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

(DS471)

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS TO THE PARTIES

PUBLIC VERSION

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China – Autos	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
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Thailand – Cigarettes	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
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US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008

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Exhibit No.	Description
USA-80	19 C.F.R. § 351.224
USA-81	*Gold East Paper (Jiangsu) Co. v. United States*, 991 F. Supp. 2d 1357, 1368 (Ct. Int'l Trade 2014) (Slip Opinion)
USA-82	19 C.F.R. § 351.309
USA-83	Antidumping and Countervailing Duty Operations Website (http://trade.gov/enforcement/operations/index.asp)
USA-84	Department of Commerce Separate Rate Certification
USA-85	19 U.S.C. 1677(33)
USA-86	Issues Memorandum for the Antidumping Duty Investigations of Steel Concrete Reinforcing Bars from the Republic of Korea, A-580-844 (June 14, 2001)
USA-87	Intentionally Omitted
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USA-91	*Notice of Amended Preliminary Antidumping Duty Determination of Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 47,417 (Aug. 5, 2004)
USA-92	PET Film Initiation Checklist
USA-93	*Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 51,979 (Aug. 24, 2010)
USA-94	Public Memorandum regarding Corroboration of the PRC-Wide Adverse Facts-Available Rate, Antidumping Duty Investigation on Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, Preliminary Determination

Exhibit No.	**Description**
USA-95	*Multilayered Wood Flooring From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 76 Fed. Reg. 76,690 (Dec. 8, 2011)
USA-96	*Multilayered Wood Flooring From the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination and Amended Final Determination of the Antidumping Duty Investigation*, 80 Fed. Reg. 44,029 (July 24, 2015)
USA-97	*Diamond Sawblades AR2 Preliminary Results*, 77 Fed. Reg. 73,417
USA-98	AD Investigation Initiation Checklist, Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China
USA-99	Shrimp 2004-2006 Final Results, 72 Fed. Reg. at 52,049
USA-100	*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. 21,203 (Apr. 17, 2015)
USA-101	*53-Foot Domestic Dry Containers From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, Decision Memorandum (April 10, 2015)
USA-102	*Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 Fed. Reg. 20,197 (Apr. 15, 2015)
USA-103	Remand Redetermination: *Diamond Sawblades Manufacturers' Coalition v. United States*, Court No. 13-00078; Slip Op. 14-50
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USA-105	*Porcelain-on-Steel Cooking Ware From the People's Republic of China; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 36419 (Oct. 10, 1986).

1 CLARIFICATIONS CONCERNING USDOC DOCUMENTS SUBMITTED BY CHINA IN THE FIRST SUBSTANTIVE MEETING WITH THE PARTIES

Question 3 (United States): Does the United States have any comments on whether the six new determinations China introduced during the course of the first substantive meeting, namely *PET Film* AR5, *Furniture* AR9, *OTR Tires* AR5, *Diamond Sawblades* AR4, *Solar Panel* AR1 and *Wood Flooring* AR2, are within the Panel's terms of reference?

Response:

1. As the Panel's question correctly notes, these six determinations are in fact "new determinations" and thus new measures that were not encompassed by China's Panel Request nor subject to consultations with the United States. Accordingly, any claims China may make with respect to them are outside the Panel's terms of reference and cannot be challenged in this dispute.

2. To be within the terms of reference of a panel proceeding, a measure must be identified as a measure at issue in both the request for consultations and the request for panel establishment. Article 4.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provides:

> {A}ny 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.[1]

Further, 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.[2]

The Appellate Body has explicitly noted that the use of the "specific measures" language in Article 6.2 indicates "that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[3] Here, the six *new* determinations China introduced during the first substantive meeting were not included in China's Request for Consultations[4] nor in its Panel Request[5] and thus are not

[1] Emphasis added.

[2] Emphasis added.

[3] *EC – Chicken Cuts (AB)*, para. 156.

[4] WT/DS471/1.

[5] WT/DS471/5.

measures within the terms of reference of this dispute. Moreover, because these *new* determinations did not exist at the time of consultations, they could not have been, and indeed were not, the subject of consultations.

3. China has not explained why or how the Panel could consider these new determinations consistent with the DSU. Instead, the only reason proffered by China thus far is that China submitted these determination when it did to be "[c]onsistent with the requirement of the working procedures to submit primary factual evidence no later than during the first substantive meeting…"[6] But China is not submitting these determinations as evidence, but rather as measures for which it seeking findings under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") – and thus the applicable requirements are the aforementioned requirements in the DSU rather than the working procedures.

4. Perhaps anticipating a terms of reference challenge to an attempt to submit new determinations, China included language throughout its Panel Request purporting to encompass "any closely connected, subsequent measures that involve … {e.g. the application of the Single Rate Presumption, the application of adverse facts available}." But what China may write in its Panel Request cannot override the requirements of DSU, which is clear that it cannot cover legally distinct measures – and these are legally distinct measures that only came into existence after the request for consultations, after the request for establishment of a panel, and after the establishment of the panel. Specifically, they have different legal implications than any of the other measures identified in China's panel request because these determinations are administrative reviews that cover entries of merchandise over a specific period of time that was not addressed by any of the determinations listed in China's Panel Request. Further, they do not amend the other AD determinations listed in China's Panel Request, which continue to govern the treatment of entries made during their respective period of investigation or review.[7] Accordingly, China does not – because it cannot – contest that these are indeed new measures.

2 USE OF WA-T METHODOLOGY IN ORIGINAL INVESTIGATIONS

2.1 Identification of a pattern using the Nails test

Alleged SAS programming errors in the OCTG and Coated Paper investigations

[6] China's Closing Statement at the First Substantive Meeting of the Panel with the Parties (July 16, 2015), para. 32.

[7] *See EC – Chicken Cuts (AB)*, para. 154 ("The two subsequent measures in this dispute make no explicit reference to the two original measures, which continue to remain in force. Moreover, the two subsequent measures have legal implications different from those of the two original measures…. We are, therefore, not persuaded that the two subsequent measures in this case can be considered as amendments to the two original measure").

Question 4: In paragraph 78 and footnote 133 of its first written submission, China appears to refer to two separate errors in the SAS programs used by the USDOC in the OCTG and Coated Paper investigations. The first error identified in paragraph 78 is that "contrary to the stated description of the gap comparison, the [SAS] program compared the gap between the AT price and the next highest NT price with each NT price gap, rather than the weighted average of all NT price gaps". China also refers to a "further error" in footnote 133 of its first written submission, namely that the SAS programs cumulated the NT price gaps in a way that rendered the NT price gaps wider than they would otherwise have been.

c. To the United States. Does the United States agree that the programming errors alleged by China did occur in the two investigations at issue?

Response:

4. China appears to have correctly described the SAS programs used by the United States Department of Commerce ("USDOC") in the OCTG and coated paper investigations, and it appears that the programs do contain what, under U.S. domestic law, would be considered certain ministerial errors.[8] The U.S. first written submission discusses the SAS programs at paragraphs 139-140.[9]

5. With respect to the coated paper investigation, the ministerial errors that China has identified have already been corrected pursuant to a remand determination made in conjunction with domestic litigation before the U.S. Court of International Trade.[10] With respect to the OCTG investigation, no interested party previously identified the ministerial errors, either during the administrative proceeding or in conjunction with domestic litigation.

6. In its first written submission, China asserts, without any explanation, that the programming errors reflect "a clear failure to provide the reasoned and adequate explanation showing compliance of this erroneous methodology with the requirements of the *Anti-Dumping Agreement*."[11] On the contrary, it remains unclear how a programming error can be evidence of a failure to provide a reasoned and adequate explanation. Additionally, we observe that the term

[8] *See* 19 C.F.R. § 351.224(f) (defining ministerial error) (Exhibit USA-80).

[9] First Written Submission of the United States of America (Confidential) (Corrected Version May 13, 2015) ("U.S. First Written Submission").

[10] *See Gold East Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317, 1328-29 (Ct. Int'l Trade 2013) (Exhibit USA-6) (requesting voluntary remand from the U.S. Court of International Trade to address programming errors); *Gold East Paper (Jiangsu) Co. v. United States*, 991 F. Supp. 2d 1357, 1368 (Ct. int'l Trade 2014) (p. 18 of the slip opinion) (noting that the USDOC "ma[de] changes to the calculations in the *Final Determination* with respect to other issues addressed in the prior opinion") (Exhibit USA-81). The voluntary correction of these errors is uncontested, though this litigation otherwise remains ongoing.

[11] First Written Submission of China (Confidential) (March 6, 2015) ("China's First Written Submission"), para. 237.

"reasoned and adequate explanation" does not appear in the AD Agreement. Rather, "reasoned and adequate explanation" is an analytical approach that has been articulated by the Appellate Body in previous disputes for assessing whether a measure is consistent with a particular provision of the AD Agreement. To establish a breach of the AD Agreement, based on the identified programming errors, China would need to establish that the analysis actually undertaken by the USDOC is inconsistent with some provision of the AD Agreement. China has not done so. It would be an extreme and untenable result to find, as China invites the Panel to do, that any ministerial error is a breach of an unspecified provision of the covered agreements because of a purported failure to provide a "reasoned and adequate explanation."

7. During the first panel meeting, China appeared to propose, again without elaboration, a different basis for finding that the identified programming errors are evidence that the USDOC breached the AD Agreement in the OCTG and coated paper investigations. China now seems to suggest, making reference to Article 17.6(i) of the AD Agreement, that the error reflects a failure by the USDOC to establish the facts properly and to evaluate them in a manner that is unbiased and objective. This effort by China to establish a breach fails as well. First, Article 17.6(i) does not, by its terms, impose any obligations on Members. Rather, that provision sets forth the analytical approach to be applied by a panel when reviewing a determination by an investigating authority for consistency with a particular provision of the AD Agreement. Second, it simply does not follow that the existence of an error in programming code reflects a failure to establish the facts properly. Programming code is entirely unrelated to the establishment of the facts. Nor does such an error constitute a failure to evaluate the facts in an unbiased and objective manner. It is merely evidence of a mistake, and one that would have been corrected in due course had it been identified during the course of the administrative proceeding when an opportunity was provided to seek correction of such errors.[12]

8. In sum, China's identification of certain ministerial programming errors does not establish a breach of any provision of the AD Agreement.

Alleged failure of the Nails Test to identify differences between export prices that were significant in a quantitative, statistical sense

Question 9: In paragraph 240 of its first written submission, China contends:

> **Indeed, USDOC's practice of arbitrarily dropping NT average prices that fell below the average AT price when undertaking the Price Gap test highlights again the analytical mischief possible when AT status is ascribed prior to analyzing the data. Rather than letting the data speak for itself, USDOC instead manipulated the data in order to remove observations that**

[12] *See* 19 C.F.R. § 351.309 (providing that interested parties may file case and rebuttal briefs within specified time limits) (Exhibit USA-82); 19 C.F.R. § 351.224 (providing for corrections to ministerial errors within specified time limits) (Exhibit USA-80).

undermine the hypothesis that the differences between AT and NT prices are "significant".

In this regard, the Panel has the following questions*:*

a. To the United States. Can the United States please explain the rationale of excluding, under the price gap test, the weighted average export prices to non-targets that were lower than the weighted average export price to the alleged target?

Response:

9. As an initial matter, the United States emphasizes that there is no "analytical mischief" and no manipulation of the data going on in the USDOC's application of the "gap test."

10. The basic rationale for the "gap test" is explained in the determinations. In the steel cylinders I&D memo, for example, the USDOC explains the rationale of the "gap test" in the following terms:

> [T]he price gap test determines whether the price gap associated with the alleged target is significant relative to the price gaps in the non-targeted group "above" the alleged target price gap. The significance in this context is determined based on whether the price gap associated with the alleged target is greater than the average price gap in the non-targeted group. In this regard, we have not set a bright-line standard or threshold, such as a fixed percentage, for measuring the price gap. If the difference exceeds the average price gap found in the group of non-target prices, then the difference in the price to the alleged target for a specific product is found to be significant. In essence, the price gap test qualifies whether a degree of separation between a low targeted price and the next lowest non-targeted prices is sufficient in determining the significant difference in prices with respect to the targeted sales. Further, we consider a five-percent share of sales to the alleged target, by volume, that are found to be at prices that differ significantly to be a reasonable indication of whether or not the alleged targeting has occurred. This threshold must be considered with the standard deviation test and the 33-percent sales volume threshold for determining whether there is a pattern of prices that differ significantly, as required by the statute.[13]

Importantly, the USDOC applied the "gap test" in addition to the "standard deviation test." This had the effect of making the *Nails* test more rigorous, and more likely to result in the non-application of the alternative, average-to-transaction comparison methodology. If, as China's argument implies, the USDOC's intent was to make a finding of "targeting" more likely, the USDOC might simply have not applied the "gap test" at all.

[13] Steel Cylinders OI Final I&D Memo, pp. 29-30 (Exhibit CHN-66).

11. Regarding the exclusion of weighted-average export prices to non-allegedly targeted groups where those export prices are lower than the export prices to the allegedly targeted group, this makes sense in light of what the "gap test" aims to measure. The USDOC used the *Nails* test to identify a specific type of pattern, namely, a pattern of sufficiently low export prices as compared to other higher export prices. The USDOC conducted its analysis on the basis of the "targeted dumping" allegation made by the domestic industry. Since the USDOC used the *Nails* test to identify a pattern of low prices in relation to other higher export prices, it is logical that the "gap test" would compare the export prices to an alleged target to higher export prices to non-alleged targets.

12. Additionally, the one-standard-deviation threshold that the USDOC used represents a floor. Where the weighted-average export prices to the alleged target fall below the one-standard-deviation floor, necessarily any export prices to any non-alleged target that are even lower would fall even further below the floor.

b. To the United States. The Panel understands that the USDOC used the Nails test when targeted dumping was alleged by the petitioner[14] and that the USDOC ascribed the alleged target status prior to analysing the relevant export price data at issue. If so, will the choice of the alleged target, under the Nails test, not influence which non-targeted purchasers, regions or time periods are excluded from the price gap test and which are retained under that test? To illustrate this point, assume that exporter X exports to purchasers 1, 2, 3, 4 and 5 in the United States. The CONNUM-specific weighted average export price to purchasers 1-5 increase in an ascending manner, such that, the weighted average export price to purchaser 1 is the lowest and that to purchaser 5 is the highest. Assume that the weighted average export prices to purchasers 1-3 are a single standard deviation below the CONNUM-specific weighted average mean price. In such a scenario, if the petitioner selects purchaser 3 as the alleged target, under the Nails test, purchasers 1, 2, 4 and 5 would be considered to be non-targets, and under the price gap test, the CONNUM specific weighted average export price to purchasers 1 and 2 would be ignored. However, if the petitioner selects purchaser 1 as the alleged target, purchasers 2-5 would be considered to be non-targets and under the price gap test, no purchaser would be ignored. In the illustration above, it appears that non-targeted purchasers selected in calculating the non-target price gap, under the price gap test, will change depending on the identification of the alleged target, even when the export price data remains the same. Is this understanding correct? If so, would such an assessment not create possibilities for "analytical mischief" as China alleges in its first written submission?

Response:

[14] *See, e.g.*, China's First Written Submission, para. 62.

13. As suggested by the question, the "choice of the alleged target," which is made by the domestic industry when it makes an allegation of targeted dumping, does "influence which non-targeted purchasers, regions or time periods are excluded from the price gap test and which are retained under that test." The Panel's understanding, as elaborated in the hypothetical example in the question, likewise is correct. The "non-targeted purchasers selected in calculating the non-target price gap, under the price gap test, will change depending on the identification of the alleged target." It does not follow, however, that this leads to the possibility for so-called "analytical mischief."

14. In its first written submission, China suggests that "analytical mischief" is possible due to what China characterizes as the "USDOC's practice of arbitrarily dropping NT average prices that fell below the average AT price when undertaking the Price Gap test."[15] China's characterization is baseless. As the question notes, the USDOC applied the "gap test" in the challenged investigations based on the allegations of "targeted dumping" made by the domestic industry, and it did so in light of all the data reported by Chinese exporters. The USDOC did not "arbitrarily" drop prices from the "gap test," and, as we have emphasized previously, there was no "analytical mischief" and no manipulation of the data in the USDOC's application of the "gap test."

15. As explained in response to question 9(a), "the price gap test determines whether the price gap associated with the alleged target is significant relative to the price gaps in the non-targeted group '*above*' the alleged target price gap."[16] China's contention that the USDOC should have looked at price gaps relative to non-alleged targets *below* the alleged target reflects, as do China's statistical arguments, China's desire for the USDOC to apply an analysis that is different from the one that the USDOC actually applied, one that may perhaps have been more favorable to the Chinese exporters in the particular circumstances of the challenged investigations. However, China's self-serving complaints do not establish that the analysis that the USDOC actually performed is inconsistent with the AD Agreement.

16. Moreover, China's argument that the USDOC's application of the "gap test" "increase[d] the likelihood that the gap between the AT price and the nearest NT price would be found by USDOC to be 'significant'" is wrong.[17] China's argument is premised on what it describes as "the inherent properties of any peaked distribution."[18] However, as we have explained, the USDOC made no assumptions about the distribution of the export prices in the data sets in the challenged investigations, and China has not demonstrated that the data in each of

[15] China's First Written Submission, para. 240.

[16] Steel Cylinders OI Final I&D Memo, pp. 29-30 (Exhibit CHN-66) (emphasis added).

[17] China's First Written Submission, para. 239.

[18] China's First Written Submission, para. 239.

the challenged investigations were distributed in any particular manner, or that the distribution of the data, whatever it was, in fact had an impact on the results of the "gap test" analysis.

17. Additionally, China asserts that "NT prices that fell in the left hand tail of the distribution" were "inherently likely to generate wider price gaps than the NT price gaps near the center of the distribution."[19] China offers no explanation for this assertion. China's assertion appears to be based on China's own assumptions as to how data *might* be distributed. China does not analyze the actual data that the USDOC examined in the three challenged investigations, let alone demonstrate any "analytical mischief" in any of the three investigations regarding which it has brought "as applied" claims.

18. Furthermore, China's assertion appears to be premised on the assumption that the price gap for a given non-allegedly targeted price below the alleged target would be measured between that and a non-allegedly targeted price that is higher than the alleged target price. But that is wrong. Even if non-allegedly targeted prices that were lower than the alleged target price were included in the analysis, a "price gap," as that concept was used by the USDOC in applying the *Nails* test analysis in the challenged investigations, is the difference between a given price and the next higher price. So, the mere presence of a non-allegedly targeted price below the alleged target price and "in the left hand tail of the distribution," using China's terms, tells one nothing about the price gap between that price and the next higher price relative to it.

19. Finally, the arguments China presents in Exhibit CHN-1 concerning the "gap test"[20] are, like China's other contentions related to the *Nails* test, premised on the assumption that the USDOC was applying a particular type of statistical probability analysis based on the assumption of a normal distribution, but that is not what the USDOC was doing. Accordingly, China's arguments related to the "gap test" are inapposite and its assertion concerning the possibility for "analytical mischief" is unfounded.

