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

(DS471)

FIRST EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

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

August 11, 2015

I. INTRODUCTION

1. At stake in this dispute is whether Members have the ability to "unmask" dumping concealed by a pattern of export prices which differ significantly, and whether Members have the ability to provide a remedy for dumping by exporters in non-market economy countries, such as China. China proposes interpretations of the AD Agreement that are divorced from the customary rules of interpretation. The Panel should find that all of China's proposed interpretations of the AD Agreement simply are not supported by the ordinary meaning of the text of the agreement, in context, and in light of the object and purpose of the agreement. Accordingly, all of China's legal claims lack merit, and should be rejected.

II. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

2. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination." It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Accordingly, China, as the complaining party, must establish a *prima facie* case before the United States, as the defending party, has the burden of showing consistency with that provision.

III. CHINA'S CLAIMS UNDER ARTICLE 2.4.2 OF THE AD AGREEMENT

3. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." Through its "as applied" challenges in this dispute, China seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance China's efforts in this regard.

China's Claims Related to the Coated Paper, OCTG, and Steel Cylinders Investigations

4. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "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." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding 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. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

7. China "acknowledges that an investigating authority is not bound by [the] *Anti-Dumping Agreement* to structure [its] enquiry into the existence of a relevant pricing pattern in any specific manner," but nevertheless proposes a narrow interpretation of the "pattern clause" that would impose rigid, specific requirements on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. Such requirements are not supported by the text of the second sentence of Article 2.4.2 of the AD Agreement.

8. China argues that one of the "key characteristics" of a pattern is that "the observations comprising the pattern may be discerned – that is, distinguished – from that which is *not* part of the pattern." China's arguments lack any foundation in the text of the second sentence of Article 2.4.2 or in logic. On its face, the text of Article 2.4.2 contemplates *a* pattern of export prices that would transcend multiple purchasers, regions, or time periods. Furthermore, the relevant "pattern" is "a pattern of export prices *which differ significantly* among different purchasers, regions, or time periods." Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. Logically, an investigating authority might examine all of an exporter's export sales in search of "a pattern," and likely may find that "a pattern" exists which consists of all of the exporter's export sales, including lower export prices to certain purchasers, regions, or time periods and higher export prices to other purchasers, regions, or time periods.

9. In each of the challenged investigations, the USDOC applied a two-part test – the *Nails* test – to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by respondents. As reflected in the discussion in the final issues and decision memoranda, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers,

regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" of Article 2.4.2.

10. China argues that the USDOC "failed properly to identify as 'significant', in a quantitative, *statistical* sense, the differences among export prices that it found to be a part of a relevant pricing pattern." The premises of China's statistical arguments are flawed. 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. 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 statistical tools. The basic logical premise of China's arguments is equally flawed. China contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis. However, the *Nails* test does not involve the type of statistical analysis discussed by China. China's statistical criticism of the *Nails* test simply is inapposite. China seeks to replace the USDOC's balanced approach with one of the extremes noted by the USDOC, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is China's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

11. China argues that there is a "[q]ualitative dimension of 'significant' price differences" and that "it is appropriate to consider whether quantitative differences in prices *reflect factors unconnected with targeted dumping*, particularly where variations in price reflect normal or regular dynamics of the relevant product market." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. That latter question is not germane to an application of the "pattern clause." Additionally, China's reasoning is unsound. Low prices of sales, if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing. In the challenged investigations, the USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 by not doing so.

12. China argues that, "in order to identify a meaningful pattern, the investigating authority must assess such a pattern by observing the prices of individual export sales transactions." However, nothing in the text of the second sentence of Article 2.4.2 prohibits the use of weighted averages in connection with an investigating authority's analysis of a "pattern" within the meaning of the "pattern clause." The text of the second sentence of Article 2.4.2 simply does not support China's proposed interpretation, and actually supports the opposite conclusion. The proper focus is not on individual export prices *per se*, or on differences between export prices to a given purchaser, region, or time period, but on differences in export prices *among different* purchasers, regions, or time periods. China is also incorrect to suggest that the use of weighted averages would lead an investigating authority to "overlook the individual prices." When the USDOC undertook analyses pursuant to the "pattern clause" in the challenged investigations, it

took into account all of the export prices for U.S. sales reported by each exporter during the period of investigation.

