facts available rate, USDOC continued to presume non-cooperation{.}")

to a determination that is governed by Article 6.8.[420] Rather, Article 6.8 is triggered only where an investigating authority has resorted to facts available in the making of a determination. Here, USDOC did not resort to facts available, but instead applied a rate assigned to the China-government entity in a prior proceeding (which was based on facts available pursuant to Article 6.8). But in contrast to the earlier proceedings in which the entity did not cooperate and facts available were used, the record is undisputed that in these 7 reviews USDOC did not resort to facts available, for instance, by reaching a finding of noncooperation, or calculate a rate based on facts available.[421]

260. China disagrees with the panel's findings in *US – Shrimp II (Viet Nam)* in this respect, but does not explain its reasoning, stating only that "China does not consider that to be the correct mode of analysis{,}" which China states is a "formalistic approach{.}"[422] The analysis is straightforward and compelling though – there is no determination of a new rate for the seven (7) reviews, no resort to facts available to determine a rate, and thus the discipline of Article 6.8 and Annex II do not apply where facts available were not used in making a determination.

261. For these reasons, China's claim that USDOC's alleged resort to facts available in these seven (7) reviews is inconsistent with Article 6.8 and Annex II(1) must fail because USDOC did not make such a determination.[423] The United States also notes that China's claim in this respect rests on its argument – which resembles China's similar faulty argument with respect to Article 6.1 – that USDOC's alleged resort to facts available was improper because USDOC failed to request the information necessary for the calculation of a margin of dumping from all the companies within the China-government entity in these 7 reviews.[424] The United States has established previously that this argument has no merit.[425] Moreover, China fails to explain why USDOC was required to send a dumping questionnaire to all members of the China-government entity based on the facts of these seven (7) reviews. Nor does China raise any other argument why any alleged resort to facts available in these seven (7) reviews was inconsistent with Article 6.8 and Annex II(1). Thus, China has failed to establish that any alleged resort to facts available is inconsistent with Article 6.8 and Annex II(1) in these 7 reviews.

262. 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. Thus, by China's own definition, the alleged norm quite

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420 *See* U.S. First Written Submission paras. 534-536; U.S. Reponses to the Panel's First Set of Questions, paras. 144-146 (citing *US – Shrimp (Viet Nam) II*, paras. 7.234-7.235).

421 The same is true with respect to Wood Flooring AR2.

422 *See* China's Response to Panel Questions, fn 595 (citing *US – Shrimp (Viet Nam) II*, para. 7.233).

423 The same is true with respect to Wood Flooring AR2, to the extent that review is found within the Panel's terms of reference.

424 *See* China's First Written Submission, paras. 632-637.

425 *See* Section VIII above.

plainly was not applied in these 7 reviews.[426] Likewise, without establishing that USDOC resorted to facts available in these 7 reviews, China's remaining arguments that the alleged selection of facts available in these 7 reviews is inconsistent with Article 6.8 and Annex II(7)[427] also must fail.

263. In sum, China has not established any breach of Article 6.8 and Annex II in these reviews because there was no use of facts available in any challenged determination.

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

264. As discussed above in Section III, China's claims with respect to Tires AR5 and Diamond Sawblades AR4 are outside of the Panel's terms of reference because they are new measures to which China raises entirely new claims that USDOC acted inconsistently with Article 6.8 and Annex II "by resorting to facts available without having met the prerequisites for doing so{}" in these two reviews.[428] Although China purports to raise the same claims (with the same reasoning) with respect to these reviews as the originally challenged determinations,[429] as we will demonstrate below, and as acknowledged by China, these reviews present entirely new facts and do not comport with China's claims with respect to those originally challenged determinations. In any event, we demonstrate that these claims have no merit.

265. We first address China's claims with respect to Tires AR5. In this review, USDOC determined that the mandatory respondent Double Coin[430] was part of the China-government entity.[431] Double Coin is wholly-owned by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC). USDOC found that the SASAC also wielded significant control over Double Coin's Board of Directors. Therefore, USDOC determined that Double Coin had not demonstrated the absence of government control over its export activities.

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426 China agrees with this point, to an extent. *See* China's Response to Panel Questions, fn 595 ("{I}f the present Panel were to take the same formalistic approach as the Panel in *US – Shrimp II (Viet Nam)*, then it would also need to find that the Use of Adverse Facts Available norm was not triggered in such reviews.")

427 We specifically refer to the arguments set forth in paras. 674-717 of China's First Written Submission and summarized as "Argument A" through "Argument D" on the right hand side of Visual Aid NME3 (Exhibit CHN-496). These arguments are addressed in further detail below.

428 *See* China's Responses to the Panel's First Set of Questions, para. 19.

429 *See* China's Responses to the Panel's First Set of Questions, para. 19 ("{B}oth of the reviews are inconsistent with {Article 6.8 and Annex II(1)} for all the same reasons as the 26 challenged determinations addressed in China's First Written Submission.")

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

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

266. Because Double Coin participated in the administrative review and provided USDOC with its verified sales and production data, USDOC was able to calculate a weighted-average dumping margin for Double Coin as part of the China-government entity. However, because USDOC did not have information on the record with respect to the full composition of the China-government entity, USDOC could not determine Double Coin's portion of the China-government.[432] Thus, contrary to China's assertions, this was not a finding of "full cooperation" of the entity.[433] With the limitations of available facts, USDOC accounted for Double Coin's questionnaire response by calculating a simple average of Double Coin's calculated weighted-average dumping margin and the previously assigned China-government entity rate. This new rate was then assigned to the entire China-government entity, including Double Coin.

267. In Diamond Sawblades AR4, in contrast to Tires AR5, and contrary to China's characterization, USDOC did not make any findings with respect to the level of cooperation of the entity.[434] Instead, in assigning a rate to the entity, USDOC applied the rate that had been determined for the China-government entity, which included ATM,[435] in the Diamond Sawblades AR2 remand redetermination.[436] That rate, similar to Tires AR5, was based on a simple average of ATM's calculated weighted-average dumping margin and the previously assigned China-government entity rate.[437]

268. China recognizes that these facts differ from the 26 challenged determinations. For instance, China notes certain distinctions, such as the fact that there was no finding of non-

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[432] Tires AR5 Final Decision Memo at 20 (Exhibit CHN-472) ("The Department lacks information to determine what share of production and exports of subject merchandise Double Coin constitutes as part of the PRC-wide government-controlled entity during the current POR. As a result, we are able to calculate a margin for an unspecified portion of a single PRC-wide entity, but cannot do so for another unspecified portion of the entity.") In contrast to Tires AR5, USDOC has found the China-government entity to be fully cooperative, and assigned the entity a calculated rate, in a different investigation. *See 53-Foot Domestic Dry Containers From the People's Republic of China: Final Determination of Sales at Less Than Fair Value; Final Negative Determination of Critical Circumstances*, 80 Fed. Reg. 21203 (Dep't of Commerce Apr. 17, 2015) (Exhibit USA-100), and accompanying Issues & Decision Memorandum at cmt. 10. (Exhibit USA-101). *See also* United States' Response to Panel Questions, para. 319.

[433] China's Responses to the Panel's First Set of Questions, paras. 14, 17, 19, 284.

[434] China's Responses to the Panel's First Set of Questions, paras. 14, 17, 19, 284.

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

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

[437] *See* Final Remand Redetermination: Diamond Sawblades Manufacturers Coalition v. United States, Court No. 13-00241, Slip Op. 14-112 (Exhibit USA-104). *See* United States' Response to Panel Questions, para. 322.

cooperation in Tires AR5 or Diamond Sawblades AR4, unlike the other challenged determinations.[438] In addition, China states that "because USDOC applied a rate that was partially based on facts available, and thereby replaced missing information without first having sought that information, USDOC violated Article 6.8 and Annex II(1) by resorting to facts available without having met the prerequisites for doing so."[439] Quite plainly, China does not allege these same facts, or same claims for any other determinations. Thus, these new determinations are as noted in Section III outside of the Panel's terms of reference and cannot be challenged in this dispute.