USE OF THE WEIGHTED AVERAGE OF EXPORT PRICES RATHER THAN INDIVIDUAL TRANSACTION PRICES

Question 13 (To China and the United States): Does Article 2.4.2 of the AD Agreement require an investigating authority to find a pattern on the basis of the prices of "individual export transactions" to purchasers, regions or time periods, rather than the weighted average of those individual export transaction prices to particular purchasers, regions or time periods? Article 2.4.2 refers to a pattern of "export prices". Does the reference to "export prices" in the plural imply that an investigating authority must consider individual export transaction prices rather than their weighted average? Considering that the weighted average export price to a purchaser, region or time period is an aggregate of all

[19] China's First Written Submission, para. 239.

[20] *See* Exhibit CHN-1, paras. 61-69.

export prices to such a purchaser, region or time period, is the obligation to find a pattern of "export prices" nevertheless discharged by the use of weighted average export prices?

Response:

20. On its face, the second sentence of Article 2.4.2 of the AD Agreement has two parts. The first part of the sentence reads: "A normal value established on a weighted average basis may be compared to prices of individual export transactions." This first part of the sentence describes the alternative, average-to-transaction comparison methodology that may be used when certain conditions are met. The second part of the sentence sets forth the conditions.

21. The term "individual export transactions" appears in the first part of the sentence as part of the term "prices of individual export transactions" in the context of the description of the alternative comparison that may be made between "[a] normal value established on a weighted average basis" and "prices of individual export transactions." The presence of the term "individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement does not support a finding that, as the question perhaps suggests, Article 2.4.2 of the AD Agreement requires an investigating authority to find a pattern on the basis of the prices of "individual export transactions" to purchasers, regions or time periods, rather than the weighted average of those individual export transaction prices to particular purchasers, regions or time periods.

22. China is incorrect when it contends that the "pattern clause" of the second sentence of Article 2.4.2 requires investigating authorities to examine export prices on an individual basis.[21] Contrary to China's arguments, the text of the second sentence of Article 2.4.2 of the AD Agreement actually supports the opposite proposition. While the second sentence of Article 2.4.2 permits an investigating authority to compare an average normal value with the "prices of *individual* export transactions,"[22] later in the same sentence, the investigating authority is tasked with finding a "pattern of export prices," not a pattern of *individual* export prices. The presence of the term "individual" as a modifier of "export transactions" and the absence of the same term – or any modifier at all – in connection with "export prices" in the same sentence is a compelling basis to conclude that Article 2.4.2 does not require that an investigating authority's finding of a pattern be based on an analysis of export prices on an individual versus a weighted-average basis. 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."

23. With respect to the last question in this series of questions, we agree with the observation in the question that "the weighted average export price to a purchaser, region or time period is an aggregate of all export prices to such a purchaser, region or time period." Accordingly, the use of weighted-average export prices in conjunction with an analysis undertaken pursuant to the

[21] *See* China's First Written Submission, paras. 130-134.

[22] AD Agreement, Art. 2.4.2, second sentence (emphasis added).

"pattern clause" of the second sentence of Article 2.4.2 does, indeed, discharge the obligation to find a pattern of "export prices." Further, we observe that when the USDOC undertook analyses pursuant to the "pattern clause" in the challenged antidumping investigation, it took into account all of the individual export prices reported by respondents during the period of investigation. China's suggestion that the USDOC "disregard[ed]" individual export prices simply is wrong,[23] and China's proposed dichotomy between an examination involving *actual* export prices and an examination involving averages of certain sets of export prices is a false dichotomy. Any average of export prices will, in fact, be based on "actual," individual export prices.

2.2 Adequacy of explanations as to why the differences in the patterns of export prices could not be taken into account appropriately through the WA-WA or T-T methodologies

Question 15 (To the United States): The Panel understands that in the Coated Paper, OCTG and Steel Cylinders investigations, the USDOC compared the margin of dumping obtained through the WA-WA methodology and the WA-T methodology, found that there was a difference between those two margins of dumping, and on that basis decided that the significant differences in the relevant export price patterns could not be taken into account appropriately through the WA-WA methodology.[24] Can the United States explain if this difference was attributable partly or wholly to the fact that zeroing was used under the WA-T methodology whereas it was not used under the WA-WA methodology?

Response:

24. The United States notes a certain circularity in this question. Zeroing, as the United States has shown, is an inherent and necessary feature of the alternative, average-to-transaction comparison methodology.[25] The use of zeroing in connection with the alternative comparison methodology is required to accomplish the goal of unmasking "targeted dumping." By definition, an approach that unmasks dumping may entail a different margin of dumping than an average-to-average approach that does not unmask dumping. Thus, the different results arise from the pattern of export prices that differ significantly among different purchasers, regions, or time periods, and the adoption of a comparison methodology that successfully unmasks targeted dumping.

25. Utilizing zeroing under the average-to-transaction comparison methodology, as we have shown in the U.S. first written submission, is necessary so that "targeted" dumping is unmasked. Otherwise, the two methodologies would yield mathematically equivalent results,[26] in which case the "masked dumping" would remain masked, even under the alternative, average-to-

[23] China's First Written Submission, para. 261.

[24] *See, e.g.*, U.S. First Written Submission, paras. 184-186.

[25] *See* U.S. First Written Submission, paras. 237-275.

[26] *See* U.S. First Written Submission, paras. 237-275.

transaction comparison methodology in a situation where a pattern of significantly differing export prices exists.

Question 16 (To China and the United States): Article 2.4.2 of the AD Agreement requires investigating authorities to explain why significant differences in the export price pattern cannot be taken into account appropriately by the use of a WA-WA "or" T-T comparison methodology. In the parties' view, should the Panel, in interpreting the disjunctive "or" in the second sentence of Article 2.4.2, accord any significance to fact that the WA-T methodology is an exception?

Response:

26. We recall that the U.S. first written submission discusses the meaning and implications of the term "or" as it is used in both the first and second sentences of Article 2.4.2 of the AD Agreement.[27] Of course, as with any term in any of the covered agreements, the term "or" in the second sentence of Article 2.4.2 must be interpreted in accordance with the customary rules of interpretation. That is, it must be interpreted in good faith in accordance with the ordinary meaning to be given to the term *in its context* and in light of the treaty's object and purpose. The fact that the average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 is subject to conditions and is an exception to the comparison methodologies set forth in the first sentence of Article 2.4.2, which are to be used "normally," is a contextual element that should be taken into account when interpreting the term "or" in the second sentence.

27. The exceptional nature of the average-to-transaction comparison methodology is relevant in the sense that that methodology stands in contrast to the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."[28] The Appellate Body has further explained that it would be illogical if these two comparison methodologies were to yield "results that are systematically different."[29] That is why, as we explain in the U.S. first written submission, it makes no sense to interpret the "or" in the second sentence of Article 2.4.2 as requiring an investigating authority to explain separately why both the average-to-average comparison methodology and the transaction-to-transaction comparison methodology cannot take into account appropriately the observed pattern of export prices. An explanation for one of two comparison methodologies that "fulfil the same function" is sufficient.

28. Finally, we observe that in investigations involving nonmarket economy countries, such as China, the transaction-to-transaction comparison methodology cannot be used, because normal value is not based on transaction-specific home market sale prices. So, in the challenged

[27] *See* U.S. First Written Submission, paras. 172-182.

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

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

investigations, the pattern of export prices, of course, could not be taken into account appropriately by a comparison methodology that was impossible to use.

Question 17 (To China and the United States): Regarding the observation of the Appellate Body in US – Zeroing (Japan) that investigating authorities are required to provide an explanation as to why differences in the relevant export price pattern cannot be "taken into account appropriately by the use of either of the two symmetrical comparison methodologies",[30] can the parties please further elaborate on the extent to which the Appellate Body's reasoning is relevant to the Panel's assessment of China's argument that the USDOC should have made an explanation with respect to both WA-WA and T-T methodologies in the three investigations at issue?

Response:

29. The United States considers that the portion of the *US – Zeroing (Japan)* Appellate Body report that is quoted in the question is of no assistance to the Panel here. On its face, the Appellate Body was doing nothing more than providing a brief summary of the conditions set forth in the second sentence of Article 2.4.2 of the AD Agreement. That summary was presented as a preface to the Appellate Body's evaluation of a contextual analysis undertaken by the panel in that dispute. The Appellate Body was not interpreting the terms of the "explanation clause" or any other part of the second sentence of Article 2.4.2 when it offered the summary. The Appellate Body did not explore the ordinary meaning of the terms of the "explanation clause," or conduct a contextual analysis of its meaning. Accordingly, this portion of the Appellate Body report cannot be read as any type of definitive statement on the meaning of the "explanation clause." And to the extent that any implications may be drawn from this part of the Appellate Body report, they provide no support for China's positions.

30. On its face, the quoted passage simply does not further clarify the meaning of the "explanation clause," nor does it help resolve the present dispute between China and the United States concerning the meaning of that provision. While the Appellate Body restated the "explanation clause" condition in a manner that is somewhat different from the actual terms of the second sentence of Article 2.4.2, it did not do so in a way that sheds light on the meaning of the terms of the "explanation clause" themselves.

31. To the extent that the Panel reads the Appellate Body's statement as providing guidance about the interpretation of the second sentence of Article 2.4.2, the Appellate Body's statement actually supports the interpretation proposed by the United States. This is evident when paragraph 131 of the *US – Zeroing (Japan)* Appellate Body report is reviewed in its entirety. There, the Appellate Body explained that:

[30] *US – Zeroing (Japan) (AB)*, para. 131 (emphasis original).

> We recall that, under the first sentence of Article 2.4.2, an investigating authority is "normally" required to use either of the two symmetrical comparison methodologies provided for in that sentence. The second sentence of Article 2.4.2 provides an asymmetrical comparison methodology to address a pattern of "targeted" dumping found among certain purchasers, in certain regions, or during certain time periods. By its terms, this methodology may be used if two conditions are met: first, that the investigating authorities "find a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and secondly, that an "explanation" be provided as to why such differences in export prices cannot be taken into account appropriately by the use of either of the two *symmetrical* comparison methodologies set out in the first sentence of Article 2.4.2. The second requirement thus contemplates that there may be circumstances in which targeted dumping could be adequately addressed through the normal symmetrical comparison methodologies. The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be used.[31]

32. In the first sentence of the paragraph, the Appellate Body explains that "an investigating authority is 'normally' required to use *either of the two symmetrical comparison methodologies* provided for in that sentence."[32] The Appellate Body's reference to "either of the two symmetrical comparison methodologies," however, does not mean "both" methodologies. Indeed, the Appellate Body has explained that an "investigating authority *may choose between the two* depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing 'margins of dumping' and that there is no hierarchy between them, it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology."[33] Accordingly, the Appellate Body has recognized that the investigating authority may select one of the two normal methodologies and use it in a particular investigation.

33. When it summarizes the explanation requirement under the second sentence of Article 2.4.2 in the same paragraph in the *US – Zeroing (Japan)* report, the Appellate body uses identical language. The language quoted in the question, *i.e.*, "taken into account appropriately by the use of either of the two *symmetrical* comparison methodologies," is the same as the language that is used in the first sentence of paragraph 131 of the *US – Zeroing (Japan)* Appellate Body report. Nothing in the Appellate Body's explanation suggests that the Appellate Body intended to convey a different meaning by the use of the same language. Logically, the language used by the Appellate Body in the third sentence of the paragraph has the same meaning as the same language used in the first sentence of the paragraph. It does not mean "both." It does not mean that the

[31] *US – Zeroing (Japan) (AB)*, para. 131 (italics in original; underlining added).

[32] *US – Zeroing (Japan) (AB)*, para. 131 (emphasis added).

[33] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93 (emphasis added).

investigating authority must abandon its choice of one of the symmetrical methodologies, as China appears to suggest, and provide an explanation regarding the "normal" methodology that the investigating authority did not select or use in the proceeding.

34. Of course, the Panel's task is to interpret the terms of the AD Agreement, not those of an Appellate Body report in a previous dispute. For the reasons given, the passage of the Appellate Body report identified in the question will not help the Panel resolve the interpretive issue that it faces.

Question 18 (To the United States): Does the United States agree that the USDOC did not explain why the significant differences in the export price pattern could not be taken into account appropriately by the use of the T-T comparison methodology?

Response:

35. In the challenged investigations, the USDOC did not provide a separate explanation, in addition to the explanation provided with respect to the average-to-average comparison methodology, for why the pattern of significantly differing export prices it had identified could not be taken into account appropriately by the use of the transaction-to-transaction comparison methodology. As we have demonstrated, including in response to question 16 above, the USDOC was not required to do so by the terms of Article 2.4.2 of the AD Agreement. In addition, we have explained that, in investigations involving nonmarket economy countries, such as China, the transaction-to-transaction comparison methodology cannot be used, because normal value is not based on transaction-specific home market sale prices. So, in the challenged investigations the pattern of export prices could not be taken into account appropriately by a comparison methodology that was impossible to use.

2.3 APPLICATION OF THE WA-T METHODOLOGY TO ALL US SALES

Question 20 (To the United States): The United States argues that a pattern "necessarily includes" both high priced and low priced sales.[34]

a. How does the United States reconcile its argument that a pattern necessarily includes both high priced and low price sales with the observation of the Appellate Body in *US-Zeroing (Japan)* that the "universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply"[35]?

Response:

[34] *See, e.g.*, U.S. First Written Submission, para. 202.

[35] *US – Zeroing (Japan) (AB)*, para. 135.

36. There is no conflict between the U.S. argument and the Appellate Body statement quoted in the question. As explained in the U.S. first written submission,[36] the relevant "pattern" within the meaning of the second sentence of Article 2.4.2 is "a pattern of export prices *which differ significantly* among different purchasers, regions, or time periods."[37] Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. An export price cannot "differ significantly" on its own. Given that "difference" is a comparative or relative concept, for something to be different, it must differ from something else. Thus, lower export prices, which may not differ significantly from one another, are not, standing alone, a "pattern of export prices which differ significantly" without reference to the higher export prices from which they differ significantly.

37. This is true whether the "universe of export transactions" is all of an exporter's export transactions or just a subset of export transactions. Whatever the universe of transactions is, for there to be a pattern of export prices which differ significantly, the universe must include both higher-priced and lower-priced export sales. If the "universe" were limited only to lower-priced sales, the basis for finding a pattern of export prices which differ significantly – namely, a comparison to higher-priced sales also included in the universe – would be lost.

38. We also note that we discuss the passage quoted in this question in the U.S. first written submission.[38] There, we suggest that, to the extent that the Panel takes into account the Appellate Body's discussion in paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report, it should exercise caution in doing so. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the alternative, average-to-transaction comparison methodology. Furthermore, the Appellate Body "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."[39] 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.

b. If in the United States' view both high priced and low priced sales form part of the relevant pricing pattern, why does the Nails test focus exclusively on low priced sales to discern that pattern?

Response:

39. With respect, the *Nails* test does not focus "exclusively on low priced sales to discern that pattern." Rather, the *Nails* test examines all of an exporter's sales – higher, lower, and

[36] *See* U.S. First Written Submission, para. 55.

[37] AD Agreement, Art. 2.4.2, second sentence (emphasis added).

[38] *See* U.S. First Written Submission, paras. 286-289.

[39] *US – Zeroing (Japan) (AB)*, para. 136.

everything in between – to ascertain whether sales to an alleged "target" (*i.e.*, a particular purchaser, or region, or time period) "differ significantly" from sales to other purchasers, or regions, or time periods, by virtue of being significantly lower than those other sales. In other words, a "pattern" of lower-priced sales to the alleged target can only be discerned by analyzing the prices to the alleged target in relation to the other purchasers, or regions, or time periods.

40. Further, the "pattern" found through the use of the *Nails* test is not a pattern of "targeted dumping" or even of low-priced export sales to the "target." Rather, per the terms of the second sentence of Article 2.4.2 of the AD Agreement, it is a "pattern of export prices which differ significantly among different purchasers, regions, or time periods."

Question 21 (To the United States): In paragraph 187 of its first written submission, China notes that the USDOC itself observed, when developing its targeted dumping regulations, that the application of the WA-T methodology with respect to all sales by an exporter found to have engaged in targeted dumping would, in many instances, be unreasonable and unduly punitive. In that context, can the United States explain with respect to the three USDOC investigations at issue, why the application of the WA-T methodology to all sales of the exporter, even when targeted dumping was found, would not unreasonable and unduly punitive.

Response:

41. As explained in the U.S. first written submission, a limitation on the application of the alternative comparison methodology that the U.S. investigating authority, for a time, imposed on itself provides no guidance as to the correct interpretation of the terms of Article 2.4.2 of the AD Agreement.[40] Additionally, in withdrawing its regulation, the USDOC acknowledged that it "may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."[41]

42. With respect to the particular passage referenced by China, the USDOC provided a specific example of what could constitute an unreasonable application of average-to-transaction methodology to all sales by an exporter, namely in a situation where targeted sales accounted for only one percent of exporter's total sales. This factual situation was not present in any of the three investigations challenged by China. Additionally, in the paragraph that follows the passage referenced by China, the USDOC expressly rejected as the "other extreme" the proposal that "the average to transaction method should always be limited to those sales that constitute targeted dumping."[42] Accordingly, while the USDOC may have initially established criteria and thresholds that prevented the use of the average-to-transaction methodology to unmask dumping,

[40] *See* U.S. First Written Submission, para. 209.

[41] *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930, 74,931 (December 10, 2008) (Exhibit CHN-86).

[42] *Antidumping Duties; Countervailing Duties, Notice of Proposed Rulemaking and Request for Public Comments*, 61 Fed. Reg. 7,308, 7,350 (February 27, 1996) (Exhibit CHN-98).

even under those initial criteria and thresholds – which have since been replaced – the USDOC did not adopt the view advocated by China that the average-to-transaction comparison methodology should always be limited to those sales that constitute targeted dumping.

43. In any event, nothing China has put before the Panel establishes that the USDOC's application of the alternative, average-to-transaction comparison methodology to all of an exporter's sales in the challenged investigations was inconsistent with the second sentence of Article 2.4.2, and certainly nothing before the Panel demonstrates that it was "unreasonable" or "unduly punitive." On the contrary, it was necessary to apply the alternative, average-to-transaction comparison methodology to all sales to "unmask" what the Appellate Body has referred to as "targeted dumping" in a situation where the USDOC, after analyzing all of an exporter's export sales, had identified a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

2.4 USE OF ZEROING WHILE APPLYING THE WA-T METHODOLOGY

Question 23 (To the United States): In paragraph 223 of its first written submission, the United States explains that in the Coated Paper, OCTG and Steel Cylinders investigations, the USDOC calculated multiple weighted average normal values for different averaging groups to ensure price comparability.

a. Does the phrase "differing averaging groups" refer to the use of CONNUMs?