The "Explanation Clause"

13. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize 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." The "explanation clause" requires a reasoned and 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. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

14. In the challenged investigations, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the weighted average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The USDOC concluded that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. The USDOC provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible 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 "explanation" that the USDOC provided in the challenged investigations is not inconsistent with Article 2.4.2.

Application of the Average-to-Transaction Comparison Methodology to All Sales

15. China claims that the USDOC acted inconsistently with Article 2.4.2 in the challenged investigations by applying the alternative, average-to-transaction comparison methodology to all sales when, in China's view, "the exceptional [average-to-transaction] comparison methodology under Article 2.4.2 of the *Anti-Dumping Agreement* must be limited solely to sales comprising the relevant pricing pattern" and "may *not* be applied to all sales." China's claims lack merit. When the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is constrained as China proposes. The Appellate Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.

16. China's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping." "Masked" or "targeted dumping" involves both sales below normal value, which are evidence of dumping, as well as sales above normal value, which may mask such dumping. "Targeted dumping" is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced sales, and by ensuring that the higher-priced sales do not offset dumping that properly should be evidenced by the lower-priced sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

17. China's arguments also are at odds with other prior findings of the Appellate Body. For example, given that the Appellate Body has found that dumping is an exporter-specific concept and the margin of dumping must be determined for the product under investigation as a whole, it would be an untenable interpretation of Article 2.4.2 to require an investigating authority to limit its application of the average-to-transaction comparison methodology to transactions "for which 'targeted dumping' has been found." China also departs from prior Appellate Body findings when it suggests that the alternative, average-to-transaction comparison methodology should be applied on a model-specific basis. That would appear to be directly contrary what the Appellate Body said about the so-called "targeted dumping" provision in *EC – Bed Linen*.

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

18. China's claims that the USDOC acted inconsistently with Article 2.4.2 of the AD Agreement by using zeroing in connection with the average-to-transaction comparison methodology are without merit. The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. China is incorrect when it argues that "the logic of the Appellate Body's reasoning" in prior disputes means that zeroing is impermissible when the alternative, average-to-transaction comparison methodology is used to determine "margins of dumping" under the second sentence of Article 2.4.2.

19. 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 accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes. That the average-to-transaction comparison methodology is an exception to the normal comparison methodologies, and that it can be used to "unmask targeted dumping" is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law, in particular the "principle of effectiveness."

20. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the challenged antidumping proceedings, 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. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

21. The meaning of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement, which reflect that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked and that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

China's Claims Related to the PET Film Third Administrative Review

22. China's claims that "the United States acted inconsistently with Article 9.3 of the *Anti-Dumping* Agreement and Article VI:2 of the GATT 1994 by applying zeroing procedures in an administrative review of the anti-dumping order concerning PET Film from China" lack merit. China's claims fail because they are dependent upon the Panel finding that the use of zeroing is impermissible when applying the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. However, as we have demonstrated, zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology. Accordingly, when an antidumping duty is calculated in an administrative review pursuant to the second sentence of Article 2.4.2 – *i.e.*, using the alternative, average-to-transaction comparison methodology, with zeroing – that antidumping duty necessarily does not exceed the margin of dumping as established under Article 2 of the AD Agreement. On the contrary, it is, by definition, the margin of dumping as established under Article 2 of the AD Agreement.

23. While 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 comparison methodology, is inconsistent "as such" with the AD Agreement, the Appellate Body has never found that zeroing is impermissible 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. As with investigations, the permissibility of using zeroing in administrative

reviews when applying the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is an issue of first impression for the Panel.

IV. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES HAS BREACHED ARTICLES 6.10 AND 9.2 ON ACCOUNT OF AN ALLEGED 'SINGLE RATE PRESUMPTION'

A. China Has Failed To Establish a Rule Or Norm Of General And Prospective Application That May Be Challenged "As Such"

24. China's "as such" claims cannot be sustained because China's evidence fails to establish that the so-called Single Rate Presumption is a "rule" or "norm of general and prospective application" that can be challenged "as such." In particular, China has not demonstrated that USDOC's treatment of Chinese companies rises to the level of a measure challengeable "as such", that is, a measure that expresses a rule or norm of general and prospective application. Even assuming that China has demonstrated the existence of such a measure, "particular rigor is required … to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document." China has not met this high evidentiary burden. Specifically, a complainant in order to discharge its high burden must demonstrate, at the very least: (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.