269. In any event, China has failed to establish that USDOC's determinations in these reviews are governed by Article 6.8 and Annex II, paragraph 1. For instance, aside from its cursory assertions that USDOC applied "partial facts available", China has not demonstrated how USDOC resorted to facts available in Tires AR5 or Diamond Sawblades AR4. Nor can China merely rely on its same arguments as the 26 challenged determinations to establish its *prima facie* case, because, as demonstrated above, these facts and claims are different. It appears that China attempts to argue again, unconvincingly, that USDOC failed to request the information necessary for the calculation of a margin of dumping from all the companies within the China-government entity. But China has not demonstrated that in these two reviews USDOC was required to do so.

270. Thus, China's contentions with respect to these two reviews lack merit. The United States also refutes China's argument that in both of these reviews, USDOC made a finding of "full cooperation" for the China-government entity.[440] This is an improper characterization of the facts at issue in those reviews. As demonstrated above, USDOC did not find that the entire entity was "fully cooperative". Rather, in Tires AR5, USDOC found that those parts of the entity that were 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 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).

E. 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)[441]

271. China's claim that USDOC's resort to facts available is inconsistent with Article 6.8 and Annex II(1) rests entirely on its similar, faulty argument with respect to Article 6.1 that USDOC failed to request the information necessary for the calculation of a margin of dumping from all the companies within the China-government entity. But as demonstrated above, China has not

438 *See* China's Responses to the Panel's First Set of Questions, paras. 14-19.

439 *See* China's Responses to the Panel's First Set of Questions, para. 19.

440 *See* China's Response to Panel Questions, paras. 19, 284.

441 To the extent the Panel finds that China's Article 6.8 and Annex II(1) claims with respect to Solar AR1 are within the Panel's terms of reference, those claims are without merit for the reasons discussed herein.

demonstrated that such action was required. To be clear, China does not otherwise challenge, in the context of USDOC's *resort to facts available*, USDOC's finding that the China-government entity was non-cooperative. For instance, China makes no arguments *in this context* that USDOC improperly found the China-government entity non-cooperative based on the noncooperation of one or more members of the entity.[442]

272. Thus, 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. The United States will demonstrate below how 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. The United States will also explain that China has not demonstrated that USDOC was required to send the dumping questionnaire to each and every member of the China-government entity in each challenged determination. In short, China has failed to establish that USDOC's resort to facts available inconsistent with Article 6.8 and Annex II(1) in these 19 challenged proceedings.

273. In 5 investigations[443] and 1 review,[444] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information. China argues that a party's failure to respond to a request for quantity and value information is not a proper basis to reach a finding of noncooperation.[445] According to China, "the only information that an authority could permissibly replace for a respondent not selected for individual examination is any information which is necessary to

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442 *See* China's First Written Submission, paras. 625-637; *id.*, para. 626 ("{I}n each of the challenged investigations, USDOC violated Article 6.8 and Annex II(1) of the *Anti-Dumping Agreement* by resorting to facts available in making a final determination of dumping for the PRC-wide entity, without having specified in detail the information required to make that determination."); *id.*, para. 637 ("USDOC acted inconsistently with Article 6.8 and Annex II(1) of the *Anti-Dumping Agreement* in each of the challenged reviews in which it determined a rate for the PRC-wide entity by resorting to facts available in making a final determination of dumping for the PRC-wide entity, without having specified in detail the information required to make that determination.").

443 Shrimp OI, Solar OI, Steel Cylinders OI, Tires OI, and Wood Flooring OI. *See also* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 141. In Shrimp OI, USDOC's recourse to facts available was also based in part on the failure of the Chinese government to respond to a request for information. *See* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 149.

444 Ribbons AR3. *See also* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 141. As discussed in paragraphs 142 and 143 of the United States' Response to Panel Questions, the failure of a mandatory respondent to cooperate was an additional ground for USDOC's finding of noncooperation of the China-government entity in Ribbons AR3. In Solar AR1, one of the new challenged determinations, USDOC found the China-government entity non-cooperative because of the failure of certain companies within the entity to respond to a request for quantity and value information. *See* Solar AR1 Preliminary Decision Memo at 2, 17-18 (Exhibit CHN-488), unchanged in Solar AR1 Final Determination, 80 FR at 40999 (Exhibit CHN-489). Assuming *arguendo* that the Panel finds this determination within its terms of reference, China's claims with respect to this determination are without merit for the reasons discussed herein.

445 *See* China's Responses to the Panel's First Set of Questions, para. 291.

make an informed decision about respondent selection and which the respondent did not provide despite the authority's detailed request."[446]

274. The basis for China's argument in this respect are panel findings from *China – GOES* and *China – Autos*.[447] But those findings are inapposite because the panels were evaluating whether *unknown* companies that did not respond to a request for quantity and value information could be assigned a rate based on facts available. Here, the China-government entity, including those constituent companies for which USDOC explicitly sent a request for Q&V information, is not "unknown". Rather, the entity and such constituent companies are known but have simply failed to respond to a request for necessary information.

275. Moreover, the panel in *China – Broiler Products* reached the opposite conclusion from the *China – GOES* and *China – Autos* panels, finding:

> In our view, in the case of a failure by an interested party to provide some initial information necessary for the determination of a producer's margin of dumping, the authority is justified in replacing other information that it cannot collect as a result of that failure, even if it did not specifically request the other information. Such information initially required may include the producer's contact details and information necessary for the authority to decide on sampling.[448]

The panel's analysis in *China – Broiler Products* comports with basic logic regarding both the AD Agreement and the effective functioning of investigating authorities. Specifically, it recognizes that a failure by an interested party to provide information in response to one request can have broader implications regarding other information that is used to make determinations regarding that particular interested party – and thus may "lead to a result which is less favorable to the party than if the party did cooperate."[449] If a party could pick and choose what information it submits, it would incentivized to only participate and selectively disclose information that benefits its interests rather than provide all of the necessary information to ensure the most appropriate determination. This would "seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority's satisfaction."[450]

276. Furthermore, the panel in *US – Shrimp I (Viet Nam)* rejected the same argument China makes here:

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446 *See* China's Responses to the Panel's First Set of Questions, para. 291.

447 *See* China's Responses to the Panel's First Set of Questions, para. 291 (citing *China – GOES*, para. 7.386 and *China – Autos*, paras. 7.134-7.137).

448 *China – Broiler Products*, para. 7.306 fn. 501.

449 AD Agreement, Annex II, para 7.

450 *US – Steel Plate*, para. 7.64.

> Regarding Viet Nam's argument that the Article 6.8 facts available mechanism does not apply in respect of non-selected respondents, we note that the first sentence of Article 6.8 envisages the use of facts available in cases of non-cooperation by "any" interested party. The reference to non-cooperation by "any" interested party suggests that Article 6.8 is of broad application. There is nothing in the text of Article 6.8 to suggest that the facts available mechanism only applies in respect of non-cooperation by a limited category of interested parties. In particular, there is no indication in the text to suggest that, in cases of limited examination (under Article 6.10), Article 6.8 only allows the use of facts available in respect of those interested parties that were selected for individual examination, as alleged by Viet Nam.[451]

Again, the analysis in this instance is compelling. Textually, it correctly captures that the language of Article 6.8 on its face is broad in scope. Logically, it comports with a reality. The fact that a constituent of the China government entity is non-cooperative is unaffected by whether other constituents received Q&V questionnaires; it is non-cooperative all the same and the investigating authority's examination of the entity has been impeded. Moreover, aside from its repeated misplaced reliance on *EC – Fasteners* discussed above,[452] China has not presented any other argument why under the AD Agreement, despite this initial request for information, USDOC was still required to also send a full dumping questionnaire to every member of the China-government entity.