Response:

44. When we refer in paragraph 223 of the U.S. first written submission to "different averaging groups," we are referring to the grouping together of similar transactions for the purpose of making comparisons between normal value and export price. Similarity of export transactions is generally determined on the basis of product characteristics. Therefore, comparison groups are commonly referred to as "models" or CONNUMs. However, other factors affecting price comparability are also taken into account, *e.g.*, level of trade.

b. Can the United States please explain how the USDOC calculated the margin of dumping, under the WA-WA and the WA-T methodology, using "multiple weighted average normal values", in each of the three investigations at issue?

Response:

45. When the USDOC applied the average-to-average comparison methodology in the challenged investigations, similar export transactions – *i.e.*, same model/CONNUM and same level of trade – were grouped together and an average export price was calculated for the comparison group. That average export price was compared to a comparable normal value. This was done for all of the averaging groups, and the result was multiple intermediate comparison results. Some of the comparison results were positive, indicating that the weighted average export price for the averaging group was lower than the comparable normal value. Some of the comparison results were negative, which indicated that the weighted-average export price for the averaging group was higher than the comparable normal value. All of the intermediate

comparison results were aggregated, and in the aggregation process, zeroing was *not* used. Accordingly, positive intermediate comparison results were offset with negative intermediate comparison results. The USDOC then divided the aggregate amount of dumping by the aggregate export prices of *all* U.S. sales made by the exporter/producer during the period of investigation to arrive at the "weighted average dumping margin" that would result from the application of the average-to-average comparison methodology.[43]

46. When the USDOC applied the alternative, average-to-transaction comparison methodology in the challenged investigations, normal value was calculated in the same manner as under the average-to-average comparison methodology. Thus, there were multiple annual average normal values for different models/CONNUMs. Each export price transaction was compared individually to the relevant, comparable normal value, which yielded numerous individual comparison results. Some of the comparison results were positive, because export price was lower than normal value. This was evidence of dumping. Some of the comparison results were negative, because export price was higher than normal value. The USDOC aggregated the intermediate comparison results. In doing that aggregation, the USDOC used zeroing to prevent the negative comparison results from masking the evidence of dumping that would be revealed by the positive comparison results. The USDOC then divided the aggregate amount of dumping by the aggregate export prices of *all* U.S. sales made by the exporter/producer during the period of investigation to arrive at the "weighted average dumping margin" that would result from the application of the average-to-transaction comparison methodology.

c. In addition, can the United States please explain how zeroing was applied under the WA-T methodology? Can the United States explain how, if at all, the nature of zeroing used in the three investigations at issue differed from the zeroing practices examined, and found to be inconsistent with the WTO rules, in the case law?

Response:

47. As an initial matter, the manner in which the USDOC used zeroing in the challenged investigations in connection with the alternative, average-to-transaction comparison methodology is described above, in response to the preceding subpart of the question.

48. With regard to the "nature of zeroing," this phrase could have a number of different meanings. From a mathematical standpoint, the "nature of zeroing" used in the challenged investigations is likely to be similar to various "zeroing practices" that have been examined in prior WTO disputes.

49. From the perspective most relevant to this dispute – that is, with respect to the connection to the legal disciplines set out in the AD Agreement – the "nature of zeroing" in the challenged investigations is completely different from zeroing practices examined in prior disputes. As the United States has demonstrated, the use of zeroing in connection with the alternative, average-to-

[43] 19 U.S.C. § 1677(35)(B) (Exhibit CHN-107).

transaction comparison methodology – when the conditions for the use of that methodology have been met – is necessary to give meaning to the provisions of the AD Agreement intended to unmask "targeted" dumping.

50. Further, if the "nature of zeroing" refers to relevant legal findings regarding "zeroing," then again, the "nature of zeroing" in this dispute is completely different from prior disputes. No prior panel or Appellate Body report contains findings concerning an investigating authority's use of zeroing in connection with an application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Moreover, as we have shown, the logical extension of the Appellate Body's findings related to the use of zeroing is that its use is permissible – indeed, it is necessary – in connection with the application of the alternative, average-to-transaction comparison methodology.[44]

Question 25 (To the United States): In paragraph 54 of its opening statement, China asserts that the United States' mathematical equivalence argument fails to grapple with the relevance of the T-T methodology. China argues that the T-T comparison methodology will generally yield results that are different from both the WA-WA and WA-T methodologies, even though zeroing is not permissible under the T-T methodology. Can the United States please comment on this argument by China?

Response:

51. China's assertion that application of the transaction-to-transaction comparison methodology does not yield results that are mathematically identical to the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing) does not support its position. The United States does not argue that the transaction-to-transaction comparison methodology should lead to the same mathematical result as either the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing).[45]

52. However, the Appellate Body has found that there is no hierarchy between the average-to-average and transaction-to-transaction comparison methodologies, they "fulfill the same function," and they should not be interpreted in a way that would "lead to results that are systematically different."[46] This, of course, does not mean that the outcomes of these two "normal" methodologies should be mathematically the *same*. Though, per the Appellate Body's guidance, their results would be expected to be similar "systematically," and they are the comparison methodologies that are to be used "normally," while the average-to-transaction comparison methodology is to be used when certain conditions are met and its use is necessary

[44] *See* U.S. First Written Submission, paras. 211-317.

[45] *See, e.g.*, U.S. First Written Submission, para. 264.

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

to, in the words of the Appellate Body, "unmask targeted dumping."[47] China offers the Panel the transaction-to-transaction comparison methodology as a way to obfuscate the mathematical equivalence argument, but China offers the Panel nothing that would lead to an interpretation of the second sentence of Article 2.4.2 of the AD Agreement that would give meaning and effect to that provision.

53. Additionally, as the United States explained in response to question 16, in investigations involving nonmarket economy countries, such as China, the transaction-to-transaction comparison methodology cannot be used, because normal value is not based on transaction-specific home market sale prices.

3 USE OF THE WA-T METHODOLOGY IN THE THIRD ADMINISTRATIVE REVIEW IN PET FILMS

Question 26 (To the United States): Can the United States please explain how the margin of dumping was calculated for the DuPont Group in the third administrative review in PET Films and how the anti-dumping duty liability was assessed? In particular, can the United States explain how the normal value was calculated in these proceedings, including whether it was determined on a monthly or yearly basis? In answering this question, can the United States please comment on the assertions contained in paragraph 8 of the oral statement made by Korea at the third party session that "shifting from annual average normal value to monthly average normal value is a routine part of the USDOC practice" and that "the USDOC does not limit monthly normal value to just some of its administrative reviews: it applies this more contemporaneous approach to all its reviews".

Response:

54. The margin of dumping for the DuPont Group in the third administrative review of the antidumping order on PET film was calculated using the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement, after the conditions for the use of the alternative comparison methodology had been established.[48] We note that China does not claim that the conditions for the use of the alternative comparison methodology were not met in the third administrative review of the PET film antidumping order.[49]

55. The explanation of the USDOC's application of the alternative, average-to-transaction comparison methodology in the third administrative review of the PET film antidumping order is exactly the same as the explanation given in response to question 23(b) with respect to the

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

[48] *See* PET Film AR3 Preliminary Analysis Memo, pp. 17-19 (Exhibit CHN-104); PET Film AR3 Preliminary Calculations Memo, pp. 8-10 (Exhibit CHN-103); PET Film AR3 Final I&D Memo, Issue 8 (Exhibit CHN-101).

[49] *See* China's First Written Submission, paras. 298-316.

application of the alternative, average-to-transaction comparison methodology in the challenged antidumping investigations. Importantly, normal value was determined in the challenged PET film administrative review on an annual basis, just as in the challenged investigations, *not on a monthly basis*.[50] In cases involving nonmarket economy countries, such as China, normal value is based on factors of production rather than home market sales, and, thus, normal value is determined based on surrogate values that are contemporaneous in time with the period of review, not on a monthly basis.[51]

56. In antidumping administrative reviews involving *market* economy countries, China and Korea are correct that the USDOC uses monthly average normal values in such administrative reviews, both when applying the average-to-average comparison methodology and when applying the alternative, average-to-transaction comparison methodology.[52] However, the administrative review at issue in this dispute involves a product from China, a nonmarket economy country. Contrary to Korea's assertion, the USDOC does *not* calculate monthly average normal values in administrative reviews involving nonmarket economy countries.[53]

[50] *See, e.g.*, PET Film AR3 Final I&D Memo, Issue 7 (Exhibit CHN-101) (explaining that the USDOC identifies surrogate values for factors of production that are "based on broad market averages, are publicly available, are tax and duty exclusive, and are *contemporaneous*" with the period of review).

[51] *See, e.g.*, PET Film AR3 Final I&D Memo, Issue 7 (Exhibit CHN-101).

[52] *See* 19 C.F.R. § 351.414(d)(3) (explaining that "[w]hen applying the average-to-average method in an investigation the [USDOC] normally will calculate weighted averages for the entire period of investigation," but "[w]hen applying the average-to-average method in a review, the [USDOC] normally will calculate weighted averages on a monthly basis") (Exhibit CHN-83).

[53] *See, e.g.*, Issues and Decision Memorandum accompanying *Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 Fed. Reg. 35,723 (June 24, 2014), p.19 (Exhibit CHN-133) (explaining that "in [nonmarket economy] [administrative] reviews . . . pursuant to section 773(c)(1) of the Act, the Department calculates *a single CONNUM-specific weighted-average normal value for the* [*period of review*] in a manner similar to how it calculates constructed value, except that it values the [factors of production] utilizing, to the extent possible, the prices or costs of [factors of production] in one or more market economy countries . . . .") (emphasis added).

4 ALLEGED SINGLE RATE PRESUMPTION

Question 30 (To China and the United States): With respect to the characterization of the "Single Rate Presumption" as a "norm of general and prospective application [] attributable to the United States"[54], what, if any, is the relevance for this dispute of the finding of the panel in *US – Shrimp II (Viet Nam)* that "the application by the USDOC in anti-dumping proceedings on imports from NMEs of a rebuttable presumption that all companies belong to a single, NME-wide entity, and the assignment of a single rate to that entity amounts to a rule or norm of general and prospective application"?[55] In particular:

a. Is the rule or norm of general and prospective application Viet Nam challenged in that dispute the same as, or otherwise exhibits the same features of, the alleged Single Rate Presumption in this dispute?

Answer:

57. The measure that the Panel in *US – Shrimp II (Viet Nam)* found to be a norm in the quoted language differs in material respects from the measure China calls the "Single Rate Presumption," which China has also alleged to be a norm. Specifically, China has alleged in this dispute that the so-called Single Rate Presumption contains two elements:

> [(i)] In anti-dumping proceedings relating to imports from countries that the United States considers to be NMEs, USDOC presumes that all producers and exporters in the country comprise a single entity under common government control (the "NME-wide entity") and assigns a single margin of dumping, or anti-dumping duty rate, to that entity
>
> [(ii)] [t]o rebut this presumption and obtain an individually-determined margin of dumping, a producer/exporter must complete USDOC's separate rate application and satisfy the "Separate Rate Test".[56]

While the first element appears at least superficially similar to the language referenced by the Panel above,[57] the second element was completely absent from the dispute in *US – Shrimp II*

[54] China's First Written Submission, subheading V.B.1.

[55] *US – Shrimp II (Viet Nam)*, para. 7.121.

[56] China's First Written Submission, para. 317. *See also id.*, para. 318 ("China uses the term 'Single Rate Presumption' to refer to the United States' rule, as a whole, comprising both the presumption of membership in a single country-wide entity, and the Separate Rate Test through which that presumption may be rebutted.")

[57] *US – Shrimp II (Viet Nam)*, para. 7.82 ("(i) the USDOC's presumption, in anti-dumping proceedings – including original investigations and administrative reviews – involving imports from NMEs, that all companies within the designated NME country are essentially operating units of a single, government-wide entity and the assignment of a single anti-dumping duty rate to that entity; and (ii) the manner in which this anti-dumping rate is determined, distinct from the separate rate, on the basis of facts available.")

(Viet Nam). Accordingly, despite China's similar nomenclature – "Single Rate Presumption" – China's challenge is broader as it addresses not only a presumption that entities in nonmarket economies are under government control, but also the investigating authority's process of investigating whether exporters and producers in nonmarket economies are related. The United States notes that the Appellate Body's analysis in *EC – Fasteners (AB)* explicitly recognized investigating authorities are permitted to examine whether distinct legal entities may be treated as a single exporter or producer.[58] Unlike the *EC – Fasteners* dispute though, China is not challenging the content of the investigating authority's mechanism to make such a determination, but rather that USDOC maintains a mechanism altogether, *i.e.*, a "producer/exporter must complete USDOC's separate rate application." Thus, China is seeking a finding that goes beyond, if not contravening, the Appellate Body's analysis in *EC – Fasteners (AB)*.

b. Is the body of evidence on which the panel in *US – Shrimp II (Viet Nam)* based its conclusion of the existence of a rule or norm of general and prospective application, similar to the evidence currently on the record of this dispute?

Response:

58. The evidence is analogous, and, in our view, was deficient in that dispute and remains so now. To the extent China proffers what it considers additional evidence than what was before the *US – Shrimp II (Viet Nam)* panel, this additional evidence still fails to provide adequate support for the existence of a rule or norm of general and prospective application. As the United States explained in its presentation at the first panel meeting, adducing deficient evidence to a base of deficient evidence does not render the evidence collectively any more reliable – and get China any closer to meeting its high burden of establishing a rule or norm of general and prospective application.[59]

59. The panel in *US – Shrimp II (Viet Nam)* evaluated the Antidumping Manual; Policy Bulletin 05.1; and certain statements from USDOC contained in documentation from the various proceedings at issue, such as Federal Register Notices and Issues and Decisions Memoranda (that concern Vietnam). In the present dispute, China likewise proffers the Antidumping Manual; Policy Bulletin 05.1; and certain statements from USDOC contained in documentation from various NME proceedings, such as Federal Register Notices and Issues and Decisions Memoranda. The panel in *US – Shrimp II (Viet Nam)*, which was required to apply "particular rigor … to support a conclusion as to the existence of a 'rule or norm'"[60] failed to discuss – at all – some of the key aspects of this purported evidence that called into question its reliability when trying to prove the existence of a norm of general and prospective application. For example, the *Shrimp II* panel did not address that the cited language in Policy Bulletin 05.1 did not come from the section that purports to elucidate USDOC's policy, but rather the section titled Background.

[58] *EC – Fasteners (AB)*, para. 376.

[59] *See US – Zeroing (EC) (AB)*, para. 198.

[60] *Id*.

While China approvingly draws upon the ultimate finding of the *US – Shrimp II (Viet Nam)* panel that a norm was established, it does not address the failure of the actual analysis to grapple with these critical issues in the evidence.

60. China appears to argue that it has not only included the same evidence as that before the panel in the *Shrimp II* dispute, but that it has in fact provided more including court decisions and more statements from particular antidumping proceedings. At the outset, the United States recalls the analysis of the Appellate Body in *US – Zeroing (EC)*, which China referenced during the panel meeting in support of its argument that court decisions and administrative determinations are sufficient to establish a norm of general and prospective application.

> This evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract.[61]

Thus, to the extent China wishes to draw parallels between the present dispute and the various zeroing disputes where a norm was found to exist, the type of additional evidence cited by China was never found to be sufficient in and of itself to prove the existence of a norm of general and prospective application. To the contrary, the evidence in those disputes was far more comprehensive. As the United States has explained, at best, the selective statements from court cases proffered by China merely describe USDOC's conduct at a particular moment in time and affirm that such a practice is within the agency's authority under U.S. law.[62] And with respect to a statement consistently repeatedly in administrative determinations, absent some other connection – which China has not shown – the only thing proven is the fact of consistent statements – not the existence of a measure.[63] Indeed, even if the Panel were to assume *arguendo* that these statements amount to practice, that fails to establish the existence of the norm China asserts. The panel's findings in *US – Export Restraints* on this point are instructive:

[61] *US – Zeroing (EC) (AB)*, para. 204.

[62] As the Panel in Question 34 has asked specific implications regarding the court decisions, the United States will address the particularities of those cases in response to that question. Suffice it to say, they are adjudications over issues decided in prior antidumping proceedings. Moreover, the decisions involve determinations made on a particular set of facts; they do not constitute a pronouncement on what USDOC will do generally in the future, particularly with respect to the so-called Single Rate Presumption.

[63] *Thailand – Cigarettes*, para. 7.133 ("We are mindful that the burden of proving the existence of an unwritten norm or rule, as elaborated by the Appellate Body, is rather high, specifically because of the very fact that it does not exist in the form of a written document.")

> Canada may be right that under US law, "practice must normally be followed, and those affected by US [CVD] law . . . therefore have reason to expect that it will be", past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of doing something or requiring some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC "normally" follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives "legal effect to that 'practice' as determinative of the interpretations and methodologies it applies". US "practice" therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada.[64]

In short, and as discussed in the United States' First Written Submission,[65] the evidence is deficient (in both disputes) and cannot maintain China's assertion regarding the existence of a rule or norm of general and prospective application.

c. What is the relevance of the conclusion of the panel in *US – Shrimp II (Viet Nam)* (in paragraph 7.121 of its report, quoted above), in the light of the Appellate Body's statement that, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case"?

Response:

61. The only relevance of this particular finding from the *US – Shrimp II (Viet Nam)* panel report is to the extent that China challenges the same alleged "norm" at issue in that earlier dispute (which it does not), that China has presented the same evidence that the Panel evaluates in the same way as that panel, and that the Panel finds persuasive the *Shrimp II* panel's evaluation of the existence of that alleged measure. As noted in response to Question 30(a), the norm in the present dispute is materially different in that China's challenge extends to any requirement for a producer or exporter to complete USDOC's separate rate application and satisfy the "Separate Rate Test."[66] The conclusions of the *Shrimp II* panel are not binding on this panel, and no provision of the DSU permits a Panel to set aside its obligation to make an objective assessment of the matter referred to it by the DSB[67] in favor of the assessment made by *another* panel. Even setting aside what basis in the DSU there is for the Appellate Body's

[64] *US – Export Restraints*, para. 8.126.

[65] U.S. First Written Submission, Section V.C.

[66] China's First Written Submission, para. 317.

[67] *See* DSU, Articles 7.1, 11.

statement in *US – Stainless Steel (Mexico)* concerning the absence of "cogent reasons", in any event the decision to decline to apply an erroneous analysis is of course a cogent reason.