25. The extent of China's arguments with respect to these three elements rests with its faulty claim that the proffered evidence establishes that the so-called Single Rate Presumption is a rule or norm of general and prospective application, the third element.

26. With respect to Policy Bulletin 05.1, upon which China relies as evidence of a purported rule or norm of general and prospective application, China quotes language it describes as a "statement of policy." However, the precise language China quotes is not from the section in Policy Bulletin 05.1 that it actually titled "Statement of Policy," but in the "Background" section. The referenced language is also speaking only to an "NME antidumping investigation," and thus cannot be extended to periodic review proceedings. The Antidumping Manual, upon which China similarly relies, is also not availing to China's argument. It clearly states on the very first page that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. <u>This manual cannot be cited to establish DOC practice</u>."

27. China also tries to establish that the alleged Single Rate Presumption has general and prospective application by attempting to import the panel's findings in *US – Shrimp II (Viet Nam)*. A prior panel's findings cannot alleviate China's own burden. Moreover, in any event, the panel's findings in that dispute concern an alleged norm which differs in material respects from the measure China has raised here.

28. China cites to prior USDOC determinations involving non-market economy cases. These documents do not help China meet its burden of establishing that the so-called "single rate presumption" is an unwritten measure. Moreover, it is critical to note that the referenced statements are taking place in the context of specific investigations rather than any document that

purports to reflect a general and prospective measure. Thus, even under China's presentation, these documents only illustrate what USDOC has practiced in particular instances in the past. Legally, past practice is insufficient to establish the existence of a measure because repeated application in and of itself only proves that repeated applications occurred.

29. Moreover, USDOC is not applying the same outcome to every case without consideration of the record evidence or a party's arguments, but evaluates, in each instance where a party provides such information and argument, whether that party is under common government control. Moreover, the Government of China could request that USDOC re-examine its NME status under U.S. antidumping duty law. Given that this flexibility exists, and USDOC does not automatically reach the same outcome in each case, China has failed to demonstrate that this is anything more than a "consistent practice" that USDOC applied in a discrete number of cases.

30. Finally, China cites certain decisions from U.S. domestic courts. The quoted language from these decisions do not establish what USDOC will do in the future, but speaks to it being "within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy" and that such a presumption – because it is not required by U.S. law – is subject to change at any time. More fundamentally, these decisions – like those at issue in in *Thailand – Cigarettes (Philippines)* – are necessarily decisions evaluating particular complaints rather than authoritative statements of future policy.

B. China Has Misapplied The Legal Analysis

31. Legally, China fails 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, these provisions permit investigating authorities to treat the export activity of multiple companies as the pricing behavior of a single exporter or producer. Factually (and legally), China fails to address the basis for USDOC's treatment of Chinese firms as part of a single government entity (China's Accession Protocol and Working Party Report), or USDOC's continued finding that China should be treated as an NME. Moreover, China does not address that the information solicited by the United States allows Chinese firms to demonstrate whether they should be treated as part of a common Chinese government entity or not. Because of such failings, China's various claims of breach are deficient and must fail.

32. In applying Article 6.10 of the AD Agreement, the initial question is to identify the entity, or group of entities, that constitute each known "exporter" or the known "producer." China has no basis for asserting that related entities, simply because they may be organized as a formal matter as separate companies, must be treated as individual exporters for the purpose of Article 6.10. Similarly, Article 9.5 of the AD Agreement establishes an obligation to carry out a review to determine an "individual" margin of dumping for a new shipper "provided that the[] exporter[] or producer[] can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." This provision indicates that such an exporter that cannot demonstrate that it is not related to an exporter or producer subject to the duty would not be entitled to an "individual" margin of dumping.

33. Accordingly, depending on the facts of a given situation, an investigating authority may reasonably consider actual commercial activities and relationships of companies in deciding

whether they should be treated as a single exporter or producer as opposed to simply accepting their nominal status as legally distinct companies. This textual analysis is consistent with the Appellate Body findings in *EC – Fasteners*, which in turn approvingly drew from the panel report's findings in *Korea – Certain Paper*.