277. In 7 investigations,[453] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information and to respond to the dumping questionnaire. We have demonstrated above that China is incorrect in arguing that a failure to respond to a request for quantity and value information does not allow for the application of facts available in determining a rate for the China-government entity. Also, aside from its misplaced reliance on *EC – Fasteners* discussed above, China has not presented any other argument why under the AD Agreement, despite these repeated requests for information, USDOC was still required to also send a full dumping questionnaire to every member of the China-government entity.

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451 *US – Shrimp (Viet Nam) I*, para. 7.263.

452 *See* China's Response to Panel Questions, paras. 305-307, 312-314, 413, 678, 741, 854, and 856.

453 Aluminum OI, Coated Paper OI, Diamond Sawblades OI, Furniture OI, OCTG OI, Retail Bags OI, and Ribbons OI. *See also* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 141. In Diamond Sawblades OI and Furniture OI, the recourse to facts available was also based in part on the failure of the Chinese government to respond to requests for information. *See* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 149.

278. In one investigation[454] and 5 reviews,[455] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to the dumping questionnaire. Aside from its misplaced reliance on *EC – Fasteners* discussed above, China has not presented any other argument why under the AD Agreement, despite this request for information, USDOC was still required to also send a full dumping questionnaire to every member of the China-government entity. Thus, the United States has demonstrated that nothing in the text of the AD Agreement obliges an investigating authority to refrain from the recourse to facts available when a constituent of an entity has failed to respond to a request for information. This interpretation comports with basic notions of logic. If an investigating authority is investigating a particular firm and a relevant subsidiary declines to assist, the investigating authority is not required to ignore that fact and issue requests to other subsidiaries. The non-cooperation is logically imputed to the parent firm. Likewise, the failure by any constituent of the China government entity to provide a response to the dumping questionnaire is an adequate basis for USDOC to determine the cooperation of the entity itself.

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

279. As discussed above, China's sole claim with respect to USDOC's *resort to facts available* is that USDOC failed to request the necessary information before resorting to facts available in violation of Article 6.8 and Annex II(1) in the 26 challenged determinations.[456] China raises no other claims or arguments in this context to challenge USDOC's resort to facts available, or its finding of noncooperation of the China-government entity. For instance, China does not argue that USDOC improperly reached a finding of non-cooperation of the China-government entity based on the "procedural circumstances" of non-cooperation of one or more members of the entity before resorting to facts available.[457] Nor does China argue that USDOC's

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[454] PET Film OI. *See also* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 141.

[455] Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, and Shrimp AR8. *See also* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 141.

[456] *See* China's First Written Submission, paras. 625-637; *id.*, para. 626 ("{I}n each of the challenged investigations, USDOC violated Article 6.8 and Annex II(1) of the *Anti-Dumping Agreement* by resorting to facts available in making a final determination of dumping for the PRC-wide entity, without having specified in detail the information required to make that determination."); *id.*, para. 637 ("USDOC acted inconsistently with Article 6.8 and Annex II(1) of the *Anti-Dumping Agreement* in each of the challenged reviews in which it determined a rate for the PRC-wide entity by resorting to facts available in making a final determination of dumping for the PRC-wide entity, without having specified in detail the information required to make that determination.").

[457] China raises this both in the context of its "as such" and as applied claims pursuant to Article 6.8 and Annex II(7). *See* China's Visual Aid NME3 at "Argument 2" (Exhibit CHN-496) ("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{.}"); China's First Written Submission, paras. 645-660 (as such claims); China's Visual Aid NME3 at "Argument B" (Exhibit CHN-496) ("USDOC, in the relevant challenged determinations, select{s} a facts available rate for the PRC-wide entity based on the procedural circumstances of presumed non-cooperation by the PRC-wide entity{.}"); China's First Written Submission, paras. 679-682. *See also* China's Response to Panel Questions, paras. 704-733 (discussing the various circumstances in which USDOC made a finding of noncooperation).

resort to facts available was improper because of the specific circumstances of each respondent within the China-government entity[458] or the manner or procedural circumstances in which information is missing.[459] Additionally, China does not argue that resort to facts available was improper because the China-government entity is allegedly a fictional entity based on presumption and not facts.[460]

280. China raises *none* of these claims or arguments in the context of USDOC's *resort to facts available*, although they all specifically relate to such a determination. Yet, China raises *all* of these claims and arguments within the context of its "as such" and "as applied" claims regarding USDOC's *subsequent selection of facts available*.[461] China thus incorrectly conflates USDOC's initial resort to facts available, and the subsequent selection of facts to use as facts available.

281. For instance, as the United States raised in its first written submission, two of China's three as such claims[462] 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.[463] 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{,}"[464] and China's claim that "USDOC, as a result of the Use of Adverse Facts

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458 In its as applied claims pursuant to Article 6.8 and Annex II(7), China argues that this is one of many factors that USDOC was required to consider in making its selection of facts to use as facts available. *See, e.g.*, China's Response to Panel Questions, para. 698 ("The identification of the "best information available" and the exercise of "special circumspection" also requires consideration of the specific circumstances of the particular case at hand, including those of the particular respondent for which the facts available are to be selected.")

459 In its as applied claims pursuant to Article 6.8 and Annex II(7), China argues that this is one of many factors that USDOC was required to consider in making its selection of facts to use as facts available. *See, e.g.*, China's Response to Panel Questions, paras. 700-701.

460 In its as applied claims pursuant to Article 6.8 and Annex II(7), China argues that this is one of many factors that USDOC was required to consider in making its selection of facts to use as facts available. *See, e.g.*, China's Response to Panel Questions, paras. 702-703, 740-745.

461 *See China's Response to Panel Questions*, paras. 362; 750-754; 787-835; 847; 854-857.

462 *See, e.g.*, China's First Written Submission, para. 640 (listing China's three as such claims). As discussed in the United States' response to panel questions, although China refers to these claims as "arguments", these claims are not an analysis or demonstration of why particular provisions have been breached, *i.e.*, arguments, but rather, these are claims broadly asserting that Article 6.8 and Annex II of the AD Agreement have been breached by the United States. *See* United States' Response to Panel Questions, paras. 185-187.

463 *See* U.S. First Written Submission paras. 493-502; United States' Response to Panel Questions, paras. 185-194.

464 *See* China's Visual Aid NME3 (Exhibit CHN-496) (China refers to this as "Argument 2"); China's First Written Submission, paras. 640, 645-660.

Available norm, select{s} Adverse Facts Available in circumstances when it has not requested the necessary information{.}"[465]

282. China still has not put forth a viable explanation why these two claims, which on their face address USDOC's resort to facts available through a finding of noncooperation, relate to the alleged norm, rather than the "trigger" condition for the norm.[466] For instance, China argues that the circumstances surrounding the finding of noncooperation are "relevant" to China's claim against the norm.[467] But at the same time, China's own statements confirm that it improperly seeks to expand its as such claims to account for USDOC's *resort to facts available*, not simply *the selection of facts available*:

> Indeed, under the norm, USDOC selects adverse facts to determine rates for NME-wide entities based solely on the procedural circumstance of non-cooperation. Additionally, pursuant to the norm, USDOC selects adverse facts available to determine this rate even in circumstances in which it has not requested the necessary information, *and therefore has no basis to resort to facts available at all*.[468]

283. Additionally, China lists the following which deal specifically with USDOC's *resort to facts available* as "factors" that USDOC should consider in its *selection of facts available*:

> (1) That USDOC improperly reached a finding of noncooperation of the China-government entity based on the "procedural circumstances" of noncooperation of one or more members of the entity before resorting to facts available;[469]
>
> (2) that USDOC failed to consider the specific circumstances of each respondent within the China-government entity before resorting to facts available;[470]

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[465] *See* China's Visual Aid NME3 (Exhibit CHN-496) (China refers to this as "Argument 3"); China's First Written Submission, paras. 640, 661-666.

[466] *See* China's Response to Panel Questions, paras. 378-384.

[467] *See* China's Response to Panel Questions, para. 379.

[468] China's Response to Panel Questions, para. 418 (emphasis added); China's Response to Panel Questions, para. 422 (referencing Aluminum Extrusions OI and stating that "as a result of applying the Use of Adverse Facts Available norm, USDOC adopted an adverse inference and selected adverse facts available in circumstances when it enjoyed *no basis to resort to facts available at all in relation to the PRC-wide entity*.") (emphasis added).