62. Numerous panels and, indeed, the Appellate Body have come to such a conclusion repeatedly. Article 11 of the DSU requires this panel to undertake its own "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreement." In the context of challenges to the "zeroing methodology", several panels, including the Shrimp II panel itself, recognized a complaining party would bear the burden of establishing the existence of that measure, for purposes of WTO dispute settlement, which the panel would need to assess objectively.[68] In so doing, these panels were not following the legal conclusions reached by previous panels. As explained by the Appellate Body in *Japan – Alcoholic Beverages II*:

> [a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, <u>they are not binding, except with respect to resolving the particular dispute between the parties to that dispute</u>.[69]

63. Indeed, even in the case of contemporaneous disputes involving similar, if not outright identical legal questions between the same parties, panels have clearly departed or made clear their disagreement with the analysis of prior panels in reaching contrary results. For example, in *China – Broiler Products*, the panel found that the investigating authority's dumping margin calculation constituted essential facts that must be disclosed to respondents under Article 6.9 of the AD Agreement even though the panel in *China – X-Rays* reached a contrary conclusion only months before.[70] Likewise, the *US – Shrimp II (Viet Nam)* panel explicitly disagreed with the *US – Shrimp I (Viet Nam)* panel's analysis regarding when the obligations in Article 6.8 of the AD Agreement are triggered.[71] In particular, the *Shrimp II* panel found that where USDOC continued to apply a rate determined in an earlier proceeding, USDOC did not make a determination with the meaning of Article 6.8.[72] Both the aforementioned disputes were

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[68] *See* e.g., *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.").

[69] *Japan – Alcoholic Beverages II* (AB), p. 14 (emphasis added).

[70] *China – Broiler Products*, para. 7.92 ("However, if the holding of the panel in *China – X-Ray Equipment* were to stand for the premise that the investigating authority does not have to disclose the formula used to make the calculations, as explained above, we respectfully disagree.")

[71] *US – Shrimp II*, para. 7.235 ("We respectfully disagree with the reasoning of the panel in *US – Shrimp (Viet Nam)*. As explained above, in our view, the application of Article 6.8 is triggered by an investigating authority resorting to 'facts available' in the making of a determination.")

[72] Paras. 7.233-7.235.

initiated after the Appellate Body's report in *US – Stainless Steel (Mexico).*[73] Thus, the finding referred to by the Panel in this question, as with any other finding in any report, is not legally conclusive or otherwise constraining with respect to how the Panel might decide the present issues before it.

64. Therefore, the only manner in which this finding is potentially relevant is to the extent the Panel finds the analysis behind it persuasive. The United States submits that the finding here, which concerns the existence of the Single Rate Presumption, is not. In particular, the panel in *US – Shrimp II (Viet Nam)* did not effectively apply the high bar that needs to be satisfied to show a rule or norm of general and prospective application. That such is the case is demonstrated by the fact the report does not give proper weight to the deficiencies with the evidence presented here, which it should have considering the demanding rigor a complainant must meet to prove a norm of general and prospective application.

65. We highlight three indicative failures in the analysis. First, the *US – Shrimp II (Viet Nam)* panel took the following view with respect to analyzing the evidence before it (the Antidumping Manual and Policy Bulletin 05.1):

> 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.[74]

Such an analysis is flawed because it fails to take into account the particularities of each piece of evidence. The *US – Shrimp II (Viet Nam)* panel's analysis of Policy Bulleting 05.1 is indicative of its failure to recognize such particularities. One section of Policy Bulletin 05.1 is clearly demarcated as the actual "Statement of Policy."[75] But another section – the section that the panel in *US – Shrimp II (Viet Nam)* relies on – is in the section titled "Background."[76] The *US – Shrimp II (Viet Nam)* panel did not explain why the statements in each section should be put on equal terms.

66. Indeed, consider the assertion by China that Policy Bulletin 05.1 has "normative character."[77] Apparently per China, this means the document is particularly significant in establishing the unwritten Single Rate Presumption norm. But why? If we accept *arguendo* that Policy Bulletin 05.1 has normative character, all that has been established is that the normative

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[73] *Compare Chile – Price Band System (AB)*, para. 234 (finding variable import levies are characterized by a lack of transparency) with *Peru – Agricultural Products (AB)*, para. 5.41 (finding lack of transparency and predictability not to be a necessary characteristic).

[74] *Id.*, para. 7.109; s*ee also id.*, para. 7.112.

[75] Exhibit CHN-109, starting on p.3.

[76] *Id*. at pgs. 1-3.

[77] China's First Written Submission, para. 323.

aspects of Policy Bulletin 05.1 may be challenged "as such." There is no reason to believe that the measure, particularly non-normative aspects such as statements in a background section, should be granted equal weight to prove the existence of something else. Indeed, by that logic, because the Marrakesh Agreement Establishing the World Trade Organization contains binding obligations, its preamble could be used to prove that a different unwritten norm in international law exists. Yet that is precisely the type of logic that the panel in *US – Shrimp II (Viet Nam)* endorses.

67. Second, not only did the *US – Shrimp II (Viet Nam)* panel inadequately assess the evidence, it also failed to weigh or even address some of the various inherent deficiencies with each piece that indicated it was not authoritative, and thus, precluded a finding that a norm or rule of general and prospective application existed.[78]

68. Finally, the United States notes that the panel in *US – Shrimp II (Viet Nam)* failed to consider the threshold legal question of whether a "practice" or "policy" can amount to a rule or norm of general and prospective application.[79] For instance, previous panels have addressed this issue by examining whether the practice or policy at issue constituted a "consistent practice" or "the simple repetition of the application of a certain methodology to specific cases", which they have distinguished from "a rule or norm of general and prospective application."[80] The lack of such an analysis undermines any persuasiveness of the *US – Shrimp II (Viet Nam)* panel's findings concerning the present dispute.

69. In sum, to the extent the Panel is concerned that it needs to identify a cogent reason for arguably departing from prior reports, there are at least three that militate powerfully: the allegations are different; the facts are different; and erroneous analysis does not need to be extended further. Thus, the panel should conduct an objective assessment of the matter before it, as required by Article 11 of the DSU, and reach its own well-reasoned conclusions, even if its findings may imply that a similar matter was wrongly decided in a prior proceeding.

Question 31 (To China and the United States): Please comment on whether the fact that the text of the Policy Bulletin 05.1 cited by China is placed in the "Background" section of this document (rather than in the "Statement of Policy") has a bearing on the analysis of the alleged Single Rate Presumption as a norm of general and prospective application.

Response:

70. The fact that the text upon which China relies appears in the "Background" section of Policy Bulletin 05.1 rather than the "Statement of Policy" section is critical to the analysis of the Panel. As the United States explained in its response to the preceding question, China asserts

[78] This point will be discussed in further detail in response to Question 31.

[79] U.S. First Written Submission, paras. 343-345.

[80] *US – Zeroing (Japan)*, paras. 7.50-7.52.

that Policy Bulletin 05.1 is significant because it is "normative" and a "statement of policy" which describes "the practice of USDOC in implementing the Single Rate Presumption norm."[81] That China asserts so is not surprising because China as noted previously has a high bar to meet in establishing the existence of a norm of general and prospective application.

71. China's characterization of the referenced statements cannot be reconciled with the actual facts though. The policy in Policy Bulletin 05.1 *actually* being announced concerns a procedural matter: the process for streamlining USDOC's request for information concerning a company's eligibility for a separate rate. In contrast, the language that China relies upon to establish the existence of the so-called Single Rate Presumption norm is from a section titled "Background," and is precisely that and lacks any normative character.

72. An additional fact to be considered is that China does not address the date of Policy Bulletin 05.1, which is after certain of the proceedings it contests, such as Retail Bags OI and Furniture OI,[82] and, furthermore, only applies to investigations, and not reviews.[83] China has not explained why or how this document which was issued after these determinations could somehow govern them.

Question 32 (To China and the United States): In Exhibit CHN-31, China has submitted a document titled "Separate Rate Application". Could the parties explain whether this template is circulated to Chinese exporters in advance of an investigation or administrative review? Are *all* Chinese exporters required to fill out this questionnaire for every investigation or administrative review?

Response:

73. USDOC notifies parties of the filing requirements and deadlines for the Separate Application – and a related document, the "Separate Rate Certification"[84] – at the beginning of each investigation or review proceeding. The Separate Rate Application provides parties the ability to demonstrate eligibility for a separate rate – that is, a rate as an entity that is separate from any afforded to the China-government entity that may be found – by helping to identify the requisite evidence required by USDOC to make such a determination. The Separate Rate Certification provides parties that have demonstrated their eligibility for a separate rate in a prior

[81] China's First Written Submission, paras. 323-325.

[82] For the sake of convenience, the United States applied the shorthand for these determinations from China's first written submission.

[83] U.S. First Written Submission, para. 339.

[84] Exhibit USA-84.

segment of a proceeding to demonstrate their continued eligibility for a separate rate. Both documents are currently available to any party, at any time, on USDOC's website.[85]

74. The United States notes that Chinese exporters are not required to fill out these documents in either investigations or reviews.[86] However, if a Chinese exporter wishes to demonstrate that the Chinese government did not materially influence its export activities, then it must comply with the procedures as discussed below and respond to USDOC's request for information. An important distinction should be drawn between a party that does not submit a Separate Rate Application, or Separate Rate Certification if appropriate, and, say for instance, a mandatory respondent that fails to respond to the dumping questionnaire. The former situation does not provide a basis for a finding of non-cooperation because only entities wishing to receive a separate rate must submit a Separate Rate Application or Separate Rate Certification, while in the latter, USDOC may determine that the failure to respond to the dumping questionnaire is a basis for a finding of non-cooperation, and the subsequent application of facts available.

75. For those investigations that occurred before the creation of the Separate Rate Application, *i.e.*, prior to the issuance of Policy Bulletin 05.1, companies could provide positive evidence to USDOC that the Chinese government did not materially influence their export activities.[87] In investigations after Policy Bulletin 05.1, companies had the opportunity to respond to the "Separate Rate Application."[88]

76. In the reviews China challenges, if a company had previously provided positive evidence to USDOC that their export activities are sufficiently independent of the Chinese government, *i.e.*, by completing a Separate Rate Application, then the company needed only certify that its status had not changed by completing the Separate Rate Certification to seek continued separate-rate treatment.[89] If the company had not previously provided this positive evidence, then to demonstrate eligibility for a separate-rate the company needed to do so by responding to the

[85] *See* http://trade.gov/enforcement/operations/index.asp at "NME Separate Rate Applications" (last visited July 21, 2015) (Exhibit USA-83).

[86] *See, e.g.*, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (10 July 2012), 77 Fed. Reg. 40565 (Exhibit CHN-192), p. 40566 (Aluminum Extrusions AR1 Initiation Notice) ("All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification[.]").

[87] *See, e.g.* Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35,320-21 (Exhibit CHN-283).

[88] *See, e.g.* Aluminum Extrusions OI, Preliminary Determination, 75 Fed. Reg. at 69408-09 (Exhibit CHN-111). *See also* Separate Rate Application (Exhibit CHN-31).

[89] *See, e.g.* Wood Flooring AR1, Preliminary Results, Preliminary Decision Memorandum at 6-10 (Exhibit CHN-263). *See also* Separate Rate Certification (Exhibit USA-84).

Separate Rate Application.[90] Assuming the company certified that it remained that its export activities remained free from the influence of the Chinese government or completed an acceptable Separate Rate Application, USDOC assigned the entity a rate separate from that of the China-government entity.[91] However, if a company could not demonstrate that it was sufficiently free from government influence, USDOC considered that company ineligible for a rate separate from that of the China-government entity.[92] Instead, that company was identified as being part of the China-government entity, *i.e.*, the entity comprised of companies that have not demonstrated that their export activities are free of government control.[93]

Question 33 (To China and the United States): Could the parties explain in sequential order the different types of questionnaires and forms Chinese exporters must fill out and submit during the course of: (i) an original investigation; and, (ii) an administrative review?

Response:

77. The sequence and types of questionnaires and forms Chinese exporters were required to fill out and submit during the course of investigations and reviews at issue in this dispute varied from case to case. The United States provides certain examples below. (The examples do not account for any "supplemental" requests for information, which were contingent upon the particular facts developed in the particular antidumping proceeding.)[94]

78. With regard to the investigations at issue, the United States provides two examples. First, in Aluminum Extrusions OI, USDOC requested the following questionnaires and forms in the order set forth below:

1) *Q&V Questionnaires*: Because of the large number of potential exporters, USDOC notified parties of its intent to collect quantity and value (Q&V) information from known exporters to determine which companies would be selected for individual examination. Those exporters that were identified in the application were issued a Q&V questionnaire. Any

[90] *See, e.g.* Aluminum Extrusions AR1, Preliminary Results, 78 Fed. Reg. at 34,987-88 (Exhibit CHN-465); Aluminum Extrusions AR1, Preliminary Results Preliminary Decision Memorandum at 9-13 (Exhibit CHN-213). *See also* Separate Rate Application (Exhibit CHN-31).

[91] *See, e.g.* Aluminum Extrusions OI, Preliminary Determination, 75 Fed. Reg. at 69,408-09 (Exhibit CHN-111); Wood Flooring AR1, Preliminary Results, Preliminary Decision Memorandum at 6-10 (Exhibit CHN-263).

[92] *See, e.g.* Aluminum Extrusions OI, Preliminary Determination, 75 Fed. Reg. at 69,408-09 (Exhibit CHN-111).

[93] *Id.* (Exhibit CHN-111).

[94] As discussed the U.S. response to Question 32, the Separate Rate Applications and Separate Rate Certifications are not "required" in the same sense as responses to Q&V questionnaires and responses to dumping questionnaires are required for certain exporters.

exporter that did not receive a Q&V questionnaire and wished to be eligible for selection for individual examination was required to respond to the Q&V questionnaire, which was available on USDOC's website.[95]

2) *Separate Rate Applications*: Exporters that sought to demonstrate that their export activities are sufficiently independent of the government were required to complete a Separate Rate Application, which was available on USDOC's website. USDOC also notified parties that in order to be considered as a separate rate applicant, parties must also have submitted a timely Q&V response.[96]

3) *Dumping Questionnaires*: Those exporters that were selected for individual examination were required to respond to the dumping questionnaire. Exporters that were not selected for individual examination were permitted to provide voluntary responses to the dumping questionnaire, which was available on USDOC's website.[97]

79. Second, in PET Film OI, USDOC sought responses only to the Separate Rate Application and dumping questionnaire.[98]

80. For the reviews at issue in this dispute, the United States also provides two examples. First, in Aluminum Extrusions AR1, USDOC requested the following questionnaires and forms in the order set forth below:

1) *Separate Rate Applications and Certifications*: Exporters 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) and sought to demonstrate that the Chinese government did not materially influence their export activities were required to complete a Separate Rate Application, or to provide a Separate Rate Certification if they had

[95] Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185).

[96] *Id.* (Exhibit CHN-185).

[97] Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69,406 (Exhibit CHN-111).

[98] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112). Unlike in Aluminum Extrusions OI, discussed above, USDOC selected respondents for individual examination based on import data sourced from US Customs and Border Protection (USCBP) and, therefore, did not solicit Q&V information.

previously qualified for a separate rate, both of which were available on USDOC's website.[99]

2) *Q&V Questionnaires*: USDOC subsequently issued Q&V questionnaires to those companies that were subject to review and showed entries of subject merchandise in the USCBP data. Exporters that were subject to review but that did not receive a Q&V questionnaire and wished to be eligible for selection for individual examination were required to respond to the Q&V questionnaire, which was available on USDOC's website.[100]

3) *Dumping Questionnaires*: Those exporters that were selected for individual examination were required to respond to the dumping questionnaire. Exporters that were subject to review and were not selected for individual examination were permitted to provide voluntary responses to the dumping questionnaire, which was available on USDOC's website.[101]

81. Second, in Shrimp AR7, USDOC sought responses only to the Separate Rate Application and Separate Rate Certification, and the dumping questionnaire. USDOC did not issue Q&V questionnaires because it selected respondents for individual examination based on USCBP import data.[102]

Question 34 (To the United States): In paragraph 48 of its opening statement during the first substantive meeting, the United States observed that the decisions by US courts China has cited in its first written submission "are adjudicating concerns raised by particular private parties in specific determinations – not what USDOC will do in the future". In this respect, what is the evidentiary value for purposes of assessing the prospective nature of the alleged Single Rate Presumption as a norm of general and prospective application, of the following statements by the USCIT:

a. That it is an "established and judicially-affirmed practice" that, "[u]nder the NME presumption, a company that fails to demonstrate independence from the NME entity is subject to the country-wide rate, while the company that

[99] Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (10 July 2012), 77 Fed. Reg. 40565 (Exhibit CHN-192), p. 40566 (Aluminum Extrusions AR1, Initiation Notice); Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 9-10 (Exhibit CHN-213).

[100] Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 2-3 (Exhibit CHN-213).

[101] *Id.* at 3 (Exhibit CHN-213).

[102] Shrimp AR7, Preliminary Results, Preliminary Decision Memorandum at 1-3, 5-6 (Exhibit CHN-167).

demonstrates its independence is entitled to an individual rate as in a market economy"[103];

b. That "the issue of USDOC's reliance upon a presumption of government control for respondents from NME-designated countries is settled"[104];

c. That the USCAFC "upheld USDOC's presumption of state control, which shifted the burden to the companies under review to demonstrate that they were independent from the state-controlled activity", and that this "presumption is rebuttable"[105]?

Response:

82. These statements in court decisions reflect that USDOC in the particular controversies that were adjudicated was found to have authority under U.S. law – not a requirement nor an expectation – to act in the manner noted in the statements. The particular court decisions and statements referenced above thus do not establish that there exists a rule or norm of general and prospective application.

83. As discussed in the United States' opening statement and in its presentation at the first panel meeting, these cases concern determinations made by USDOC in specific, prior antidumping proceedings.[106] The decisions cited affect the interests of those parties to that judicial proceeding; they do not constitute a pronouncement on what USDOC will do generally in the future, particularly with respect to the so-called Single Rate Presumption. As a previous panel has recognized, the complaining party asserting a norm of general and prospective application needs to demonstrate that an adjudication does not simply extend to a particular party, but rather establishes or revises the applicable principle in future cases:

> In this connection, in previous disputes where claims under Article X:1 of the GATT 1994 were at issue, panels had an opportunity to address the meaning of laws, regulations and rulings "of general application". In essence, a domestic agency's determination or ruling that concerns a particular importer only was not considered *per se* determinative to deciding whether such a determination or ruling should be considered as constituting a rule or norm of general and

[103] *Jiangsu Changbao Steel Tube Co., Ltd. v. United States*, 884 F.Supp.2d 1295 (USCIT 2012), (Exhibit CHN-123), pp. 1310 and 1311.

[104] *Jiangsu Changbao Steel Tube Co., Ltd. v. United States*, 884 F.Supp.2d 1295 (USCIT 2012), (Exhibit CHN-123), pp. 1311 and 1312.

[105] *East Sea Seafoods LLC v. United States*, 703 F.Supp.2d 1336 (USCIT 2010), (Exhibit CHN-134), p. 1354 (referring to *Sigma Corp. v. United States*, 117 Fed.3d 1401, 1405 (Fed.Cir.1997) and *Transcom, Inc v. United States*, 182 F.3d 876, 883 (Fed.Cir.1999)).