34. Article 9.2 provides that "when" antidumping duties are being imposed, they shall be collected in appropriate amounts on a non-discriminatory basis from all sources, *i.e.*, imposed on imports from all sources found to be dumped and at the appropriate rate. Differences in duty rates must reflect differences in the dumping margin for the source.

35. Contrary to China's arguments, nothing in the text of Article 9.2, as with the text of Article 6.10, precludes USDOC from treating multiple companies as a single entity, including, where appropriate, a China-government entity. China's attempts to rely on *EC – Fasteners* to avoid this interpretation is misplaced because it ignores the Appellate Body's conclusion in that dispute 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 … and a single margin and duty could be assigned to that single exporter."

C. China's Protocol Of Accession Supports Treating Companies as Part of a Single PRC Entity in Antidumping Proceedings

36. China's Protocol of Accession supports treating companies as part of a single China-government entity in antidumping proceedings. Under the Protocol, a Member can presume that non-market economy conditions prevail in China, as the starting point for a discussion about the extent to which market economy conditions actually prevail, to decide whether market treatment for Chinese respondents is warranted. This approach preserved for Members the flexibility to adjust their antidumping policy and practice depending on the progression of China's reforms.

37. The Accession Protocol, particularly Article 15, provides important context in terms of deciding which entities in China should be considered as a single entity for purposes of Article 6.10. In particular, the Protocol supports USDOC's: (1) decision to calculate the normal value for the industry in question based on an NME methodology and its continued use of this methodology; (2) recognition that multiple companies may comprise a single exporter or producer, *i.e.*, a single China-government entity; and (3) understanding regarding export price and output that the Government of China exerts control or material influence over entities located in China and can impact such decisions.

1. Normal Value

38. Specifically, Paragraph 15 of the Accession Protocol indicates that China confirmed on accession that importing WTO Members need not calculate normal value on the basis of Chinese prices or costs for an industry subject to an antidumping investigation. Paragraph 15 further indicates, in part, that "the non-market economy provisions" of paragraph 15 shall no longer apply to a specific industry or sector in situations where China "establish[ed], pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector."

2. Treating Multiple Companies in China as Part of a China-Government Entity

39. The descriptions of its economy in the Working Party Report indicated that China planned to develop an economy where the State continued to play a predominant role. Members expressed concern about the significant level of influence of the Government of China on its economy and how such influence could affect trade remedy proceedings. Paragraph 15 of the Accession Protocol specifically reflects the concern among Members that government influence may create special difficulties in determining cost and price comparability in the context of antidumping investigations, and that a strict comparison with Chinese costs and prices might not always be appropriate.

40. Thus, underlying the Accession Protocol is evidence that non-market economy conditions prevail in China until otherwise demonstrated. The understanding that market economy conditions do not prevail and the logical consequence that this entails state control over firms, resulting in treating certain enterprises as parts of a government-controlled entity, is not inconsistent with Article 6.10. The Accession Protocol thus supports the conclusion that USDOC may consider that there exists a China-government entity to which exporters belong.

3. Pricing and Output of Exports

41. China's Accession Protocol also provides the basis by which an importing Member may presume that China controls or materially influences all entities and thereby consider all exporters or producers as part of a single China-government entity absent positive evidence to the contrary. USDOC's finding that the Government of China is legally or operationally in a position to exercise restraint or direction over entities located in China and can impact their decisions about the production, pricing, or costs of products destined for consumption in China is not subject to dispute. As a result, given that China's Accession Protocol provides importing Members the basis on which to presume that the Government of China exerts control or material influence over commercial entities with respect to the pricing and output of products destined for consumption in China, it is also reasonable to presume that that the Government of China simultaneously exerts control or material influence over these entities with respect to the pricing and output of identical or similar products destined for export.

D. The Findings From *EC-Fasteners* Are Inapposite

42. As an initial matter, the United States believes the analysis in *EC – Fasteners* to be internally inconsistent. Specifically, in *EC – Fasteners*, the Appellate Body correctly recognized that state control is a basis to treat nominally distinct entities as a single entity, yet rejected doing so on the basis of China's Accession Protocol, which memorializes precisely those types of concerns. This dispute, however, is factually different than *EC – Fasteners* as well as *US – Shrimp II*.