[469] *See* China's Visual Aid NME3 at "Argument B" (Exhibit CHN-496) ("USDOC, in the relevant challenged determinations, select{s} a facts available rate for the PRC-wide entity based on the procedural circumstances of presumed non-cooperation by the PRC-wide entity{.}"); China's First Written Submission, paras. 679-682. *See also* China's Response to Panel Questions, paras. 704-733 (discussing the various circumstances in which USDOC made a finding of noncooperation).

[470] *See, e.g.*, China's Response to Panel Questions, para. 698 ("The identification of the "best information available" and the exercise of "special circumspection" also requires consideration of the specific circumstances of

> (3) that USDOC failed to consider the manner or procedural circumstances in which information is missing before resorting to facts available;[471] and;
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> (4) that USDOC failed to consider that the China-government entity is allegedly a fictional entity based on presumption and not facts before resorting to facts available.[472]

284. But these arguments are circular. According to China, if USDOC had properly reviewed these "factors" in its selection of facts available, it would reach the conclusion that it was not justified in resorting to facts available in the first place:

> The "careful, deliberative evaluation of *all* the evidence" on the record that is described in the quote from China's First Written Submission extracted by the Panel in its question, refers to the very last step of the process described in Annex II to identify the "best information available". Much of the relevant evidence identified in response to Panel Question 80(a) above relates to fundamental flaws at much earlier stages and even the very beginning of the process. In other words, as described under the first subheading below, USDOC should never have reached the stage in the process where it was required to engage in a "careful, deliberative evaluation of *all* the evidence" in order to identify facts available that reasonably replace missing information. As discussed under the first subheading below (paragraphs 740-744), these fundamental flaws meant that *USDOC was not justified in resorting to facts available at all*.[473]

285. Importantly, because China did not raise these additional claims or arguments in the context of USDOC's *resort to facts available*, the Panel should find that USDOC did not fail to seek the necessary information in the challenged determinations (China's only claim in this respect). In any event, as demonstrated above, and as discussed in the United States' first written submission, in each of the challenged determinations, USDOC's finding of noncooperation was not based on a presumption of noncooperation, but on actual facts and circumstances of each proceeding which demonstrate the China-government entity failed to

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the particular case at hand, including those of the particular respondent for which the facts available are to be selected.")

471 *See, e.g.*, China's Response to Panel Questions, paras. 700-701.

472 *See, e.g.*, China's Response to Panel Questions, paras. 702-703, 740-745.

473 China's Response to Panel Questions, para. 738 (emphasis in original); *see also id.*, paras. 744-745 ("{I}n each of the relevant determinations, there simply was no basis under the *Agreement* to resort to facts available at all in order to determine a rate for the fictional PRC-wide entity and all of the distinct producers/exporters included within it. Put in terms of the Panel's question, *USDOC should have taken into account its own conduct*, and should *not* have had resort to facts available to determine the rate for the fictional PRC-wide entity, and all of the respondents grouped within that fictional entity, in any of the challenged determinations.")

cooperate. Thus, USDOC's resort to facts available is consistent with Article 6.8 and Annex II(1) in the challenged determinations.[474]

286. In short, USDOC's resort to facts available was fully consistent with Article 6.8 and Annex I(1) because USDOC notified the China-government entity of the necessary information required. Moreover, USDOC's findings of noncooperation were appropriately based on the facts and circumstances of each proceeding, and not "procedural circumstances of noncooperation". In light of this, China's arguments that USDOC failed to consider the procedural circumstances of presumed noncooperation, or that it failed to consider that it did not seek the necessary information, pursuant to Article 6.8 and Annex II(7) must fail.

X. 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

287. In response to the Panel's Questions, China reiterates its claim that USDOC's selection of facts available for the China-government entity is inconsistent with Article 6.8 and Annex II based on its assertions that the selection process:

> (1) seeks out and selects "adverse information" instead of the best information available;
>
> (2) fails to take the China-government entity's circumstances into account and instead relies *solely* on the procedural circumstance of non-cooperation; and
>
> (3) does not meet the requirement of a "comparative, evaluative assessment" because USDOC does not consider all the facts on the record, and does not use the "appropriate comparators" in conducting its analysis.

As the United States demonstrates below, these arguments lack merit.

288. The United States first explains that China, in making its argument concerning the use of appropriate comparators, makes a critical concession concerning the selection of facts available when a party fails or otherwise refuses to cooperate. As explained in detail below, China concedes that an investigating authority may apply an adverse inference when selecting from among the facts available in cases of "genuine non-cooperation." China's concession makes it clear its quarrel is not with the process of selecting facts available when a party fails or otherwise refuses to provide necessary information, as requested by the investigating authority. Rather, China's issue is with USDOC's determination that the China-government entity failed to cooperate. To establish its claim on the selection of facts available, China focuses on components within the China-government entity that it claims did not fail to cooperate. China then advances arguments that misconstrue the meaning of the adverse inference, and in particular

[474] As discussed above, USDOC only resorted to facts available in 19 of the challenged determinations. In the remaining 7 determinations USDOC did not resort to facts available.

misrepresent the process USDOC employed in selecting facts available in the challenged determinations, as we demonstrate below.

289. China's arguments are misplaced. As the United States has explained – and China has failed to rebut – there is no such thing as "adverse information," there is just the available information. And with respect to the available information, USDOC's corroboration process ensures that information that is chosen is reliable and relevant, consistent with the United States' obligations under Article 6.8 and Annex II.

A. In Selecting From Among The Available Facts, USDOC Performed A Comparative, Evaluative Assessment Consistent With Article 6.8 and Annex II

290. As explained in the United States' first written submission,[475] and in answering Panel Question 85, in the process of selecting from among the facts available, USDOC considers the universe of information on the record. As noted, 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 when selecting from the available information.[476]

291. 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. 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, consistent with USDOC's determination in *Flowers from Mexico*, explained further below.

292. USDOC performed this comparative, evaluative assessment twice during each determination: at the preliminary determination or results, and again at the final determination or results. In some cases, as explained in the U.S. answers to the Panel's Questions, USDOC performed this assessment more than twice, such as in the context of an amended preliminary or amended final determination.[477]

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475 *See* U.S. First Written Submission paras. 475 and 487.

476 *See US – Carbon Steel (India) (AB)*, para. 4.469 ("the permissibility of using an inference derived from the procedural circumstances in which information is missing, as part of selecting from the 'facts available', depends on whether such use comports with the legal standard for Article 12.7. This is to be determined in the light of the particular circumstances of a given case.").

477 *See, e.g.*, *Aluminum Extrusions OI* (changing the facts available for the China-government entity in the amended preliminary determination).

293. As noted, during its selection of facts available, USDOC also considers any evidence on the record to determine whether the particular information is aberrational and therefore should not be used. For example, in *Flowers from Mexico*, USDOC rejected the selection of a cooperating party's weighted-average margin as facts available, finding the information was "unrepresentative of the other companies" in the review.[478] USDOC found that the cooperating party's rate was unrepresentative of the entire flower industry because "(1) it was an out of proportion rate explained by factors unassociated with the overall industry, and (2) Florex, {the cooperating party} represented only a small fraction of the industry."[479] USDOC determined that Florex's accumulated interest expenses from a separate line of business, which never began operations, skewed its cost of production figures so USDOC rejected Florex's calculated rate of 264.43 percent and instead chose another party's weighted-average dumping margin of 39.95 percent as facts available.[480]

294. In the challenged determinations, USDOC describes this same type of evaluation in *Steel Cylinders OI*, concluding that the selected information was not aberrational or unusual.[481]

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

479 *Id.*

480 *Id.* While this case does not pertain to an NME entity, China has not demonstrated, or even attempted to demonstrate, that the process of selecting from among the available facts for the NME entity is different from such selection for non-cooperating separate rate parties, or non-cooperating parties in market-economy cases.