[106] U.S. Opening Oral Statement, para. 48.

> prospective application. The Panel in *Japan – Film*, for example, found that "inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases". The Panel considered that, in such a case, it is incumbent upon the complainant to clearly demonstrate the existence of such unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases. On the basis of the text of the concerned official memoranda and the meeting minutes in this dispute, we do not find the content therein to be applied generally and prospectively in future cases where similar issues arise.[107]

Here, the cases cited by China make the very point that they are only deciding outcomes for individual parties in that particular proceeding. In other words, these cases merely stand for their ultimate holding, and their value is limited to communicating the court's decision concerning the USDOC action challenged by the complaining party in that particular case – not what, whether, or how USDOC may choose to act in the future.

84. For instance, the significance of the court's decision in *Transcom* is the court's holding that USDOC was permitted to subject the complaining party's imports to an antidumping duty rate based on facts available.[108] The court's holding did not speak to whether what China dubs the Single Rate Presumption is prospective in nature. Similarly, in *Sigma*, the court discussed the propriety of requiring an individual party to establish its independence from the Chinese government in that particular case.[109] Likewise, in *Jiangsu Changbao* the court affirmed USDOC's determination in that case "to *disregard Changbao's* separate rate application as unreliable[,]"[110] while in *Huaiyin Foreign Trade* the court upheld USDOC's determination to apply the results of the review to the plaintiff.[111] Indeed, an example offered by China's delegate

[107] *Thailand – Cigarettes*, para. 7.127.

[108] *Transcom, Inc. v. United States*, 294 F.3d 1371, 1383 (CAFC 2002) (Exhibit CHN-130) ("[W]e conclude that the consequence of our holding *that Transcom's Chinese producers* were within the scope of the administrative review is that it was permissible for USDOC to subject Transcom's imports to a BIA-based antidumping duty.") (emphasis added).

[109] *Sigma Corp. v. United States*, 117 F.3d 1401, 1406 (CAFC 1997) (CHN-131) ("It was proper for USDOC to *require D&L* to do more to establish Guangdong's independence of the central government.") (emphasis added).

[110] *Jiangsu Changbao Steel Tube Co. v. United States*, 884 F.Supp.2d 1295, 1299 (USCIT 2012) (Exhibit CHN-123) (emphasis added).

[111] *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1381 (CAFC 2003) (CHN-132) ("*Huaiyin-30 received* adequate notice, had a meaningful opportunity to participate in the administrative review, and is thus subject to the results of the proceeding.") (emphasis added).

at the first panel meeting is instructive in explaining why these decisions have no bearing. The delegate quoted the following passage from Transcom:

> 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").[112]

China's delegate pointed to the last sentence in an attempt to prove the existence of China's purported norm of general and prospective application. But this demonstration ignored the preceding sentence that USDOC had in fact "reversed course." That USDOC had "reversed course" (i) illustrates that a U.S. court is confined to adjudicating the instant facts before it and (ii) that USDOC can – and does – revise its approach on its own accord if it is within its legal authority to do so (which it is here).

85. In short, these decisions do not explain, indicate, or otherwise create expectations concerning what USDOC will do generally in the future concerning the alleged Single Rate Presumption. Rather, these decisions memorialize the courts' rulings concerning whether the specific USDOC actions challenged by the complaining party (*e.g.*, *Transcom*, *Sigma*, etc.) was permitted under U.S. law in a particular fact pattern. Further, although these decisions also provide, as background, a discussion of USDOC's past practice which was relevant in those determinations and that such a practice was consistent with, or "settled" under, U.S. law,[113] they fail to show that the measure alleged by China is prospective in nature or that the alleged measure constitutes a rule or norm of general and prospective application.

86. In addition, the point that these past court cases speak only to the past is equally applicable to the evidence of past proceedings that China construes as "practice."[114] Even if under China's characterization of all of the proceedings cited in China's submission, such characterizations do not prove the future, *i.e.*, what USDOC will do on a general and prospective basis.[115] Therefore, neither the cited court cases nor the past

[112] *Transcom, Inc. v. United States*, 294 F.3d 1371 (CAFC 2002) (Exhibit CHN-130) (emphasis added).

[113] *See, e.g., Jiangsu Changbao Steel Tube Co., Ltd. v. United States*, 884 F.Supp.2d 1295, 1311-1312 (USCIT 2012) (Exhibit CHN-123).

[114] China's First Written Submission, para. 331.

[115] *US – Export Restraints*, para. 8.126.

proceedings provide evidentiary support that the alleged Single Rate Presumption is a norm of general and prospective in nature.

Question 35 (to the United States): Are there circumstances under which the United States does not presume, in investigations or administrative reviews involving Chinese exporters, that the subject companies are controlled by the government, unless they overcome such presumption? In answering this question, please provide examples, if any, of actual determinations involving Chinese exporters in which the USDOC has not applied the presumption of government control.

Response:

87. There are a number of cases prior to 1991 in which USDOC did not apply the presumption of government control in cases involving China.[116] More recently, USDOC has not been presented with circumstances which resulted in USDOC not applying a rebuttable presumption that the export activities of all Chinese exporters are subject to China government control. That being said, the United States emphasizes that the presumption is not required or expected by U.S. law or USDOC's regulations. Thus, USDOC is free to issue a new approach provided the reasons before it justify so – and USDOC explains such reasons.

4.3 China's "as such" and "as applied" claims under Articles 6.10 and 9.2 of the AD Agreement

Question 36 (To the United States): In paragraph 357 of its first written submission, the United States asserts that:

> **If an investigating authority concludes that the relationship between multiple companies is sufficiently close to support treating it as a single entity or "source," an investigating authority may apply a single rate duty [sic] to all of those companies' imports.**

Does this statement signify that, in the United States' view, an investigating authority must "conclude[] that the relationship between multiple companies is sufficiently close" in every investigation or administrative review before it treats Chinese exporters as a single exporter? Does the USDOC make an *affirmative determination* of close relationship in investigations and administrative reviews involving Chinese exporters?

Response:

88. The quoted statement signifies the U.S. interpretation that Articles 6.10 and 9.2 of the AD Agreement permit an investigating authority to treat multiple legal entities as a single known

[116] *See, e.g.*, *Porcelain-on-Steel Cooking Ware From the People's Republic of China; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 36419 (Oct. 10, 1986) (Exhibit USA-105).

exporter or producer. This interpretation was adopted by the panel in *Korea – Certain Paper*[117] and the Appellate Body in *EC – Fasteners*.[118]

89. As explained in the United States' First Written Submission, USDOC has already determined that China is a non-market economy. That determination, in conjunction with China's Accession Protocol incorporating the Working Party Report, has provided circumstances that permit USDOC to treat Chinese exporters and producers as a single entity absent evidence to the contrary. Because USDOC has not been presented with facts and evidence to the contrary, in certain determinations at issue USDOC has drawn the reasonable inference that the exporters in those antidumping proceedings were in a sufficiently close relationship with the Chinese government to support treating these exporters as part of the China-government entity.[119]

90. Determinations or conclusions by USDOC that the relationship between certain companies was sufficiently close to support treatment of a single entity – like many of the numerous determinations that must be made in a given investigation or review – were based on facts and evidence, or lack thereof, appropriate inferences, or a combination thereof. We provide below four examples in the determinations at issue to demonstrate this point.

91. First, in Aluminum Extrusions OI, USDOC determined that one of the mandatory respondents, the Guang Ya Group (comprised of Guang Ya Aluminium Industries Co., Ltd., Foshan Guangcheng Aluminium Co., Ltd., Kong Ah International Company Limited, and Guang Ya Aluminium Industries (Hong Kong) Limited), should be treated as a single entity along with two other exporters: New Zhongya (comprised of Zhaoqing New Zhongya Aluminum Co., Ltd., Zhongya Shaped Aluminium (HK) Holding Limited and Karlton Aluminum Company Ltd.) and Xinya Aluminum & Stainless Steel Product Co., Ltd. ("Xinya").[120] The determination that the Guang Ya Group was in a sufficiently close relationship with New Zhongya to support treating the companies as a single entity was based on the Guang Ya Group's responses to the dumping questionnaire, *i.e.*, facts and evidence, while the same determination with respect to Xinya was based on an inference stemming from the Guang Ya Group's failure to respond to certain questions on this point.[121]

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[117] *Korea – Certain Paper*, paras. 7.162.

[118] *EC – Fasteners (AB)*, para. 376 ("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.")

[119] U.S. First Written Submission, Section V.1.c.

[120] *See* Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69406-08 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18526-27 (Exhibit CHN-32).

[121] *See* Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69406-08 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18526-27 (Exhibit CHN-32).

92. Second, in Aluminum Extrusions AR1, based on its findings from the investigation, USDOC began the review by treating the Guang Ya Group, Zhongya (related to New Zhongya), and Xinya as a single entity, however, USDOC gave the entity an opportunity to provide facts and evidence to rebut this presumption.[122] Because the entity failed to do so, USDOC made the reasonable inference to treat Guang Ya Group, Zhongya and Xinya as a single entity.[123]

93. Third, also in Aluminum Extrusions AR1, USDOC began the review by presuming that China controls or materially influences all entities within China, and thereby considered all exporters or producers as part of a single China-government entity, absent positive evidence to the contrary, entitled to the same antidumping rate, a determination supported by China's Accession Protocol.[124] Because the Guang Ya Group/Zhongya/Xinya entity failed to provide this positive evidence to the contrary, USDOC made the reasonable inference to treat these companies as part of the China-government entity.[125]

94. Fourth, even where USDOC begins with a presumption that China controls or materially influences all entities within China, where evidence is available, this presumption may be replaced with an analysis of such evidence. For example, in Tires AR5, mandatory respondent Double Coin[126] provided evidence that it 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.[127] This example demonstrates a critical point that China fails to answer. Whatever presumption may have existed at the outset did not govern the final treatment of Double Coin. It was superseded by actual facts on the record upon which USDOC made its final determination.

95. These four examples thus demonstrate that the circumstances by which USDOC may chose treat multiple legal entities as a single exporter vary. Critically though, in each and every

[122] Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 7-9 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 97, 99-100 (Exhibit CHN-35).

[123] Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 7-9 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 97, 99-100 (Exhibit CHN-35).

[124] Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 14 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 99 (Exhibit CHN-35).

[125] Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 14 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 99 (Exhibit CHN-35).

[126] 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.

[127] Tires AR5, Issues and Decision Memo at Comment 1 (Exhibit CHN-472).

case, USDOC examined the available evidence that was before in on the record in reaching its determination.

96. In considering these examples, it is important to recognize that they practically demonstrate the role that facts and inferences play in making determinations – and which the AD Agreement correctly does not prohibit. As recognized by the Appellate Body, in the process of reasoning and evaluating the relevant facts to reach a determination, an investigating authority may be called upon to draw inferences from the available facts, or lack thereof, in order to reach a conclusion.[128] The drawing of inferences is an inherent part of an investigating authority's decision-making, and the extent of inference that is permissible is a function of the facts of a particular case. Like inferences, presumptions, where appropriate, may also play a role in an investigating authority's decision-making provided the investigating authority explains why it is appropriate.[129] In legal terms, a presumption, and more specifically, a rebuttable presumption, is an evidentiary concept that is specifically related to the burden of proof. In the context of an investigation or review, an investigating authority may draw an inference in reaching a conclusion, having posed precise questions that have not been fully answered, and having provided a prior indication of the inference that it is intended to draw, and such inference would be reasonable given the circumstances. This does not necessarily mean that positing the same inference at the outset of the investigation, in the form of a presumption, would necessarily be unreasonable, provided that there is an adequate basis for such a presumption and an opportunity for parties to rebut the presumption with facts and evidence.

[128] *See US – Carbon Steel (India)* (AB), para. 4.420 ("In the process of reasoning and evaluating which 'facts available' constitute reasonable replacements for the missing 'necessary information', an investigating authority may be called upon to draw inferences from the evidence before it in order to reach a conclusion. As the Appellate Body has recognized, albeit in another – yet similar – context, the drawing of an inference to reach a conclusion on the veracity of evidence, including from the refusal to provide information, is 'an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement'") (quoting *Canada – Aircraft* (AB), para. 202).

[129] *See Mexico – Rice (AB)*, para. 204 ("Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, however, the investigating authority must ensure that its determinations are based on 'positive evidence'. Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.")

Question 37 (To China and the United States): In paragraph 363 of its report in *EC – Fasteners (China)*, the Appellate Body described the measure at issue in that dispute as:

> **…establishing a presumption that producers or exporters that operate in NMEs are not entitled to individual treatment; in order to qualify for such treatment, NME exporters bear the burden to demonstrate that they satisfy the criteria of the IT test.**

Please explain whether the measure at issue in *EC – Fasteners (China)* (as described by the Appellate Body in the statement quoted above) is analogous to, or exhibits the essential features of, the alleged Single Rate Presumption.

Response:

97. The measure at issue in *EC – Fasteners* described above differs in several relevant ways from the alleged measure at issue in this dispute. As an initial matter, the measure at issue in that dispute was a written measure based on the EC's regulation, Article 9(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 ("Article 9(5)").[130] Here, China has challenged an alleged unwritten measure, even though a written measure on this subject exists.[131] Therefore, China maintains the high burden of establishing that there exists an unwritten measure which embodies a rule or norm of general and prospective application. This is a key distinction between these two disputes which the Panel must take into account in determining whether there actually exists a measure which may be subject to an "as such" challenge.

98. Furthermore, China's challenge to the supposed rule or norm at issue here has a key difference to the legal issue examined in *EC – Fasteners.* Specifically, China, in contrast to *EC – Fasteners*, has not challenged in this dispute the investigating authority's test to determine whether legal entities are distinct exporters – the "Separate Rate Test" – but rather argues that the mere existence of any test – regardless of content – is *ipso facto* inconsistent with WTO rules. *EC – Fasteners*, however, did not make such a sweeping finding that an investigating authority was barred from conducting such a test. Rather, the Appellate Body found in *EC – Fasteners* that the criteria in the IT test employed by the EU did not concern the relationship between the Chinese government and the particular company at issue.[132]

99. China has not challenged or claimed the Separate Rate Test bears any resemblance to the IT Test which was found to be part of the measure at issue in *EC – Fasteners*. As discussed in

[130] *EC – Fasteners (AB)*, para. 385.

[131] *See, e.g.*, 19 C.F.R. 351.107(d) (Exhibit CHN-108) ("In an antidumping proceeding involving imports from a nonmarket economy country, "rates" may consist of a single dumping margin applicable to all exporters and producers.") It may be recalled that although China initially challenged this regulation in its panel request, claiming that the alleged Single Rate Presumption "is applied pursuant to" this measure, China abandoned this claim in its first written submission.

[132] *EC – Fasteners (AB)*, para. 378-379.

the United States' First Written Submission, there are key differences between the criteria in the two tests, as USDOC's separate rate analysis allows for an in-depth and individualized review of a company's relationship with the Chinese government.[133] Such an analysis goes beyond the criteria that formed the IT test at issue in *EC – Fasteners*, and that the Appellate Body found was inconsistent with Articles 6.10 and 9.2.

Question 38 (To China and the United States): In paragraph 364 of its report in *EC – Fasteners (China)*, the Appellate Body held that:

> **…placing the burden on NME exporters to rebut a presumption that they are related to the State and to demonstrate that they are entitled to individual treatment runs counter to Article 6.10, which "as a rule" requires that individual dumping margins be determined for each known exporter or producer, and is inconsistent with Article 9.2 that requires that individual duties be specified by supplier.**

Please explain whether, and if so how, this statement may be relevant to this Panel's assessment of China's claims concerning the alleged Single Rate Presumption.

Response:

100. As explained in the U.S. first written submission, the United States has explained that the analysis in *EC – Fasteners* suffers from several shortcomings,[134] which are addressed in the U.S. response to question 40 below. Accordingly, the United States, as set forth below, explains why some of the logical inconsistencies in *EC – Fasteners* should not be extended beyond the factual confines present in that dispute. With that observation in mind, the ultimate relevance of the cited analysis is limited because it is both legally and factually inapposite in the present dispute.

101. First, the statement quoted in the above question must not be considered in isolation. Rather, the quoted language must be evaluated in its proper context. Specifically, this finding must be considered in conjunction with another finding by the Appellate Body in that same dispute that recognized that not every company or entity in the first instance must be recognized as a "known exporter or producer" within the meaning of Article 6.10 of the AD Agreement. *EC – Fasteners*, therefore, did not take issue with the analysis in *Korea – Certain Paper* that a company or other legal entity is not necessarily synonymous with a known exporter or producer within the meaning of Article 6.10. Indeed, the analysis in *EC – Fasteners* went on to affirmatively state that "nominally distinct exporters may be considered as a single entity for the purpose of determining individual dumping margins and anti-dumping duties . . . due to State's control or material influence in and coordination of these exporters' pricing and output."[135] Thus, the USDOC's approach of treating the China-government entity as a "known

[133] U.S. First Written Submission, paras. 382-385.

[134] U.S. First Written Submission, paras. 376-379.

[135] *EC – Fasteners (AB)*, para. 382.

exporter/producer" – which finds its basis in China's Accession Protocol and Working Party Report – is fully consistent with Article 6.10.

102. This point raises a key factual difference between the present dispute and *EC – Fasteners (AB)* discussed in the U.S. response to Question 37: the difference between USDOC's separate rate analysis and the IT Test at issue in *EC – Fasteners (AB)*. As noted above, China does not challenge the content of USDOC's separate rate analysis. This bears emphasis. *EC – Fasteners (AB)* did not say investigating authorities were prohibited from examining legal entities in order to determine whether to treat them as a single producer or exporter. Rather, it found the specific inquiry employed by the EC in that case, the IT Test, was insufficient to determine whether several distinct exporters constitute a single entity because of structural and commercial integration or due to control or material influence by the State.[136]

103. Second, the legal basis for the presumption that *EC – Fasteners (AB)* held improper is different from the legal basis for the so-called Single Rate Presumption in the present dispute. In particular, the Appellate Body found a presumption could not be justified under Section 15 of China's Accession Protocol alone, on its face. The Appellate Body did not decide whether the Working Party Report,[137] however, may provide such a basis.[138]

104. Finally, as already discussed in response to Question 37, the nature of the measure in *EC – Fasteners (China)* is different than that in the present dispute. *EC – Fasteners* examined a written measure, the EC's Article 9(5), which the Appellate Body found to embody a norm or rule of general and prospective application. Here, China is asserting there exists an *unwritten measure* which embodies a norm of general and prospective application. Accordingly, China faces the initial – and high – burden of proving not only that the measure exists, but also the existence of the purported norm. If it cannot – as the United States has demonstrated – then China cannot challenge the consistency of the measure "as such" against these provisions.

105. In short, this dispute presents (i) different facts, such as the U.S. separate rate analysis, (ii) different legal arguments, such as the significance of the Working Party Report, and (iii) an

[136] *EC – Fasteners (AB)*, paras. 377-382.