43. First, USDOC actually collects and evaluates information that goes directly to whether Chinese respondents should be afforded individual treatment or not. USDOC's separate rate analysis allows for an in-depth and individualized review of a company's relationship with the Chinese government. *EC – Fasteners* did not preclude such examination, but rather noted the

examination in that dispute, the IT Test, was flawed because the relevant criteria denied individual treatment to producers and exporters with "little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State." Here, China makes no similar claim against USDOC's Separate Rate Test, but rather takes issue that any such test is required at all.

44. Second, USDOC has engaged in a determination that China is a non-market economy. At no time during the 13 challenged investigations and 19 challenged reviews proceedings did China, or any Chinese exporter, request that USDOC reconsider China's non-market economy status. Thus, China cannot invoke *EC – Fasteners* and *US – Shrimp II* to argue that USDOC erred by designating China a non-market economy solely on the basis of the Accession Protocol.

45. Third, the evidence China puts forward for its as-applied claims is deficient here. Principally, China relies on Table SRP, which appears to be a compilation of quotes from various antidumping proceedings. This table proves nothing because it simply provides extracted generalized quotes rather than any evidence of concrete treatment by USDOC with respect to any of the particular participants in any of the respective proceedings. For example, nowhere in Table SRP does China present evidence to indicate whether the China-government entity was under examination for purposes of Article 6.10. Likewise, China's table fails to demonstrate as-applied breaches of Articles 6.10 and 9.2 because it is does not demonstrate that any actual exporter or producer failed to receive an individual margin or confirm whether circumstances that triggered such a denial were inconsistent with the AD Agreement.

46. In sum, USDOC's conclusion that multiple companies in China are part of the China-government entity is based on a permissible, and, indeed, eminently reasonable, interpretation of Articles 6.10 and 9.2. Therefore, the United States requests that the Panel dismiss China's claims under both these provisions, both "as such" and as applied in the 32 challenged determinations.

V. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

47. Article 9.4 applies *only* to the "anti-dumping duty applied to imports from exporters or producers not included in the examination." In other words, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. Article 9.4 is thus inapplicable either to the alleged unwritten measure "as such" or as applied because China has not established this predicate condition. China makes no attempt to demonstrate that the China-government entity was not included in the examination, and therefore, Article 9.4 is implicated. In any event, in each of the 13 challenged antidumping proceedings, the China-government entity received its own rate, and thus, Article 9.4 does not apply. Beginning with the original investigations in each of the 13 challenged proceedings the China-government entity received its own rate based on facts available consistent with Article 6.8 of the AD Agreement.

48. China argues that Article 9.4 does not allow an investigating authority to differentiate between those non-selected companies that are uncooperative, and those non-selected companies that are cooperative. Rather, according to China, the phrase "any anti-dumping duty applied" means that there can only be one rate applied to the non-selected companies. The text of Article 9.4 of the AD Agreement actually provides that *any* antidumping duty for those producers or

exporters not under examination "shall not exceed" the weighted-average margin of dumping for the investigated exporters or producers, and restricts the use of zero and *de minimis* margins and margins based on facts available in calculation of that ceiling. China thus improperly seeks to create a new obligation to calculate a "single" rate.

VI. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

A. China Has Failed To Establish That USDOC's Use Of Facts Available In Assigning A Rate To The China-Government Entity As A Rule Or Norm Of General And Prospective Application That May Be Challenged "As Such"

49. China has not established that USDOC's use of facts available in assigning a rate to the China-government entity constitutes a measure which expresses a rule or norm of general and prospective application. Specifically, China fails to specify the purported norm's precise content or that it has general and prospective application.

50. China appears to allege that the content of this norm is that USDOC selects "adverse facts" when USDOC finds non-cooperation by the China-government entity. China fails though to explain what qualifies a fact as adverse. The investigating authority does not know whether the information it has selected is indeed adverse or potentially favorable because the ideal information is missing. China also makes several inconsistent statements with respect to whether a finding of non-cooperation – what China refers to as the "trigger condition" for the norm – is also part of this alleged norm, which cast further doubt on the content of this norm.