481 USDOC also references the same evaluative process reflected in *Flowers from Mexico* in ten (10) of the challenged determination and 18 of the sampled determinations. *See* Christian Marsh, *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from the People's Republic of China*, Memorandum to Paul Piquado, Assistant Secretary for Import Administration (18 March 2014), pp. 7-8 (Exhibit CHN-120); Christian Marsh, *Decision Memorandum for Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from the People's Republic of China*, Memorandum to Paul Piquado, Assistant Secretary for Import Administration (12 March 2013), (Exhibit CHN-167), pp. 9-10; *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review* (8 August 2012), 77 Fed. Reg. 47363, 47368 ("We were unable to find any information that would discredit the selected AFA rate.") (Exhibit CHN-171); *Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results, Partial Rescission of Sixth Antidumping Duty Administrative Review and Determination Not To Revoke in Part* (4 September 2012), 77 Fed. Reg. 53856, 53860-53861 (Exhibit CHN-226); *Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2006 Administrative Review and Preliminary Intent To Rescind 2004/2006 New Shipper Review* (9 March 2007), 72 Fed. Reg. 10645, 10652-10653 (Exhibit CHN-227); *Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China* (22 August 2007), 72 Fed. Reg. 46957, 46963 (Exhibit CHN-290); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review* (20 August 2008), 73 Fed. Reg. 49162, 49166 (Exhibit CHN-291); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews* (17 August 2009), 74 Fed. Reg. 41374, 41379-41380 (Exhibit CHN-292); *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part* (18 August 2010), 75 Fed. Reg. 50992, 50996-50997 (Exhibit CHN-293); *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part* (11 August 2011), 76 Fed. Reg. 49729, 49732-49773 (Exhibit CHN-294); *Uncovered Innerspring Units from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review* (6 December 2011), 76 Fed. Reg. 76126, 76127-76128 (Exhibit CHN-310); *Uncovered Innerspring Units From the People's Republic of China: Preliminary Results of First Antidumping Duty Administrative Review* (10 November 2010), 75 Fed. Reg. 69055, 69056-69057 (Exhibit CHN-311);

USDOC found that "there are significant numbers of sales with quantities similar to that in the underlying transaction."[482] Further, USDOC found that the individually investigated respondent had "a number" of other rates based on transactional information that were "very close" to the selected rate.[483] USDOC also stated that the rate "represents an actual rate at which a cooperating respondent sold the subject merchandise during the {period of investigation}".[484]

295. As noted, USDOC considered the universe of information on the record, including the rates assigned to cooperating companies. In most of these cases, USDOC found the cooperating rates to have less probative value than other information on the record because such rates did not match the circumstance of non-cooperation, and there was no information on the record indicating the rate of a cooperating party reflects the rate for the non-cooperating party. There

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Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews (17 April 2007), 72 Fed. Reg. 19174, 19175-19176 (Exhibit CHN-319); *Silicon Metal from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review* (10 March 2003), 68 Fed. Reg. 11369, 11370 (Exhibit CHN-325); Bernard T. Carreau, *Issues and Decision Memorandum for the Administrative Review of Certain Cased Pencils from the People's Republic of China; Final Results,* Memorandum to Faryard Shirzad, Assistant Secretary for Import Administration (16 July 2002), p.27 (Exhibit CHN-326); *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review* (11 July 2007), 72 Fed. Reg. 37715, 37717 (Exhibit CHN-382); *Honey From the People's Republic of China: Final Results of First Antidumping Duty Administrative Review* (5 May 2004), 69 Fed. Reg. 25060, 25061-25062 (Exhibit CHN-394); *Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review* (11 July 2003), 68 Fed. Reg. 41304, 41307-14308 (Exhibit CHN-397); *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review* (21 April 2003), 68 Fed. Reg. 19504, 19508 (Exhibit CHN-398); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Silicon Metal From the Russian Federation* (20 September 2002), 67 Fed. Reg. 59253, 59260 (Exhibit CHN-426); *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China* (9 May 2002), 67 Fed. Reg. 31235, 31237-31238 (Exhibit CHN-427); Gary Taverman, *Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review*, Memorandum to Kim Glas, Acting Deputy Assistant Secretary for Import Administration (14 March 2011), pp. 29-30 (Exhibit CHN-431); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Notice of Rescission in Part and Intent to Rescind in Part* (26 March 2007), 72 Fed. Reg. 14078, 14080-14081 (Exhibit CHN-438); *Freshwater Crawfish Tail Meat From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2005 Administrative and New Shipper Reviews* (10 October 2006), 71 Fed. Reg. 59432, 49439 (Exhibit CHN-439); *Petroleum Wax Candles From the People's Republic of China: Preliminary Results of the 2004–2005 Administrative Review* (21 June 2006), 71 Fed. Reg. 35613, 35615 (Exhibit CHN-440); *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind, in Part* (14 June 2004), 69 Fed. Reg. 32979, 32981-32982 (Exhibit CHN-442); *Honey from the People's Republic of China: Preliminary Results of First Antidumping Duty Administrative Review* (16 December 2003), 68 Fed. Reg. 69987, 69991-69992 (Exhibit CHN-443); *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review* (16 October 2002), 67 Fed. Reg. 63877, 63882 (Exhibit CHN-444).

482 *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77971. (Exhibit CHN-65).

483 *Id.* (Exhibit CHN-65).

484 *Id.* (Exhibit CHN-65).

are also cases in which USDOC finds that these rates *are* the "best information available". In twenty (20) of China's sampled determinations, USDOC assigned the weighted-average dumping margin of a cooperating company as the facts available rate for the China-government entity.[485] Similarly, among the challenged determinations, USDOC assigned the weighted-

[485] *See Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (1 October 2010), 75 Fed. Reg. 60725, 60728-60729 (Exhibit CHN-333); *Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (2 October 2008), 73 Fed. Reg. 57329, 57331-57332 (Exhibit CHN-315); *Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate From the People's Republic of China* (4 February 2008), 73 Fed. Reg. 6479, 6481-6482 (Exhibit CHN-341); *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China* (10 May 2005), 70 Fed. Reg. 24502, 24505 (Exhibit CHN-346); *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation* (11 February 2003), 68 Fed. Reg. 6885, 6887-6888 (Exhibit CHN-352); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China* (3 October 2002), 67 Fed. Reg. 62107, 62109 (Exhibit CHN-353); *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Ukraine* (30 August 2002), 67 Fed. Reg. 55785, 55787 (Exhibit CHN-164); *Glycine From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011– 2012* (8 April 2013), 78 Fed. Reg. 20,891, (Exhibit CHN-360), and accompanying Decision Memorandum at 7 (Exhibit USA-116); *Certain Cased Pencils From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review* (7 July 2010), 75 Fed. Reg. 38980 (Exhibit CHN-370), as calculated in *Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 Fed. Reg. 59,049, 59,049 (Sept. 19, 2002) (Exhibit USA-117); *Administrative Review of Honey from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Review, In Part* (6 May 2010), 75 Fed. Reg. 24880 (Exhibit CHN-371), as calculated *Honey From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 796, 797 (Jan. 8, 2009) (Exhibit USA-118); *Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review* (13 July 2009), 74 Fed. Reg. 33406 (Exhibit CHN-374), as calculated in *Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 Fed. Reg. 59,049 (Exhibit USA-117); *Honey From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review* (8 January 2009), 74 Fed. Reg. 796 (Exhibit CHN-376), as calculated *Honey From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 796, 797 (Jan. 8, 2009) (Exhibit USA-118); *Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results and Partial Rescission of the 2005–2006 Antidumping Duty Administrative Review and Rescission of 2005–2006 New Shipper Reviews* (15 April 2008), 73 Fed. Reg. 20249 (Exhibit CHN-379), as calculated in *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19,546, 19,549 (Apr. 22, 2002) (Exhibit USA-119); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Final Results of 2005–2006 Administrative Review and Partial Rescission of Review* (4 October 2007), 72 Fed. Reg. 56,724 (Exhibit CHN-381), and accompanying Decision Memorandum at 9-11 (Exhibit USA-120); *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review* (11 July 2007), 72 Fed. Reg. 37715 (Exhibit CHN-382), as calculated in *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 Fed. Reg. 37,715, 37,717 (July 11, 2007) (Exhibit USA-121); *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews* (17 April 2007), 72 Fed. Reg. 19174 (Exhibit CHN-319), as calculated in *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19,546, 19,549 (Apr. 22, 2002) (Exhibit USA-119); *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review* (6 July 2006), 71 Fed. Reg. 38366 (Exhibit CHN-385), as calculated in *Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 Fed. Reg. 59,049 (Exhibit USA-117); *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty*

average dumping margin of a cooperating company in *Furniture AR7*.[486]