[137] Paragraph 1.2 of the Protocol incorporates various paragraphs of the Working Party Report into the Protocol of Accession itself.) (Exhibit USA-33).

[138] As the United States discusses in its response to Question 40, *EC – Fasteners* failed to adequately address that interpreting Section 15 of the Accession Protocol as only allowing for special calculations of normal value incorrectly assumes that China's government would only have the power to control the pricing of firms in the home market but not in foreign markets. Even arguendo if the Appellate Body's interpretation was correct though – that Section 15 of the Accession Protocol only concerns calculation of normal value – it does not address whether or not the Working Party Report may provide a legal and factual basis to presume the Chinese government has influence over firms pricing in the export market. Thus, the Panel has an issue of first impression before it.

entirely different measure at issue. Accordingly, this dispute is far from a parallel to *EC – Fasteners (China)* as China claims.[139]

Question 40 (To the United States): In paragraph 377 of its first written submission, the United States argues that China's Accession Protocol "is a predicate for recognizing that entities are likely to be related". Does the United States argue that China's Accession Protocol allows for derogations in respect of the individual calculation of dumping margins and the consequential imposition of duties? If so, identify the textual basis for this point of view in the Protocol. Please reply in light of the Appellate Body's statement in EC – Fasteners (China), that "Section 15 [of China's Accession Protocol] only permits derogations in respect of the use of domestic prices and costs—that is, normal value—but not in respect of export prices in the calculation of margins and the consequential imposition of duties".

Response:

106. As an initial matter, there is no derogation in the determinations at issue with respect to the individual calculation of dumping margins and the consequential imposition of duties for the China-government entity and the members of the entity. This is so because the United States treated the entity itself as a known exporter or producer and the appropriate supplier consistent with Articles 6.10 and 9.2 of the AD Agreement. Therefore, the China-government entity received its own rate, as did exporters that were not part of the China-government entity. As discussed in the United States' First Written Submission, this treatment is supported in light of USDOC's determination that China is a non-market economy, and China's Accession Protocol and Working Party Report which provide both a legal and factual predicate for treating multiple companies in China as part of a China-government entity. Thus, the Appellate Body's findings in *EC – Fasteners (China)* rejecting the Accession Protocol as such a predicate appear to result in certain irreconcilable discrepancies that should call into question the persuasiveness of extending any analysis from that decision into the instant dispute. The United States discusses three discrepancies in particular.

107. First, the Appellate Body ignored, and indeed, did not even mention, the underlying basis for the special procedures in Section 15 of the Accession Protocol. Specifically, these procedures are clearly intended to address the fact that Members by and large treated China as non-market economy – and believed that antidumping measures would have to continue to take in account these conditions. Paragraph (d) of Section 15 of the Protocol is instructive:

> Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession.

In other words, China was not to be accepted automatically as a market economy. Under these circumstances, it is striking that the Appellate Body found in *EC – Fasteners (China)* that neither

[139] *See e.g.*, China's First Written Submission, paras. 13, 360, 375.

the Protocol nor any of the provisions of the AD Agreement can be a basis by which Members can presume Chinese firms are likely to be controlled by the state.

108. Second, in focusing only on Section 15 of the Accession Protocol, the Appellate Body did not address the underlying foundation of this provision: the Working Party Report. As discussed in the U.S. First Written Submission, the Working Party Report provides the necessary background which demonstrates that Section 15 of the Protocol cannot be divorced from the underlying realities which led to that provision.[140] In particular, the facts which led to Section 15 demonstrate China's involvement in its economy was so pervasive that derogation of the rules for normal value was necessary. This point was not considered by the Appellate Body in *EC – Fasteners*.

109. Third, the United States also notes that the Appellate Body's findings that the presumption was legally unsupportable contradicts the notion accepted by the Appellate Body that state control is a basis for collapsing multiple companies into a single entity. In particular, the Appellate Body ignored that Members had already decided the issue of state control, as discussed in the Working Party Report, and as adopted by the Accession Protocol. Rather than accept the negotiated understanding, the Appellate Body ignored it while recognizing Members needed to have some mechanism by which to address the reality in China that companies are often controlled by the Chinese government.

110. In short, it is because of this point that even the Appellate Body could not apply its own logic within *EC – Fasteners (China)* very far. Even after declaring the EC's presumption inconsistent with its WTO obligations, the Appellate Body proceeded to opine on the propriety of the EC's IT test. The reason is that even if the presumption were erroneous, it would of course be rendered moot if the investigating authority were to actually inquire into a party's relationship to the Chinese government. This confirms that investigating authorities are still fully allowed to ask such relevant questions.

Question 41 (To the United States): Does US law contemplate a mechanism that allows the USDOC to treat multiple exporters as a single entity in anti-dumping proceedings involving market-economy countries on the basis of a relationship found among such exporters? If so, what are the conditions foreseen under US law for the application of such a test? If there is such a mechanism, has it been frequently applied by the USDOC? Has it ever been used in proceedings involving NME countries?

Response:

111. USDOC can – and has – treated multiple producers or exporters as a single entity in proceedings involving exports from a market economy. As a general matter, in the market economy context, if USDOC determines that two or more producers are affiliated within the

[140] U.S. First Written Submission, paras. 363-365.

meaning of 19 U.S.C. 1677(33),[141] then it will analyze whether to treat the companies as a single entity. Depending on the particular facts, USDOC will treat the affiliated producers as a single entity. USDOC conducts this analysis quite frequently in market economy cases and has treated nominally legally distinct entities as a single entity.[142]

112. In the NME context, exporters that establish their independence from the China-government entity still may be treated as a single entity with another exporter provided certain conditions are met. To make this determination, USDOC begins with an analysis of whether the exporters at issue are affiliated within the meaning of 19 U.S.C. 1677(33).[143] If so, USDOC then undertakes an evaluation to determine (if applicable) whether there is a significant potential for the manipulation of price or production by examining whether the operations of the affiliated entities are intertwined through the involvement in both entities' export decisions. USDOC also regularly conducts this analysis in NME cases; an example is briefly discussed in our response to Question 36 with respect to Aluminum Extrusions OI and Aluminum Extrusions AR1.

Question 43 (To the United States): Could the United States comment on whether the relevant excerpts contained in Table SRP of Annex II to China's first written submission reflect that the USDOC applied, in each of the 32 challenged determinations, the presumption of government control over the exporters' export activities and assigned a single dumping margin unless each exporter overcame that presumption through the separate rate test?

Response:

113. Annex II of China's First Written Submission appear to contain accurately-quoted excerpts from documents issued by USDOC in these proceedings. However, those excerpted statements do not necessarily reflect the actual determinations made in those proceedings. For example, with respect to several determinations referenced in Table SRP, the quoted language merely discusses how USDOC has treated the China-government entity. The language does not demonstrate that USDOC actually *applied* a presumption of government control over the exporters' export activities and assigned a single dumping margin – unless each exporter rebutted that presumption through the separate rate test *in each respective determination*.

[141] Exhibit USA-85.

[142] *See e.g.*, Issues Memorandum for the Antidumping Duty Investigations of Steel Concrete Reinforcing Bars from the Republic of Korea, A-580-844 (June 14, 2001) (Exhibit USA-86) ("In our December 5, 2000 decision to collapse DSM and KISCO into a single entity for the purposes of this investigation, we found that (1) DSM and KISCO are affiliated due to direct stock ownership under section 771(33)(E) of the Act, (2) a shift in production would not require substantial retooling (if any), and (3) there is a significant potential for price or production manipulation due to, among other factors, evidence of significant common ownership and management overlap by senior managers who (a) have a significant influence over the production and sales decisions of both companies, (b) belong to the same family, and (c) are former managers of the other company. Based on this analysis, we found that the record evidence weighs in favor of collapsing DSM and KISCO for the purposes of this antidumping investigation of rebar from Korea.").

[143] Exhibit USA-85.

114. These determinations are: Aluminum Extrusion OI, Shrimp AR7, Shrimp AR8, Shrimp AR9, Tires AR3, OCTG AR1, Diamond Sawblades AR1, Diamond Sawblades AR2, Diamond Sawblades AR3, Wood Flooring AR1, Ribbons AR1, Ribbons AR3, Retail Bags AR3, Retail Bags AR4, PET Film AR3, PET Film AR4, Furniture AR7, and Furniture AR8. In short, the excerpts provided by China do not establish or capture the situation afforded to any particular exporter in any proceeding.

Question 44 (To China and the United States): Did the exporters concerned in each of the 32 determinations at issue receive, prior to or during the proceedings, the "Separate Rate Application" contained in Exhibit CHN-31, or any other document indicating that they were required to pass the separate rate test as a condition for obtaining an individual dumping margin and duty rate? Please elaborate.

Response:

115. As discussed above in response to Question 32, in each of the 32 challenged determinations, all Chinese exporters concerned were notified that to receive a rate separate from that of the China-government entity, they would need to submit a Separate Rate Application or Separate Rate Certification, where appropriate, or complete "Section A" of the dumping questionnaire.

116. For those three investigations that occurred before the creation of the Separate Rate Application, exporters were given the opportunity to obtain a separate rate by submitting a request for separate rates treatment along with Section A of the dumping questionnaire, which sought the requisite information concerning the company's relationship with the Chinese government.[144] For all other investigations, companies were notified in the Federal Register Initiation Notice that they would need to submit a Separate Rate Application to obtain a rate separate from that of the China-government entity.[145]

117. In the reviews China challenges, companies were notified in the Federal Register Initiation Notice that they would need to submit a Separate Rate Application, or the Separate Rate Certification, as appropriate, to obtain a rate separate from that of the China-government entity.[146]

[144] *See, e.g.*, Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35,313-17, 35,319-23 (Exhibit CHN-283); Shrimp OI Preliminary Determination, 69 Fed. Reg. at 4265-58, 42660-62 (Exhibit CHN-215); Retail Bags OI, Preliminary Determination, 69 Fed. Reg. at 3545-48 (Exhibit CHN-267).

[145] *See, e.g.*, Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185).

[146] *See, e.g.*, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (10 July 2012), 77 Fed. Reg. 40565, 40566 (Exhibit CHN-192) (Aluminum Extrusions AR1, Initiation Notice).

Question 45 (To the United States): With respect to the six final determinations that China has introduced during the course of the first substantive meeting:

a. The Panel notes that, in the context of its "as applied" claims challenging the Single Rate Presumption, China seems to present the same legal arguments with respect to the six new determinations as it does with respect to the 32 determinations originally challenged. What is the United States' response to such arguments?

b. The Panel also notes that in Annex 2; Table SRP contained in Exhibit CHN-476 (revised), China has presented certain quotations from the USDOC's determinations in these six proceedings purportedly showing that the alleged Single Rate Presumption was applied in such proceedings. What is the United States response to this series of quotations?

Response:

118. The United States provides a consolidated answer to parts (a) and (b) of this question. As an initial matter, as discussed in further detail in response to Question 3 above, these six additional determinations are outside of the terms of reference of this dispute. China's claims with respect to these additional determinations also would fail for the same reasons that China's lack merit with respect to the determinations properly at issue in this dispute.[147]

119. With respect to the quotations contained in Exhibit CHN-476 (revised), these excerpts appear to be an accurate excerpt of certain USDOC statements in these proceedings. However, with respect to the majority of these determinations, the quoted language merely discusses how USDOC has treated the China-government entity. It does not demonstrate that USDOC, unless each exporter satisfied the separate test, actually *applied* a presumption of government control over the exporters' export activities and assigned a single dumping margin *in each respective determination*. Those determinations are Solar AR1, Wood Flooring AR2, PET Film AR5, and Furniture AR9.

4.4 China's "as such" and "as applied" claims under Article 9.4 of the AD Agreement

Question 46 (To China and the United States): Under the alleged Single Rate Presumption is the calculation of the duty rate for the so-called "PRC-wide entity" based on an individual examination of that entity?

Response:

120. As discussed in the United States' First Written Submission, when the investigating authority has limited its examination, 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

[147] *See* U.S. First Written Submission, Section V.

weighted average margin of dumping established with respect to the selected exporters or producers."[148] In addition, Article 9.4 also requires that individual duties shall be applied to companies not included in the examination who have provided the necessary information, as provided for in Article 6.10.2.

121. In those cases in which the China-government entity was assigned a rate based on facts available pursuant to Article 6.8 of the AD Agreement, the China-government entity was under examination and received its own rate in these proceedings. Moreover, although China challenges numerous review determinations, the China-government entity was not under review in certain of the cases challenged by China, and, therefore, a rate was not determined for the entity in these reviews. Yet, China includes these six reviews (Shrimp AR9, Tires AR3, OCTG AR1, Retail Bags AR4, PET Film AR3, and PET Film AR4) in its claim that the alleged Single Rate Presumption is both as such and as applied inconsistent with Article 9.4 within the context of these six reviews.[149] 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.

Question 47 (To the United States): In anti-dumping proceedings against market-economy countries, does the USDOC impose a residual duty rate for unknown exporters? If so, does the USDOC impose such a rate also in proceedings involving NME countries? If the USDOC imposes such a duty rate only in proceedings involving market-economy countries, why is it that such a rate is not needed in proceedings involving NME countries, given the United States' argument that the duty rate calculated for the NME-wide entity is based on an individual examination?

Response:

122. As an initial matter, the United States would like to clarify its understanding of the term "residual duty rate." That term is not defined or found in the AD Agreement. However, the United States is aware that prior panels have described this rate as the rate that could be applied to exporters or producers that either were not known to the investigating authority or did not exist at the time of the investigation.[150] In addition, the United States is aware that a panel has found that such a residual duty rate is neither mandated– nor prohibited – by the AD Agreement, and, therefore, there is no one correct way to determine such a rate, if one is to be determined.[151] With that understanding of the term, the United States' response is as follows.

[148] U.S. First Written Submission, paras. 393-399.

[149] 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 and therefore did not receive a rate.

[150] *See China – Autos*, para. 7.97.

[151] *See China – Autos*, para. 7.130 n. 221 ("We note that although this case revolves around the question of the use of facts available to determine a residual duty rate, the Anti-Dumping Agreement does not set out any guidance for

123. In proceedings involving market economy countries, USDOC determines a residual rate in the investigation for companies unknown at the time of the investigation. This rate becomes the cash deposit rate that is set for an unknown exporter or producer following the conclusion of an investigation. However, given the nature of the United States' retrospective system, that rate would only be "imposed" on an unknown company to the extent the company subsequently exports to the United States, and does not seek a review of the rate. With respect to so-called new shipper companies, or those that did not previously export (or was not affiliated with a company that did export) during the period of investigation, such companies are entitled to seek an expedited review within the meaning of Article 9.5 of the AD Agreement before a duty is ultimately "imposed" with respect to their exports.

124. With respect to China, which USDOC has determined to be a non-market economy, USDOC does not determine a residual rate in the same sense as it does in the market economy context because there are not unknown producers or exporters in the same sense as market economy cases. This is due to the existence of the China-government entity. Thus, there are rates for those companies that have demonstrated that their export activities are independent from the Chinese government, and the rate assigned to the China-government entity (which encompasses those companies that have not demonstrated that their export activities are independent from the Chinese government). Thus, under this framework, in investigations, the rate applicable to any exporter which has not demonstrated its entitlement to a separate rate would be the rate assigned to the China-government entity. However, similar to market economy cases as discussed above, the rate set in the investigation is the cash deposit rate, and the rate ultimately "imposed" would depend on whether the company sought review and further demonstrated that its export activities were independent from the Chinese government.

Question 49 (To China and the United States): In paragraph 390 of its first written submission, the United States contends that "Article 9.4 governs the rate applied to those companies that are not included in the examination" and that China has not addressed "this critical aspect", i.e. whether "the China-government entity, which includes those companies within the entity, was not included in the examination". Please explain whether or not by the word "examination" in this context the United States means sampling, and if so, please explain the relevance of whether the PRC-wide entity is sampled for purposes of China's claim under Article 9.4 of the AD Agreement.

Response:

125. To clarify, we understand that the term "sampling" as used by the Panel in this question is meant to refer to either form of limiting examination performed pursuant to the second sentence of Article 6.10, *i.e.*, limiting examination to (A) a reasonable number of interested parties or products through the use of sampling, or (B) the largest percentage of the volume of exports which can reasonably be investigated. An interested party "not included in the

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the determination of the amount or level of such duty, although as discussed above, we consider it clear that such a duty is permitted. There may be other ways to determine a residual duty rate. In our view, however, the IA must not act inconsistently with a relevant provision of the Anti-Dumping Agreement in making that determination.")

examination" per Article 9.4 must be considered in the context of the specific facts of a given case and may take on a different meaning depending on the circumstances, and does not necessarily mean "sampling" (or as we refer to it below, where examination has been limited within the meaning of the second sentence of Article 6.10).

126. In those cases in which the China-government entity was assigned a rate based on facts available pursuant to Article 6.8 of the AD Agreement, the China-government entity was under examination, to the extent that it received its own rate in these proceedings. The rate assigned to the China-government entity differs from that assigned to those companies that were not included in the examination.

127. For instance, in several determinations USDOC sought to limit its examination to those exporters that accounted for the largest volume of exports by issuing requests for Q&V information. In these determinations, there were often two groups of companies.

(1) those that responded to the request for information, and were in the pool of eligible companies to be selected for individual examination, but that were not selected, and;

(2) those companies that did not respond to the request for information, thus depriving USDOC of the opportunity in the first instance to determine whether those companies should be selected for individual examination.

The first group, if they demonstrated that their export activities were independent of the Chinese government, received a rate pursuant to Article 9.4, because the companies within this group were not included in the examination. The second group, those that failed to cooperate by not responding to the request for information, also failed to demonstrate that their export activities were independent of the Chinese government and were part of the China-government entity. Thus, the China-government entity received an individual rate based on facts available pursuant to Article 6.8, and therefore was included in the examination. The United States notes that the text of Article 9.4 does not require that the rate applied to these companies be limited by the rate assigned to the non-selected cooperative companies from the first group.

128. In addition, in cases such as PET Film OI the China-government entity was included within the examination by virtue of the fact that a company within the entity was selected for individual examination, and because the China-government entity received its own rate based on facts available pursuant to Article 6.8.

129. Thus, the question of whether the China-government entity was included in the examination (for instance, by virtue of the fact that it received its own rate based on facts available) demonstrates China's failure to established its *prima facie* case for its "as such" and "as applied" claims under Article 9.4 of the AD Agreement. Indeed, China appears to acknowledge that it has not made such a showing by noting that "to 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."[152]

Question 50 (To China and the United States): Would a finding of inconsistency of the alleged Single Rate Presumption with Articles 6.10 and 9.2 of the AD Agreement *necessarily* lead to a finding of inconsistency with the last sentence of Article 9.4?

Response:

130. No, these are separate and distinct issues under the AD Agreement. If the Panel finds in favor of China's claims concerning the alleged Single Rate Presumption under Articles 6.10 and 9.2, there would not be a consequential breach of Article 9.4, either "as such" or "as applied".