51. Furthermore, China has not demonstrated a norm of general and prospective application that may be challenged as such. The determination to apply facts available to the China-government entity, and its selection of the rate to apply to the China-government entity, continues to be a case-by-case determination that will reflect the facts of a given case. Moreover, the U.S. statutory and regulatory framework provides USDOC with the discretion to make such a determination based on the facts and information before it.

52. The evidence China submits in support of the existence of the norm is also clearly deficient. China's sample of USDOC's NME cases over a 12-year period does not demonstrate the existence of a norm or rule of general and prospective application but rather demonstrates that the use of facts available varies in every proceeding based on the facts and circumstances at issue. Likewise, the Antidumping Manual merely describes instances in which USDOC "may" apply adverse inferences in selecting the available facts to determine the rate for the China-government entity, not any general and prospective rule. The judicial decisions cited by China are adjudications over issues decided in prior antidumping proceedings and do not constitute a pronouncement on what USDOC will do prospectively. Finally, USDOC's own statements cited by China provide no insight into the challenged determinations as these statements provide an incomplete context for the selection of facts available, as demonstrated by the analysis and actual selection in the challenged cases.

B. China Has Misapplied The Legal Analysis With Respect To Article 6.8 And Annex II Of The AD Agreement

53. China's interpretation of Article 6.8 and Annex II of the AD Agreement are flawed in key respects. First, China misinterprets the terms "any interested party" and "necessary information" in Article 6.8 to argue that USDOC must request from each company within the China-government entity information pertaining to the calculation of a dumping margin, *i.e.*, issue a dumping questionnaire to each of these companies, before it resorts to facts available. Such a reading of Article 6.8 is not supported by its text, nor shared by any previous panel or the Appellate Body. Moreover, such an interpretation would seriously undermine the ability of investigating authorities to determine appropriate dumping margins and "to proceed[] expeditiously" in reaching determinations in accordance with Article VI of the GATT 1994 and the AD Agreement. Indeed, China's strained interpretation disregards that an investigating authority requires information for determinations separate from the dumping margin determination.

54. Second, China argues that where an investigating authority collapses multiple entities into a single exporter, the investigating authority may rely on facts available only if it requested this specific information from all companies within that exporter. China is incorrect. 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. Moreover, 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. Further, where a company that is part of the China-government entity has been notified of and fails to respond to an initial request for quantity and value information, the investigating authority may find that the company, and by extension, the China-government entity, has failed to respond to a request for necessary information and has significantly impeded the progress of the proceeding. Finally, China mischaracterize the present dispute because it ignores that USDOC may need to rely on facts available 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 entity.

55. Third, China misinterprets the term "special circumspection" as stated in paragraph 7 of Annex II. China argues the term requires the investigating authority to consider whether it requested such information from each of the members of the China-government entity. Article 6.8 does not limit the type of information or the parties from whom the information was requested in the way China advocates here. Moreover, an investigating authority (such as USDOC) 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.

C. USDOC's Use Of Facts Available With Respect To The China-Government Entity Is Not "As Such" Inconsistent With Article 6.8 And Annex II

56. Nothing in Article 6.8 or Annex II limits the application of facts available to those facts that are *most favorable to the interests* of a party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to which facts should be selected. Rather, the permission to apply the "facts available" in making a determination pursuant to Article 6.8 means that an administering authority, when faced with a situation in which necessary facts have not been supplied, may apply those facts that are otherwise available – and will have to make inferences in deciding to how to select from the available facts. As Annex II(7) recognizes, when facts available are applied "this situation could lead to a result which is less favourable to the party than if the party did cooperate." Thus, the use of an "adverse inference" in this context does not mean the application is punitive, it simply reflects that the selection of information from the available information takes into account the party's failure or refusal to provide the necessary information, as the Appellate Body found in *US – Carbon Steel (India)*. Moreover, USDOC's use of an "adverse inference" in this context is not based upon a "speculative adverse inference" as was employed in *China-GOES*, where the investigating authority ignored *substantiated facts*.

57. Annex II of the AD Agreement establishes certain requirements when investigating authorities must resort to facts available to make their determinations. By following the safeguards established in Annex II, investigating authorities are able to select information that is considered the "best information available" consistent with the aim of Article 6.8 and Annex II to allow administering authorities to make determinations and complete their investigations.