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

296. China continues to argue that USDOC "is rigidly focused on the selection of adverse facts in a way that prevents proper exercise of circumspection."[487] China contends the selected facts considered by USDOC to be "sufficiently adverse" are "uniformly in USDOC's words 'adverse'".[488] In support, China notes that USDOC itself "describes its selection process as one that aims to find 'adverse' facts available."[489] In particular, China claims that, rather than performing a comparison of the available facts on the record, USDOC identifies its own points of comparison, selecting, as adverse facts "'the higher of the (a) highest rate alleged in the petition, or (b) a highest calculated rate of any respondent in the investigation' or the 'highest margin determined for any party in the {} investigation or any administrative review.'"[490] China purports to rely on US court rulings to support its claim, and concludes that "[s]uch rates are chosen not because they are accurate but rather because they are high."[491]

297. China's selective quotations from the determinations and court rulings present an incomplete and indeed inaccurate picture of the process USDOC employed in selecting the facts available rate in the challenged determinations. In particular, China extracts language from USDOC's determinations in an effort to show the rates selected are "inaccurate". China, however, has continually relied upon incomplete context to reflect the substance of the challenged determinations, while ignoring other important aspects and substantive language of

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Administrative Review, and Final Rescission of Review, in Part (20 October 2004), 69 Fed. Reg. 61636 (Exhibit CHN-392), as calculated in *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19,546, 19,549 (Apr. 22, 2002) (Exhibit USA-119); *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review* (21 April 2003), 68 Fed. Reg. 19504 (Exhibit CHN-398), as calculated in *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19,546, 19,549 (Apr. 22, 2002) (Exhibit USA-119); *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review* (22 April 2002), 77 Fed. Reg. 19546 (Exhibit CHN-402), as calculated in *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19,546, 19,549 (Apr. 22, 2002) (Exhibit USA-119).

[486] *Wooden Bedroom Furniture From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011* (12 June 2013), 78 Fed. Reg. 35249 (Exhibit CHN-59).

[487] *See* China's Response to Panel Questions, para. 382.

[488] *See* China's Response to Panel Questions, para. 383.

[489] *See* China's Response to Panel Questions, para. 346.

[490] *See* China's Response to Panel Questions, para. 352.

[491] *See* China's Response to Panel Questions, para. 347.

the determinations. If the "the highest of" language were to fully and accurately reflect USDOC's determinations, then the rates selected in the determinations where such language appears would be the highest rates available. This is simply not the case.[492] As the United States

[492] In *Aluminum Extrusions OI*, for example, USDOC used the exact same language that China relies upon, but nonetheless did not select the highest margin alleged in the application and instead selected a lower, recalculated application rate. *Aluminum Extrusions From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (4 April 2011), 76 Fed. Reg. 18524 (Exhibit CHN-32). This incomplete context is also demonstrated by comparing the quoted language from the following sampled cases to the information selected as facts available. *Compare* the quotations in China's Annex 14, Table AFA-6 with the USDOC's selection of facts available in the following cases: *Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (23 September 2013), 78 Fed. Reg. 58,273, 58,276 (Exhibit CHN-330) (selecting a lower rate based on a cooperating respondent's transaction information); *High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (7 May 2012), 77 Fed. Reg. 26,739, 26,741 (Exhibit CHN-14) (selecting a lower rate based on a cooperating respondent's transaction information); *Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (18 October 2011), 76 Fed. Reg. 64,318, 64,232 (Exhibit CHN-49) (selecting a lower rate based on a cooperating respondent's transaction information); *Drill Pipe From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances* (11 January 2011), 76 Fed. Reg. 1966, 1969 (Exhibit CHN-332) (selecting a revised, lower application rate); *Certain Woven Electric Blankets From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (2 July 2010), 75 Fed. Reg. 38459, 38461 (Exhibit CHN-334) (selecting a lower application rate); *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (24 July 2009), 74 Fed. Reg. 36,656, 36,660 (Exhibit CHN-336) (selecting a lower application rate); *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China* (19 April 2007), 72 Fed. Reg. 19,690, 19,693 (Exhibit CHN-343) (selecting a lower application rate); *Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China* (2 March 2007), 72 Fed. Reg. 9508, 9510 (Exhibit CHN-344) (selecting a lower application rate); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China* (14 February 2005), 70 Fed. Reg. 7475, 7477 (Exhibit CHN-347) (selecting a revised, lower application rate); *Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China* (14 October 2004), 69 Fed. Reg. 60,980, 69,982 (Exhibit CHN-348) (selecting a lower application rate); *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China* (16 April 2004), 69 Fed. Reg. 20,594, 20,596 (Exhibit CHN-323) (selecting a lower application rate); *Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate From the People's Republic of China* (6 August 2003), 68 Fed. Reg. 46,577, 46,578 (Exhibit CHN-350) (selecting a lower, revised application rate); *Notice of Final Determination of Sales at Less Than Fair Value: Lawn and Garden Steel Fence Posts From the People's Republic of China* (25 April 2003), 68 Fed. Reg. 20,373, 20,375 (Exhibit CHN-351) (selecting a revised, lower application rate); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China* (3 October 2002), 67 Fed. Reg. 62,107, 62,109 (Exhibit CHN-353) (selecting a cooperating party's weighted-average dumping margin); *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China* (12 February 2002), 67 Fed. Reg. 6482, 6483 (Exhibit CHN-355) (selecting a lower application rate); *Certain Polyester Staple Fiber From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011* (11 January 2013), 78 Fed. Reg. 2366, 2367 (Exhibit CHN-361) (selecting a lower application rate); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Final Results of 2005–2006 Administrative Review and Partial Rescission of Review* (4 October 2007), 72 Fed. Reg. 56,724 (Exhibit CHN-381), and accompanying Decision Memorandum at 9-11 (Exhibit USA-120) (selecting a cooperating party's weighted-average dumping margin); *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews* (17 April 2007), 72 Fed. Reg. 19,174, 19,716 (Exhibit CHN-319) (selecting a cooperating party's weighted-average dumping margin); *Porcelain–on-Steel Cooking Ware from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review* (26 April 2006), 71 Fed. Reg. 24,641, 24,642 (Exhibit CHN-386) (selecting an application

has demonstrated in examining China's selected sample of cases, and 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.[493] It is clear that China's selected statements from these determinations, shorn out of context, cannot and do not accurately reflect the selection process USDOC employed in the challenged determinations.

298. 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*,[494] for example, China points to specific language while ignoring the ruling itself and other relevant language. China cites the court's language in *Lifestyle* that states "AFA rates must be reasonably accurate estimates of respondents' rates with some built-in increase as a deterrent for non-compliance."[495] 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 refusal or failure to cooperate in selecting the rate. Indeed, China does not substantiate otherwise with respect to actual respondents in any of the challenged determinations. Thus, contrary to China's claim, neither an adverse inference nor the language of the court cases provide USDOC with "carte blanche" to choose whatever fact it wishes. Rather, USDOC must avoid selection of a rate that is not probative based upon an examination of independent information on the record.