131. It is important to recall the exact structure and scope of China's Article 9.4 claims. In particular, China alleges that two purported obligations have been breached. The first obligation concerning the "ceiling rate for the level of duties that may be applied to non-selected exporters or producers", *i.e.*, the ultimate rate assigned to the China-government entity, is raised *only* in connection with China's claims regarding the application of the facts available in 26 determinations.[153] Thus, China's challenge to the ultimate rate applied to the China-government entity is limited to its "as applied" claims in the context of the 26 determinations in which USDOC allegedly applied facts available. Importantly, China is not challenging – on either an "as such" or "as applied" basis – that the alleged Single Rate Presumption prevents companies within the China-government entity from receiving their appropriate rate under this first obligation in Article 9.4.

132. Instead, China's Article 9.4 challenge to the alleged Single Rate Presumption is concerning 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."[154] 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

[152] China's Opening Statement, para. 131.

[153] 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).

[154] China's First Written Submission, paras. 365-367, 384-385.

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.[155]

133. There are two critical defects to China's claim. First, as discussed above, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. As discussed in the United States' First Written Submission and as demonstrated above, by not addressing this threshold issue of whether the China-government entity was included in the examination, China's claims must fail.

134. Second, 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[156] and the last sentence of Article 9.4.[157] 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. But China ignores that the last sentence of Article 6.10.2 does not provide for an automatic right to an individual rate. 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
>
> (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 non-selected company that seeks an individual rate will not be entitled to an individual rate, *irrespective* of the alleged Single Rate Presumption.

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

[156] This provision states:

> 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.

[157] This sentence states: "The authorities shall apply individual duties ... 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."

135. Despite the fact that China rests its claim on such a scenario, (namely, that companies 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. This failure defeats both China's "as such" and "as applied" claims. Thus, a finding of inconsistency with respect to Article 6.10 and 9.2 by the Panel would not cure the deficiencies of China's Article 9.4 claims.

136. Furthermore, a finding of inconsistency with respect to Articles 6.10 and 9.2 would not lead to a similar finding of inconsistency with respect to Article 9.4. The question before the Panel under Articles 6.10 and 9.2 is whether USDOC's treatment of NME firms as part of a government entity denies an individual margin of dumping to a known exporter or producer and whether the resulting duty is specific as to the appropriate supplier. The question before the Panel under Article 9.4 is to determine whether Article 9.4 applies, *i.e.*, whether the China-government entity was not included in the examination, and if so, whether the resulting rate applied to the China-government entity is in breach of that provision. Importantly, the Panel must consider whether the rate assigned to the China-government entity is governed by Article 6.8, in which case Article 9.4 would not necessarily apply.

137. In sum, the inquiry with respect to Article 9.4 is distinct from the legal issues that arise under Articles 6.10 and 9.2.

Question 51 (To China and the United States): With respect to China's "as applied" claims under Article 9.4 of the AD Agreement concerning the alleged Single Rate Presumption, would a finding that the Single Rate Presumption, "as such", is inconsistent with Article 9.4 be sufficient to conclude that the 32 challenged determinations are also inconsistent with Article 9.4? If not, what else would need to be demonstrated to establish a breach of that provision in each of the 32 challenged determinations?

Response:

138. No. The United States references its answer to the preceding question, including in particular the discussion that Article 9.4 is inapplicable where the China-government entity was included in the examination. Moreover, as discussed in response to Question 50, the basis for China's "as such" and "as applied claims" that the alleged Single Rate Presumption is inconsistent with Article 9.4 is that this norm precludes a company that otherwise would receive an individual rate pursuant to the last sentence of Article 9.4 from receiving such a rate. But this fact pattern did not arise in any of the 32 determinations challenged by China. For this reason alone, China's "as applied" claims in this respect must fail.[158]

Question 52 (To China and the United States): Please explain whether there has been an investigation or administrative review where an exporter included in the PRC-wide entity

[158] The same point applies to the six new determinations that are outside the Panel's terms of reference.

requested individual examination pursuant to Article 6.10.2. If so, please explain how the USDOC entertained such requests.

Response:

139. In the 32 determinations challenged by China, the United States did not see this situation arise.[159]

5 FACTS AVAILABLE

5.1 Request for Information and Recourse to Facts Available

Question 53 (To China and the United States): The Panel understands the factual circumstances surrounding the USDOC's notification of and request for information to be: the USDOC issued Q&V questionnaires to all known exporters in 20 of the challenged 26 determinations and did not issue Q&V questionnaires in the remaining six determinations. The USDOC issued a full dumping questionnaire to one or more individual exporters within the PRC-wide entity, but not all, in 16 of the challenged 26 determinations and to none of the individual exporters within the PRC-wide entity in the remaining 10 determinations. Can both parties confirm this understanding?

Response:

140. Yes, the Panel's understanding in these cases is accurate, with one exception. In Wood Flooring AR 1, USDOC did not issue Q&V questionnaires.[160] There are two additional considerations that are pertinent:

(1) USDOC's notification of its request for information with respect to the process for obtaining a rate separate from that of the China-government entity, and;

(2) USDOC's notification of its request for information from the Chinese government.

As discussed above in response to Question 44, in each of the challenged determinations, all Chinese exporters concerned were given notice of the information required to establish that they were entitled to a rate separate from that of the China-government entity. Also, as discussed in the United States' First Written Submission, in 3 cases USDOC provided notification to the Chinese government as well as requested information from it.[161]

[159] It did not arise in the six new determinations that are outside the Panel's terms of reference as well.

[160] *See* Wood Flooring AR1, Preliminary Determination Memo at 4-5 (Exhibit CHN-263).

[161] *See* U.S. First Written Submission, paras. 532-533, 580 (referencing requests for information in Furniture OI and Shrimp OI). Beyond the Furniture OI and Shrimp OI mentioned in the United States First Written Submission, USDOC notified and requested information pertaining to quantity and value from the Chinese government, and

Question 54 (To China and the United States): The Panel understands the basis for the USDOC's finding of non-cooperation and recourse to facts available with respect to the PRC-wide entity to be: in seven[162] of the challenged 26 determinations, the failure of some exporters within the PRC-wide entity to respond to the Q&V questionnaire and the failure of one or more mandatory respondents, ultimately included in the PRC-wide entity, to respond to the full dumping questionnaire. In five[163] of the challenged 26 investigations, the failure of some exporters within the PRC-wide entity to respond to the Q&V questionnaire. In one of the challenged investigations and five of the challenged administrative reviews,[164] the failure of one or more mandatory respondents, ultimately included in the PRC-wide entity to respond to the full questionnaire. In seven[165] of the challenged administrative reviews, the USDOC made no finding of non-cooperation with respect to the PRC-wide entity. Can both parties confirm this understanding?

Response:

141. Yes, the Panel's understanding with respect to the factual circumstances surrounding USDOC's finding of non-cooperation and recourse to facts available in these cases is accurate, with the exception of Ribbons AR3 which is discussed in further detail in response to Question 55. As noted in the response to the preceding question, a pertinent factual circumstance to USDOC's finding of non-cooperation and recourse to facts available was USDOC's finding of non-cooperation on the part of the Chinese government, which led to recourse to facts available for the China-government entity.[166]

received no response in another challenged investigation as well. *See* Diamond Sawblades OI, Preliminary Determination, 70 Fed. Reg. at 77121-22, 77128 (Exhibit CHN-135). Therefore, this factual scenario was present in three of the challenged investigations rather than exclusively the two investigations cited in the United States' First Written Submission.

[162] *Aluminum* OI, *Coated Paper* OI, *OCTG* OI, *Ribbons* OI, *Diamond Sawblades* OI, *Furniture* OI and *Bags* OI.

[163] *Solar Panels* OI, *Steel Cylinders* OI, *OTR Tires* OI, *Wood Flooring* OI and *Shrimp* OI.

[164] *PET Film* OI, *Aluminum* AR1, *Aluminum* AR2, *Furniture* AR7, *Shrimp* AR7 and *Shrimp* AR8.

[165] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Bags* AR3, *Wood Flooring* AR1, *Furniture* AR8 and *Ribbons* AR1.

[166] *See* U.S. First Written Submission, paras. 532-533 (referencing the GOC's failure to respond to requests for information in Furniture OI and Shrimp OI). The United States unintentionally omitted an additional cases from this group: Diamond Sawblades OI, in which the GOC failed to provide requested quantity and value information. *See* Diamond Sawblades OI, Preliminary Determination, 70 Fed. Reg. at 77121-22, 77128 (Exhibit CHN-135).

Question 55 (To China and the United States): Regarding the USDOC's finding of non-cooperation and recourse to facts available with respect to the PRC-wide entity in *Ribbons* AR3, China asserts that the basis of the USDOC's finding was the failure of one or more mandatory respondents, ultimately included within the PRC-wide entity, to respond to the full dumping questionnaire[167] and the United States asserts that the basis of the USDOC's finding was the failure of some exporters within the PRC-wide entity to respond to the Q&V questionnaire.[168] Could both parties please substantiate their respective assertions by referring to the relevant exhibits?

Response:

142. In Ribbons AR3, USDOC specifically cited to the failure of an exporter within the China-government entity to respond to a Q&V questionnaire.[169] In addition, there was an additional basis for finding non-cooperation in this case. On November 8, 2013, USDOC initiated the third administrative review of *Ribbons* and issued Q&V questionnaires to the 15 companies identified in the initiation notice. USDOC received responses from 14 companies. The sole company that did not respond to the Q&V questionnaire was Yangzhou Bestpak Gifts & Crafts Co., Ltd. (Bestpak).[170]

143. On December 6, 2013, USDOC selected Papillon Ribbons & Bow (H.K.) Ltd. as the sole mandatory respondent in the review and issued Papillon a full antidumping questionnaire. Papillon notified USDOC that it would withdraw from active participation in the review on December 24, 2013, and did so.[171] However, Papillon was under review as part of the China-government entity. For this reason, USDOC stated that "the PRC-wide entity has failed to cooperate to the best of its ability" on the identified ground that "Bestpak, as part of the PRC-wide entity, did not respond to the {USDOC's} request for information."[172] Thus, Papillon's non-cooperation provided additional support on the record for USDOC's finding of non-cooperation on the part of the China-government entity.

[167] China's First Written Submission, para 631.

[168] U.S. First Written Submission, para. 515.

[169] Exhibit CHN-52, p. 61,289.

[170] Ribbons AR3 Preliminary Decision Memorandum at 2 (Exhibit CHN-156), unchanged in *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value* (19 July 2010), 75 Fed. Reg. 41808 (Exhibit CHN-33).

[171] *Id*.

[172] *Id.* at 7.

Question 56 (To the United States): On page 8 of the USDOC's Anti-Dumping Manual's Chapter 10 it is stated:

> **In the Department's notices initiating administrative reviews, the Department includes the following footnote with respect to initiations of reviews for NME countries:**
>
> **If one of the above-named companies does not qualify for a separate rate, all of the other exporters of {product name} from {NME country name} who have not qualified for a separate rate are deemed to be covered by this review as part of the single {NME country name} entity of which the named exporters are a part.[173]**

a. In light of this statement, could the United States please explain if the PRC-wide entity was subject to review in the seven challenged administrative reviews[174] which the United States contends fall outside the scope of Article 6.8?

b. In the view of the United States, did the USDOC determine a duty rate for the PRC-wide entity in these seven administrative reviews? If so, which provisions of the AD Agreement was such a duty rate calculated pursuant to? If not, why is it that no duty rate was determined for the PRC-wide entity?

Response:

144. The United States will provide a consolidated response to the subparts of this question. In these seven reviews, the China-government entity had previously been examined and assigned a rate based on facts available pursuant to Article 6.8. 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. USDOC applied the same rate that had previously been assigned to the entity. In other words, USDOC continued to apply the existing rate of a government-entity exporter, which had failed to cooperate in this proceeding.

145. In particular, there was no determination to apply facts available within the meaning of Article 6.8. In nearly identical circumstances, the panel in *US – Shrimp (Viet Nam) II* agreed with this assessment:

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[173] USDOC's Anti-Dumping Manual, Chapter 10: Non-Market Economy Countries (Exhibit CHN-23), p. 8.

[174] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Bags* AR3, *Wood Flooring* AR1, *Furniture* AR8 and *Ribbons* AR1.

> {I}n our view, the application of Article 6.8 is triggered by an investigating authority resorting to "facts available" in the making of a determination. Given our view that, in the administrative reviews at issue, the USDOC did not make a determination within the meaning of Article 6.8, we are unable to find that the USDOC made a determination on the basis of facts available in the three administrative reviews at issue.[175]

Like the reviews at issue in *US – Shrimp (Viet Nam) II*, in these seven reviews USDOC did not make a finding of non-cooperation with respect to the China-government entity. As discussed in the United States' First Written Submission, and as found by the panel in *US – Shrimp (Viet Nam) II*, the AD Agreement does not prohibit Members from continuing to apply the existing rate of a government-entity producer or exporter, which had failed to cooperate in this proceeding, under these circumstances.[176]

Question 57 (To the United States): The Panel notes that the United States does not provide any arguments regarding the alleged inconsistency of the USDOC's decision to resort to facts available with respect to the PRC-wide entity in seven of the challenged administrative reviews[177] in addition to the assertion that the rates assigned to the PRC-wide entity in these administrative reviews fall outside the scope of Article 6.8. Assuming that these rates are found to fall within the scope of Article 6.8, does the United States wish to respond to China's claim that the USDOC's decision to resort to facts available with respect to the PRC-wide entity in these administrative reviews was inconsistent with Article 6.8 and paragraph 1 of Annex II?

Response:

146. The record is undisputed that USDOC did not make a facts available finding within the meaning of Article 6.8 in these seven reviews.

[175] *US – Shrimp (Viet Nam) II*, paras. 7.234-7.235.

[176] Para. 7.235.

[177] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Bags* AR3, *Wood Flooring* AR1, *Furniture* AR8 and *Ribbons* AR1.

Question 60 (To the United States): In paragraphs 565 and 566 of its first written submission, the United States refers to the Appellate Body's finding that interested parties' rights under Articles 6.1 and 6.2 must legitimately cease to exist at some point. In paragraph 242 of its report in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that this point is reached:

> **Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to "control the conduct" of its inquiry and to "carry out the multiple steps" required to reach a timely completion of the sunset review, a respondent will have reached the limit of the "ample" and "full" opportunities provided for in Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.**

Please explain how exactly the alleged violation of Article 6.1 with respect to not providing the exporters within the PRC-wide entity with ample opportunity to present evidence in the challenged 26 determinations may be explained by the concern underlined by the Appellate Body, namely an investigating authority's obligation to complete the proceeding in a timely fashion. Put differently, what was the role of time constraints in the USDOC not sending full dumping questionnaires to the individual exporters within the PRC-wide entity in these determinations?

Response:

147. As discussed in the United States' First Written Submission, in certain proceedings USDOC sought, but did not receive, responses to its Q&V questionnaire from certain members of the China-government entity. Thus, in these cases, USDOC did not continue to seek information from the China-government entity, which had already demonstrated that it was non-cooperative in responding to this initial request for information. As recognized by the Appellate Body:

> Articles 6.1 and 6.2 do not provide for "indefinite" rights, so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose.[178]

In other words, Articles 6.8, read in conjunction with Article 6.1, does not require USDOC to continue to allow a party opportunities to provide further information after the party has not complied with an initial request for information. To do otherwise would allow that non-cooperative party, as opposed to the investigating authority, to control the conduct and timing of the proceeding.

148. In the remaining cases where USDOC did issue the dumping questionnaire to a company found to be part of the China-government entity, and where USDOC determined that the entity

[178] *US — Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 241.

did not cooperate, there is no requirement that USDOC solicit additional information from the entity. This is particularly the case where one or more members of the China-government entity have demonstrated non-cooperation.

Question 63 (To the United States): The Panel notes the United States' assertion that the Chinese Government failed to cooperate in two of the challenged 26 determinations and that the USDOC was entitled to take this into account when determining whether or not the PRC-wide entity had failed to cooperate.[179] Could the United States please explain if a full dumping questionnaire was issued to the Chinese Government in the challenged 26 determinations? If so, was that because the USDOC considered the Government to be part of the PRC-wide entity just like the individual exporters within the entity? Given that the standard for passing the Separate Rate Test is to demonstrate the absence of Government control over an exporter's export activities, please explain the role of the Government of China in the PRC-wide entity in a given proceeding.

Response:

149. The Chinese government was issued a full dumping questionnaire in Furniture OI, and provided no response indicating it was not able to provide the requested information or otherwise. In addition, the Chinese government was also issued a request for quantity and value information in Shrimp OI and Diamond Sawblades OI. The Chinese government provided no response indicating it was not able to provide the requested information or otherwise. The Chinese government is considered part of the China-government entity by virtue of the fact that it is presumed, based on China's control of its economy and absent any evidence to the contrary, that the export activities of the companies within the entity are subject to the control of the China-government entity. Thus, a response from the Chinese government to the USDOC's request for either the quantity and value questionnaire or to the full dumping questionnaire is relevant to USDOC's determination with respect to the Chinese-government entity, including the rate to be assigned to the entity.

Question 64 (To China and the United States): Could both parties please provide their understanding of the following factual issues regarding the sample provided by China to show general and prospective application of the alleged Use of Adverse Facts Available Norm (FA Norm):

a. In how many of the sampled determinations were the originally selected facts available corroborated?

b. In how many of the sampled determinations did the record only contain one rate?

c. In how many of the sampled determinations was the rate assigned to the PRC-wide entity based on the highest rate of the record?

[179] U.S. First Written Submission, paras. 532 and 533.

Response:

150. China's sample includes ninety-two (92) determinations. Forty (40) determinations pertain to anti-dumping duty investigations; the remaining fifty-two (52) determinations pertain to administrative reviews of existing anti-dumping duty orders. In twenty-four (24) determinations, the PRC-government entity was not subject to review and thus no rate for the PRC-government entity was issued,[180] leaving a total of sixty-eight (68) determinations involving the PRC-government entity for purposes of China's selected sample.

a. In how many of the sampled determinations were the originally selected facts available corroborated?

151. To respond to this question, the term "originally selected facts available" is interpreted to mean the first rate USDOC attempted to corroborate. Based on this interpretation, the originally selected facts available rate corroborated in twenty (20) of the sixty-eight (68) determinations.[181]

b. In how many of the sampled determinations did the record only contain one rate?

152. In three (3) determinations, the record contained only one rate.[182] It is noteworthy, however, that in several investigations the rates from the domestic industry's application were the only rates on record. In many of these investigations, domestic industry's application contained more than one rate.[183]

c. In how many of the sampled determinations was the rate assigned to the PRC-wide entity based on the highest rate of the record?