58. Where USDOC relies on secondary information, the relevant domestic instruments direct that USDOC "shall, to the extent practicable, corroborate that information from independent sources reasonably at [its] disposal." The relevant regulation defines the term "corroborate" to mean that USDOC "will examine whether the information to be used has probative value." In doing so, USDOC considers the reliability and relevance of the information to be used as facts available. Where USDOC finds the information is unreliable or not relevant to the non-cooperating party being examined, USDOC rejects such information as "facts available", as required by law. In fact, the USDOC rejected certain information as "facts available" in many of the challenged determinations.

59. The actual determinations referenced by China also demonstrate there is no rule or norm of general or prospective application when USDOC selects facts available to be applied to the non-cooperating China-government entity, or any other non-cooperating party for that matter. USDOC is neither *prevented* from evaluating the information on the record in selecting information to be used as facts available, nor is it *prevented* from exercising special circumspection in determining whether the information selected has probative value. These determinations demonstrate that USDOC engaged in the required "comparative, evaluative assessment" of the information it may use as a proxy for the China-government entity's rate.

60. China's second and third claims concerning the purported norm are inconsistent with DSU Article 6.2 because China did not raise these claims on an "as such" basis in its panel request. These claims concern USDOC's initial decision to apply facts available, *i.e.*, its finding that the China-government entity is non-cooperative on the basis of the non-cooperation of one or more companies within the China-government entity. Accordingly, these claims must be rejected because they are outside of the Panel's terms of reference, and are not otherwise identified by China as being part of a norm of general and prospective application.

D. China Has Not Established Its As-Applied Claims

61. As an initial matter, in seven of the challenged determinations, USDOC did not make a determination based on "facts available". Rather, in these particular determinations, USDOC assessed duties at the cash deposit rate and thus, the duty rate previously established from a previous period of investigation or review continued to apply. Where USDOC did make a facts available determination in a challenged proceeding, the evidence demonstrates that USDOC notified companies within the China-government entity of the necessary information required, and appropriately determined that a failure to respond to this request for information warranted the use of facts available for the China-government entity. In these 19 determinations, USDOC applied facts available, using one of the following, depending on the information available: (1) a rate from the domestic industry's application; (2) a rate calculated for a cooperative respondent in a previous period of review; or (3) a rate calculated from a cooperative respondent's transactional information in the current period of investigation. Each determination met the requirements under Article 6.8 and Annex II: each had a factual foundation; no substantiated fact contradicted the information selected; and nothing indicated the information selected was an unreasonable replacement for the missing information.

VII. THE PANEL SHOULD REJECT CHINA'S CLAIMS THAT USDOC ACTED INCONSISTENTLY WITH ARTICLE 6.1 OF THE AD AGREEMENT

62. Per the text itself, Article 6.1 concerns proper notice of the information required by an investigating authority, not the substantive type of information it must seek. Article 6.1 does not apply if the investigating authority does not require certain information, or is not asking for such information at that point in the proceeding. Thus, even assuming, *arguendo*, that the investigating authority is seeking the wrong information in determining a dumping margin for the NME-government entity, Article 6.1 is concerned with whether the investigating authority gave notice of the information that it has determined that it requires and is seeking from parties.

63. Article 6.1 must also be read in conjunction with Article 6.8 and Annex II of the AD Agreement. Where the investigating authority has properly determined that a party has failed to respond to a request for information or otherwise significantly impeded the proceeding, despite having notice of the request and the consequences of not cooperating, Articles 6.8 and 6.1 together do not require the investigating authority to continue to allow that party opportunities to provide information. Therefore, China's argument that an investigating authority must request the specific information necessary for the calculation of a dumping margin from all companies within the NME-government entity is unsupported by the text of Article 6.1, and also ignores the realities of an antidumping proceeding and the different circumstances of all interested parties. Moreover, in each of the 26 challenged proceedings, the evidence confirms that USDOC (1) properly notified all companies within the China-government entity of the information which USDOC required, and (2) permitted companies within the China-government entity ample opportunity to present in writing all evidence which they considered relevant.

VIII. CONCLUSION

64. For the foregoing reasons, the United States respectfully requests that the Panel reject China's claims.