299. If anything, the court rulings China cites demonstrate that taking account of non-cooperation has recognized limitations under U.S. law. As noted, if there is another rate on the record that has greater probative value, USDOC is required to use that rate as facts available, including for purposes of the China-government entity's rate. Contrary to China's implication, "reasonably accurate estimates" are not sacrificed for purposes of deterring non-cooperation.

300. 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. As the United States stated in the first Panel hearing, there is no test to determine whether a rate is "sufficiently adverse" to

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rate); *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review* (18 November 2005), 70 Fed. Reg. 69,937, 69,939 (Exhibit CHN-388) (selecting a revised application rate); *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review* (21 April 2003), 68 Fed. Reg. 19,504, 19,508 (Exhibit CHN-398) (selecting a cooperating party's weighted-average dumping margin); *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review* (22 April 2002), 77 Fed. Reg. 19,546, 19,549 (Exhibit CHN-402) (selecting a cooperating party's weighted-average dumping margin).

493 USDOC applied the highest rate on the record in only eight (8) of the challenged determinations and only 36 of the sampled determinations. *See* United States answers to Panel Questions at paras. 150-153, 207-210, and accompanying chart at Exhibit USA-90. The United States is providing an updated, correct chart (Exhibit USA-114) that replaces Exhibit USA-90.

494 *Lifestyle Enterprise, Inc. v. United States*, 768 F.Supp.2d 1286 (Ct. Int'l Trade 2011) (Exhibit CHN-301) (*Lifestyle*).

495 *See* China's Response to Panel Questions, para. 346.

induce cooperation. Rather, by taking into account the party's non-cooperation, USDOC may apply an inference that *may* be unfavorable or adverse to the interests of the non-cooperating party in selecting from the available facts. In doing so, the party may be incentivized to cooperate.

301. For example, in the *Aluminum Extrusions OI*, the selected rate as facts available was 33.28 percent, compared to the all others rate of 32.79 percent.[496] This example demonstrates that these are fact-driven determinations, the results of which *may or may not*, but are not required to, incentivize cooperation.

302. Next, China claims USDOC failed to take account of factors or circumstances in selecting from among the facts available. In particular, China identifies (1) the fact that USDOC did not request necessary information to calculate a margin for the China-government entity; (2) the degree of cooperation by components of the China-government entity; (3) the fact that Q&V information is not the information necessary to calculate a margin of dumping; (4) that some primary information was available for part of the China-government entity in each determination; and (5) the rates selected were contradicted by other facts on the record.[497]

303. 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, as it must, to make its argument that the rate selected is inaccurate. In doing so, China makes an important concession. China concedes that the comparator or benchmark that it insists be used as the hallmark of accuracy – *i.e.*, the all others rate - is <u>*not*</u> a reasonable replacement for a party that has "genuinely", to use China's own words, failed to cooperate. Based on this clarification, it is clear China's quarrel is not with the process of selecting facts available when a party fails or otherwise refuses to provide necessary information, as requested by the investigating authority. Rather, China's issue is with USDOC's determination that the China-government entity as a whole failed to cooperate.

304. Notwithstanding China's arguments, it should be recognized that to make such determinations, investigating authorities need complete and comprehensive information for the whole entity. If the information of some of the components is lacking, then the picture is incomplete. Where the failure of one or more components of the entity to provide information makes the information provided by other components unusable to reach meaningful determinations, the investigating authority must be able to disregard that information and base its determinations on facts available, as discussed above. An obligation to apply individual rates to those companies within the entity that provided their information would eliminate the entity as a whole where one component of the entity failed to provide its information. Moreover, using a rate of one cooperating component of the NME entity without information to indicate this rate is probative of the NME entity's rate as a whole would subject the determination to manipulation.

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496 *See Aluminum Extrusions From the People's Republic of China, 76 Fed. Reg. 18,524 (Apr. 4, 2011) (final deter.)* (Exhibit CHN-32).

497 *See* China's Response to Panel Questions, paras. 362; 750-754; 787-835; 847; 854-857.

305. China next asserts that USDOC's process was "fatally truncated because it was driven *solely* by the finding of non-cooperation."[498] To support its conclusion in response to the Panel's question, China identifies specific evidence it claims USDOC failed to consider in selecting from among the facts available. China identifies (1) the margins of dumping calculated for cooperating respondents; (2) the all others rates determined for non-individually investigated respondents, as well as (3) the age of the information.[499] China's assertion lacks merit.

306. 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.[500] China claims both groups of companies are in "the exact same situation" in that both separate rate companies and the companies within the China-government entity are not asked for the necessary information to calculate a dumping margin.[501] But China merely repackages the same argument raised above with respect to USDOC's resort to facts available, that is, both separate rate companies and the companies within the China-government entity are not asked for the necessary information to calculate a dumping margin.[502] China ignores key material differences between these two groups. That is, 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 quantity and value information.[503] 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. China, however, fails to explain why such differences *must* be ignored to be consistent with Article 6.8 and Annex II.

307. Critically, through the arguments presented, it is clear China is seeking to establish that the calculated rates for cooperating parties and the all others rates are to be the benchmarks against which all other information must be measured in the process of selecting from among the available facts.[504] It is one thing to evaluate the probative value of a cooperating party's rate for purposes of selecting from among the facts available. It is entirely another to interpret Article

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498 *See* China's Responses to the Panel's First Set of Questions, para. 749 (emphasis in original).

499 *See* China's Responses to the Panel's First Set of Questions, para. 697.

500 *See* China's Responses to the Panel's First Set of Questions, para. 354.

501 *See* China's Responses to the Panel's First Set of Questions, paras. 355-365.

502 *See* China's Responses to the Panel's First Set of Questions, paras. 355-365.

503 *See, e.g.*, *Aluminum Extrusions OI*, Initiation, 75 Fed. Reg. at 22112 (Exhibit CHN-185) ("The Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate–rate application by the respective deadlines in order to receive consideration for separate–rate status."); *Aluminum Extrusions AR1*, Preliminary Decision Memo at 2-3, 12-13 (Exhibit CHN-213) (granting a separate rate to Shenzhen Jiuyuan Co. Ltd., a company that had responded to the Q&V), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 98, 100 (Exhibit CHN-35).

504 *See* China's Responses to the Panel's First Set of Questions, paras. 353; 850-857.

6.8 and Annex II to *require* that cooperating parties' rates must be used as benchmarks of accuracy against which all other information must be measured, *notwithstanding the fact that there is no information on the record to indicate that the rate of any cooperating party is more probative of the non-cooperating party's rate than any other information on the record*. China's argument is simply another attempt to prohibit authorities from taking account of a party's non-cooperation in selecting from among the facts available, contrary to the reasoning and analysis in panel and Appellate Body reports.

308. It is worth recalling the Appellate Body's approach when it focused on whether an adverse inference is permissible for purposes of selecting facts available.[505] In *US – Carbon Steel (India)*, the Appellate Body stated that "as part of the process of reasoning and evaluating which 'facts available' constitute reasonable replacements, the procedural circumstances in which information is missing, *including the non-cooperation of an interested party*, may be taken into account."[506] In that dispute, the Appellate Body rejected India's claim that such an inference was prohibited, stating:

> In our view, however, the authorization to use an inference that is 'adverse to the interests' of a non-cooperating party is not necessarily inconsistent with Article 12.7. As we see it, the permissibility of using an inference derived from the procedural circumstances in which information is missing, as part of selecting from the 'facts available' depends on whether such use comports with the legal standard for Article 12.7.[507]

309. That standard - the same standard for Article 6.8 of the AD Agreement as it is for Article 12.7 of the SCM Agreement - requires that (1) "all substantiated facts on the record be taken into account"; (2) "facts available determinations have a factual foundation"; and (3) "facts available be generally limited to those facts that may reasonably replace the missing information."[508] Nothing in Article 6.8, Annex II, or the approach articulated by the Appellate Body establishes the *per se* rule China seeks to have this Panel impose in selecting from among the facts available.

310. Further, contrary to China's claim, USDOC also considers the age of the information on the record, using information from the current period of investigation or review, or the newest information available.[509] For example, in the 2009-2010 administrative review of the antidumping duty order of polyethylene terephthalate film, sheet, and strip from Taiwan, when the mandatory respondent Nan Ya did not respond to USDOC's questionnaire, USDOC preliminarily selected Nan Ya's transactional information from the immediately prior period of

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505 U.S. First Written Submission, paras. 457-461.

506 *US-Carbon Steel India (AB)*, para. 4.468 (emphasis added).

507 *US-Carbon Steel India (AB)*, para. 4.469.

508 U.S. First Written Submission para. 451, citing *US-Carbon Steel India (AB)*, paras. 4.429-4.430.

509 *See, e.g., id.* (stating that USDOC used transactional information from the 2009 period of review because more recent data were unavailable because of parties' non-cooperation).

review as the facts available.[510] For the final results, USDOC determined to select different facts than the rate selected in the preliminary results, namely, a rate based on transactional information from the same period of review.[511] USDOC determined that this lower rate had greater probative value because it was calculated during the same period of time (rather than an earlier period) for a company selling the same merchandise.[512] While the facts underlying each determination vary, this example demonstrates that, contrary to China's assertion, USDOC does consider the age of the facts to be a relevant consideration in its selection of facts available.

311. China complains about USDOC's failure to take account of one cooperating party within the China-government entity in the *Diamond Sawblades OI*.[513] In that case, however, USDOC found thirteen (13) companies to be part of the China-government entity that did not respond to a request for quantity and value information.[514] The China-government entity also included an *unknown number* of companies that did not receive a direct request for quantity and value information but that had the opportunity to voluntarily submit their information for purposes of the investigation. In addition, one of the mandatory respondents also did not provide requested information pertaining to a calculation of a dumping margin.[515] In light of these circumstances, USDOC was not required to disregard the non-cooperativeness of the China-government entity and rely only upon information provided from one mandatory respondent.[516] In that situation, it is not possible to know the extent of the missing information, making the information from one component unreliable for purposes of determining the dumping rate for the China-government entity as a whole.

312. China argues that even the U.S. courts support its position that USDOC fails to properly account for all of the information on the record during its corroboration process. Specifically, China points to the *Lifestyle Enterprises v. United States* case decided by the U.S. Court of International Trade (CIT), arguing that the Court held that USDOC failed to consider additional factors that called into question its selected facts available rate.[517] However a closer examination

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510 *See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Preliminary Results of Antidumping Duty Administrative Review*, 76 Fed. Reg. 47,540 (Dep't of Commerce Aug. 5, 2011) (Exhibit USA-122).

511 *See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review*, 76 Fed. Reg. 76,941 (Dep't of Commerce Dec. 9, 2011) (Exhibit USA-123).

512 *See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review*, 76 Fed. Reg. 76,941 (Dep't of Commerce Dec. 9, 2011), and accompanying Issues & Decision Memorandum at cmt. 1 (changing from 99 percent to 74.34 percent) (Exhibit USA-124).

513 China's Responses to the Panel's First Set of Questions, para. 735.

514 *Diamond Sawblades OI, Preliminary Determination*, 70 Fed. Reg. at 77121-22, 77128 (Exhibit CHN-135).

515 *Id.*

516 *Id.*, unchanged in Diamond Sawblades OI, Final Determination, 71 Fed. Reg. at 29308 (Exhibit CHN-45).

517 China also points to a Federal Circuit case, *De Cecco de Filippo v. United States*, which pertained to imports of pasta from Italy. *See* China's Panel Answers, at n. 521. Unlike China, Italy is not considered to be, nor treated as, a non-market economy country for purposes of antidumping duty determinations. China's reliance on

of the *Lifestyle* case, and the U.S. Court of International Trade's subsequent interpretation of *Lifestyle*, supports the United States' position.

313. First, China fails to acknowledge that the CIT upheld the selected facts available rate, as it pertained to the China-government entity in the *Lifestyle* case. Dream Rooms, an importer of wooden bedroom furniture, challenged USDOC determination with respect to the China-government rate and the Court upheld USDOC's finding that its Chinese exporter was part of the China-government entity. The selected facts available rate of 216 percent was applied to that exporter.[518]

314. The CIT's findings upon which China relies pertain solely to a company, Orient, which had demonstrated its independence from the China-government entity. The record contained some public information about Orient, which the Court held USDOC should consider in evaluating whether a previously calculated rate should be selected as facts available.[519] For example, USDOC had information on the types of merchandise Orient produces based on a sample invoice on the record.[520] USDOC also had information on the record demonstrating that Orient was one of the largest exporters subject to the administrative review.[521] This is in direct contrast to the situation of the China-government entity, where USDOC had no information as to its size or production.

315. China points to factors that it claims USDOC does not, but should, consider when selecting a facts available rate for the China-government entity.[522] These factors include 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.[523] However, as explained above, USDOC does consider the rates of cooperating respondents and the all others rate but typically finds that this information has less probative value because it does not correspond with a party's non-cooperation. In *Lifestyle*, USDOC determined that the 29.98 percent rate, calculated for a cooperating respondent and also assigned as the all others rate, was not a reasonable replacement for Orient's rate after Orient had withdrawn its business proprietary information from the record, in an effort to obtain a more favorable result.[524] In fact, USDOC had selected the previously calculated rate of a cooperative respondent, a new shipper that had

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cases that do not pertain to NME entities further demonstrates there is no separate rule or norm of general and prospective application for NME entities for purposes of the selection of facts available.

518 *Lifestyle Enterprises v. United States*, 768 F. Supp. 2d at 1299-1300 (Exhibit CHN-301).

519 *Id*. at 1299.

520 *Lifestyle Enterprises v. United States*, 896 F. Supp. 2d 1297, 1301 (Ct. Int'l Trade 2015) (Exhibit USA-115)

521 *Id*.

522 *See* China's Panel Answers, para. 788.

523 *Id*.

524 *Lifestyle Enterprises v. United States*, 768 F. Supp. 2d at 1299-1300 (Exhibit CHN-301).

requested a review to obtain its own rate.[525] As to the age of the information, China ignores the fact that USDOC evaluated a different cooperating respondent's transactional information from the same period of review and found that such contemporaneous data supported the selected rate.[526] Finally, USDOC cannot consider the China-government entity's age or size, as it did for Orient, because that information for the China-government entity was unknown.

316. Most importantly, China ignores the CIT's recent interpretation of the *Lifestyle* case which directly contradicts China's argument. In *Mark David v. United States*, the same court sustained the same selected facts available rate as it pertained to the China-government entity based upon the record.[527] The Court stated that "*Lifestyle I* does not call into question the PRC-wide rate as applied to the PRC-wide entity"[528] Further, the Court found that no evidence called into question the relevance or reliability of the 216 rate."[529] China's arguments notwithstanding, U.S. court decisions do not support its contention that USDOC fails to consider relevant contradictory information on the record when selecting facts available for the China-government entity rate.

317. Last, China contends that USDOC's corroboration process does not examine the information that is apt to contradict the selected rate.[530] Once again, however, China relies on a truncated version of the process USDOC employed in the challenged determinations, as described above. In addition, China's attempt to expand the meaning of "contradictory facts" to include information that it claims would represent a "reasonable replacement for the missing information" should be rejected.[531] In *China-GOES*, the contradictory facts ignored by the investigating authority in that case pertained directly to the non-cooperating party. Indeed, China has not identified any facts that would properly qualify as contradictory facts which USDOC failed to consider in the challenged determinations.

XI. CONCLUSION

318. 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.

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525 *Lifestyle Enterprises*, 768 F. Supp. 2d at n.15 (Exhibit CHN-301).

526 *Id*. at 1297 (Exhibit CHN-301).

527 *Mark David v. United States*, 24 F. Supp. 3d 1355 (Ct. Int'l Trade 2014) (Exhibit CHN-299).

528 *Id*. at 1360.

529 *Id*. at 1361.

530 China's Responses to the Panel's First Set of Questions, pars. 787.

531 China's Responses to the Panel's First Set of Questions, pars. 788.