153. USDOC applied the highest rate on the record in 36 out of a total of 68 determinations. In twelve (12) of the 36 determinations, USDOC based the facts available determination on a calculated rate from a fully cooperating party. In 32 of the 68 determinations, USDOC applied a facts available rate that was lower than the highest rate available on the record of each case.

[180] *See* Exhibit USA-90 pertaining to determinations marked in blue.

[181] *Id.*

[182] The three cases are (1) Laminated Woven Sacks; (2) Sodium Nitrate; and (3) Grain-Oriented Electrical Steel. *See* Exhibit USA-90.

[183] For example, in twenty-seven (27) out of a total of 40 investigations in China's sample contained more than one rate in the domestic parties' application.

Question 66 (To China and the United States): The Panel notes that the USDOC's Anti-Dumping Manual contains several references to the term "adverse facts available as do a number of the USDOC's determinations in anti-dumping proceedings. The Panel also notes that, in paragraphs 60 and 61 of its opening statement during the first substantive meeting, the United States draws a distinction between "adverse facts available" and "adverse inferences".

a. Please comment on the United States' distinction between "adverse facts available" and "adverse inferences"? In your view, is there a relationship between the two?

b. Please explain where in the AD Agreement, these notions find their basis. In your view, does the AD Agreement permit the use of "adverse facts available" or "adverse inferences" as those terms are used by the parties in this dispute? Please elaborate by referring to the relevant provisions of the AD Agreement.

Response:

Part a

154. The United States appreciates this opportunity to further clarify the terms "adverse facts available" and "facts available with adverse inferences." In the U.S. statute and regulations, USDOC is permitted to make "determinations on the basis of facts available" when parties refuse or otherwise fail to provide necessary information.[184] Where USDOC finds a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information", the statute provides that USDOC "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[185] USDOC has used the term "adverse facts available" as shorthand for, in the terms of the U.S. statute, using "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." This phrase is the domestic law equivalent of the last sentence of paragraph 7, Annex II of the AD Agreement, which provides that:

> It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

The term "adverse inference" reflects the selection of information from the available information that takes into account the party's failure or refusal to provide necessary information.

[184] 19 U.S.C. § 1677e(a) (Exhibit CHN-153); 19 CFR §351.308(a) and (b) (Exhibit CHN-152).

[185] *Id*.

155. In the U.S. First Written Submission and opening statement, the United States explained the difference between this application of an adverse inference from China's argument that USDOC applies "adverse information" or "adverse facts" – namely, that there is no discernible notion of what constitutes an "adverse fact."[186] In situations where a non-cooperative party has withheld facts, USDOC cannot know whether the information it has selected is adverse to that party because the precise information is missing from the record. The term "adverse inference" reflects the selection of information from the available information, taking into account the party's failure or refusal to provide necessary information. Thus, USDOC, like any investigating authority, is making an inference to select among available facts precisely because the actual information has been withheld.

156. Where an interested party fails to cooperate, it may have chosen to withhold its information because it has undertaken an analysis and believes that use of facts available on the record (such as margins set out in the application) would lead to a lower dumping margin than if it decided not to withhold its own information. In this situation, the use of an adverse inference, and the selection of record facts, in a very real sense does not lead to an "adverse" result for the non-participating party. To the contrary, it may well lead to a lower antidumping than would result from the party's cooperation. Thus, in situations where a non-cooperative party has withheld facts, an authority cannot know whether the information it has selected is truly adverse to the interests to the non-cooperative party.

Part b

157. The text of the AD Agreement confirms an investigating authority's ability to apply an adverse inference to the facts available when information is missing from the record because of a party's non-cooperation. First, Article 6.8 enables investigating authorities to make determinations based on the facts available when an interested party (i) refuses access to necessary information within a reasonable amount of time; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. Article 6.8 then provides that "the provisions of Annex II shall be observed in the application of this paragraph."

158. In particular, paragraph 1 of Annex II states:

> The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, *including those contained in the application for the initiation of the investigation by the domestic industry*.[187]

Paragraph 7 of Annex II explicitly contemplates that non-cooperative parties may face a less favorable result. It states:

[186] U.S. First Written Submission, paras. 455-461; U.S. First Opening Statement, para. 59-60.

[187] Annex II(1) emphasis added.

> It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

159. This provision of the AD Agreement confirms that the term "facts available" includes the ability of authorities to apply inferences that could lead to less favorable results.[188] As noted, inferences are an inherent part of making determinations based on the available facts, for the reason that such determinations will be made only when "necessary information" is not provided. In that circumstance, there unavoidably will be informational gaps in the record, which could prevent the authorities from making their determinations. To prevent such circumstances from impeding an investigation, the AD Agreement allows authorities to make their determinations instead "on the basis of the facts available." In examining the U.S. provision on facts available, the Appellate Body in *US - Carbon Steel (India)* recognized the need to draw inferences when necessary information is not provided, and to take the refusal to provide such information into account. The Appellate Body stated:

> The use of the inference contemplated by the measure is part of the process of "selecting from among the facts otherwise available" on which to base such a determination. In this regard, we recall our finding that, as part of the process of reasoning and evaluating which "facts available" constitute reasonable replacements for the missing "necessary information", an investigating authority may use inferences. Further, as part of that 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.[189]

As the United States noted in its First Written Submission, the need to draw inferences is fundamental to all investigatory or adjudicatory systems. Thus, even though nothing in the DSU provides for the use of adverse inferences, panels and the Appellate Body have recognized that an inference that could be adverse to a party's interests may be the appropriate inference if a party in possession of evidence refuses to provide it.[190] Moreover, as noted, in the antidumping context, paragraph 7 of Annex II recognizes that inferences can be drawn from the fact of non-cooperation.

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[188] *US- Carbon Steel(AB)*, paras. 4.426 and 4.420.

[189] *US-Carbon Steel (AB*), paras. 4.468, and 4.420 citing *Canada – Aircraft (AB*), para. 202. *See also*, *US – Carbon Steel (AB*), at para. 4.426, stating that "non-cooperation crates a situation in which a less favourable result becomes possible due to the selection of a replacement for an unknown fact. Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority's use of "facts available" under Article 12.7 of the SCM Agreement."

[190] U.S. First Written Submission, para. 457.

Question 68. In paragraph 453 of its first written submission, China refers to a statement by the USCIT in *Peer Bearing Co. v. Changshan*. This statement reads:

> **In calculating the PRC-wide entity rate, it has been USDOC's "longstanding practice of assigning to respondents who fail to cooperate with USDOC's investigation the highest margin calculated for any party in the less-than-fair-value investigation or in any administrative review.[191]**

Furthermore, in paragraph 454 of its first written submission, China refers to a statement by the USCIT in *East Sea Seafoods LLC v. United States*. This statement reads:

> **The Court notes that in most, if not all, cases involving a country-wide NME antidumping duty rate, the country-wide margin has been calculated using adverse inferences.[192]**

Lastly, in paragraph 454 of its first written submission, China refers to a statement by the USCIT in *Hubbel Power Systems, Inc. v. United States*. This statement reads:

> **Furthermore, in NME reviews, respondents not individually examined must demonstrate independence from state control in order to receive the all-other's rate and avoid a prohibitive PRC-wide rate.[193]**

c. (To the United States) In the United States' view, what is the significance of such statements in US court decisions under the US legal system?

Response:

160. The United States refers back to its response to Question 34. In particular, the United States emphasizes that the particular court decisions submitted by China are adjudications over issues decided in prior antidumping proceedings. The decisions affect the outcome of the particular proceeding; they do not constitute a pronouncement on what USDOC will do generally in the future, including with respect to the alleged "Facts Available Norm." That point is evident in these decisions themselves, which speaks to outcomes for individual parties.

161. In *Peer Bearing*, the Chinese exporter CPZ argued that the rate selected as facts available with an adverse inference was not sufficiently corroborated.[194] To review, USDOC finds a rate

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[191] *Peer Bearing Co. v. Changshan*, 587 F.Supp.2d 1319 (USCIT 2008) (Exhibit CHN-163), p. 1327, (quoting *Sigma Corp v. United States*, 117 F.3d 1401, 1411 (USCAFC 1997) (Exhibit CHN-131), at 1411).

[192] *East Sea Seafoods LLC v. United States*, 703 F.Supp.2d 1336 (USCIT 2010) (Exhibit CHN-134), footnote. 15.

[193] *Hubbel Power Systems, Inc. v. United States*, 884 F.Supp.2d 1283, 1288 (USCIT 2012) (Exhibit CHN-148), at 1288.

[194] *Peer Bearing Co. v. Changshan*, 587 F.Supp.2d 1319 (USCIT 2008) (Exhibit CHN-163).

is corroborated when it determines that the rate has probative value, meaning it is both relevant and reliable. The court reviewed the steps USDOC took to corroborate the rate and upheld USDOC's facts available determination finding that the rate selected was "not demonstrably less probative than another rate" and was not punitive.[195] Rather than demonstrating any alleged "Facts Available Norm", *Peer Bearing* shows that USDOC's application and selection of facts available to CPZ, as part of the China-government entity, was supported by substantial evidence on the record.

162. In *East Sea Foods*, the court considered USDOC's determination that ESS LLC was a new and different company, and therefore, was not a successor-in-interest to ESS JVC, and further that ESS LLC was part of the Vietnam-government entity.[196] In that case, although the court upheld USDOC's determination as to successor-in-interest status, the court found that USDOC failed to consider whether ESS LLC could demonstrate its independence from the Vietnam government. Nothing in this case supports China's argument on the existence of a "Facts Available Norm." The footnote that China relies upon states that "in most, if not all cases involving a country-wide NME anti-dumping duty rate, the country wide margin has been calculated using adverse inferences." This statement – "most, if not all" in fact demonstrates that the there is no binding norm, as China alleges. Rather, the statement reflects that in most cases (of which the court was aware) the government entity did not cooperate, resulting in the application of adverse inferences.

163. Finally, in *Hubbel*, the court considered whether USDOC's rescission of its administrative review as to the Chinese exporter Gem Year was consistent with the applicable statute and regulation.[197] After finding that USDOC must consider Gem Year's separate rate application, the court specifically declines to rule on the merits of the rate applied to the China-government entity finding that any such ruling could be ultimately unnecessary, if USDOC determined Gem Year was independent from the China-government entity.[198]

164. In sum, China's reliance on these three judicial decisions is misplaced. None of the decisions state or imply that the United States has adopted a supposed norm of general and prospective application as alleged by China.

[195] *Id.* at 1329.

[196] *East Sea Seafoods LLC v. United States*, 703 F.Supp.2d 1336 (USCIT 2010) (Exhibit CHN-134).

[197] *Hubbel Power Systems, Inc. v. United States*, 884 F.Supp.2d 1283, 1288 (USCIT 2012) (Exhibit CHN-148), at 1288.

[198] *Id.* at 1294.

Question 69 (To the United States): Are there circumstances under which the USDOC finds that an NME-wide entity failed to cooperate but does not select "adverse facts available" when assigning a rate to that NME-wide entity? In answering this question, please provide examples, if any, of actual determinations involving non-cooperating NME-wide entities in which the USDOC did not select "adverse facts available".

Response:

165. There are circumstances under which the USDOC could find that an NME-government entity failed to cooperate but does not select facts available with an adverse inference when determining a rate for the entity. As explained in the U.S. First Written Submission, where a party has not cooperated, but USDOC has the information on the record pertaining to that party, USDOC must use the information notwithstanding the party's failure to cooperate, provided certain conditions are satisfied.[199] 19 U.S.C. 1677m(e) states that USDOC:

> *shall not decline* to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by {USDOC}, if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by {USDOC} with respect to the information, and
>
> (5) the information can be used without undue difficulties.[200]

This statute is applicable in both the market economy and non-market economy contexts and applies equally to all parties under review, including an NME-government entity. Thus, if USDOC has information on the record pertaining to the NME-government entity that meets the criteria explained in the statute, USDOC will use that information in calculating a rate for the NME-government entity.

166. In the United States' First Written Submission, the United States noted several instances where a party failed to cooperate but, because the necessary information was on the record,

[199] Para. 475.

[200] 19 U.S.C. § 1677m(e) (emphasis added). (Exhibit CHN-154).

USDOC used the available information and did not apply an adverse inference.[201] For example, in the countervailing duty investigation of *Stainless Steel Bar from Italy*, the mandatory respondent CAS failed to respond to USDOC's questionnaire.[202] However, the Government of Italy and European Community provided some of the requested information and USDOC determined that the information "was properly submitted by an interested party, verified (except for the information from the EC, which {USDOC} chose not to verify), was complete enough to rely upon, and can be used without undue difficulties."[203]

167. Although these examples[204] are in the countervailing duty context, the statute set out above applies to both AD and CVD proceedings. For example, if a producer or exporter failed to cooperate, but its importer submitted timely, verifiable information that can serve as a reliable basis for reaching a determination, USDOC is required by law to use the information on the record to calculate an antidumping duty rate for that producer or exporter.

Question 71 (To the United States.): How does the United States respond to China's argument in paragraph 85 of China's opening statement during the first substantive meeting that the statements by the USDOC, listed in tables NME3, NME4, AFA1, AFA2, AFA3, AFA6 and AFA7 in Annexes 5, 6, 8, 10, 11, 14 and 15 to China's first written submission, illustrate "that USDOC refers to practice from previous determinations as a *justification* and a *motivation* for the decision in the instant investigation or review"?[205]

Response:

168. The statements set out in Tables NME4, AFA2, and AFA3 in Annexes 6, 10, and 11 discuss the facts of each individual case[206] and make no reference to, nor purport to rely upon, prior practice as a "justification" or "motivation" for the decision on the relevant proceeding.[207]

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[201] *See* U.S. First Written Submission n.541.

[202] *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163 (Jan. 23, 2002) (*Issues & Decision Memorandum* at Comment 1) (Exhibit USA-54).

[203] *Id*. at 18.

[204] *See also Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran*, 70 Fed. Reg. 54027 (Sep. 13, 2005) at p. 7-8 (Comment 1). (Exhibit USA-55).

[205] Emphasis original.

[206] It does not appear that China relies on the statements made in Tables NME4, AFA2, and AFA3 in Annexes 6, 10, and 11 to support its argument. For instance, footnote 92 of China's Opening Statement cites only Tables NME3, AFA1, AFA6, and AFA7 in Annexes 5, 8, 14, and 15, and makes no mention of the above-referenced tables.

[207] *See, e.g.,* Table NME4 in Annex 6 ("This table demonstrates that, in each of the challenged determinations in which USDOC determined a rate for the PRC-wide entity, USDOC presumed that the PRC-wide entity failed to cooperate to the best of its ability and selected adverse facts from among the information available to it, in order to set a rate for the PRC-wide entity, including all the producers/exporters within that fictional entity."); Table AFA2 in Annex 10 ("This table demonstrates that USDOC systematically selects adverse facts in order to set the rate for

If anything, these statements confirm that USDOC's finding of non-cooperation and its recourse to facts available, and the facts it selects in applying facts available, will depend on the facts and circumstances of each case.

169. The statements located in Tables NME3, AFA1, AFA6, and AFA7 in Annexes 5, 8, 14, and 15 also fail to advance China's argument. Although some of the statements in Tables AFA6 and AFA7 in Annexes 14 and 15 make reference to past practice, these statements mostly confirm that USDOC's selection of facts in applying facts available depends on the facts and circumstances of each case. The remaining tables, Table NME3 in Annex 5 and Table AFA1 in Annex 8, feature statements in which USDOC references its general practice. Importantly, however, this reference to general practice is not a justification and motivation for USDOC's decision independent of the facts and circumstances of each proceeding. Rather, this reference to general practice simply provides guidance in USDOC's evaluation of the facts on the record. Ultimately – as demonstrated, for instance, in Table NME3 – the facts and circumstances of each case are the driving forces in determining which facts are selected in applying facts available.

170. Moreover, China's argument that USDOC's reliance on past practice for justification or rationale for its determinations somehow affirms the existence of an alleged norm is further undermined by the panel's findings in *US – Steel Plate (India)*:

> [A] practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC. We note in this regard that the USDOC decisions on application of facts available turn on the particular facts of each case, and the outcome may be the application of total facts available or partial facts available, depending on those facts. India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.[208]

171. In sum, China has failed to demonstrate that reference to, or reliance upon, past practice somehow establishes the existence of a norm.

NME-wide entities, including all the producers/exporters within those fictional entities, when it finds that an NME-wide entity failed to cooperate to the best of its ability."); and Table AFA3 in Annex 11 ("This table demonstrates that USDOC systematically uses adverse facts for NME-wide entities, including all the producers/exporters within those fictional entities, when it finds that an NME-wide entity failed to cooperate to the best of its ability.").

[208] *Id.*, para. 7.22.

Question 72 (To the United States): Could the United States please explain if corroboration only allows the USDOC to replace initially selected facts available which have no probative value at all with other facts available on the record which have some probative value or if it also allows the USDOC to compare initially selected facts available which have some probative value with other facts available on the record that may have more probative value? In other words, in a case where the initially selected facts available have some probative value, does the USDOC engage in the corroboration exercise? If so, has this ever happened in practice? Please explain by referring to the documents in the relevant proceedings.

Response:

172. In the determinations at issue, USDOC's process of examining and selecting facts available allowed it to compare initially selected facts, determined to have some probative value, with other facts on the record, determined to have more probative value.[209]

173. Where USDOC resorted to facts available, the precise, party-specific, information that was necessary for its anti-dumping determination was missing from the record (or otherwise not usable). To make its determination based on the facts available, *USDOC considered all the information on the record*. This included information contained in the domestic parties' application for initiating an anti-dumping investigation, information that was obtained during the course of the investigation or 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 the Department 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. 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 on the record.

174. In considering the probative value of the available information, the margin of dumping of a cooperating party does not correspond to the circumstance of a non-cooperating company in which facts available must be selected. A key circumstance then is cooperation as compared with non-cooperation. It provides a basis for a distinction between information that relates to a cooperating party, as compared to information that relates to a non-cooperating party. USDOC takes these particular circumstances into account through its comparative assessment in selecting the particular dumping rate to be applied.

175. When USDOC resorted to making a determination based on facts available, the information from which USDOC selected the facts available was necessarily limited. In some cases, the parties refused to provide necessary information, as requested. Where no party cooperated, USDOC was left with only the information provided in the application. In other cases, where only one party cooperated, USDOC was left with the information provided by the one cooperating party and the information from the application. Thus, USDOC's selection of the

[209] *See, e.g., Aluminum Extrusions OI* and *Furniture AR7*, as explained below.

facts available and corroboration of that rate was necessarily limited by the record before it, and the party's cooperation or lack thereof.

176. In evaluating the available rates that could have been used as facts available, USDOC's examination allowed it to evaluate if facts available other than those initially selected had more probative value than the initially selected facts available. For example, when USDOC selected information on the record to be used as facts available in a preliminary determination or preliminary results, USDOC continued to evaluate or re-evaluate its selection leading up to its final determination or final results and changed its selection when it found that there were are other facts on the record that had greater probative value.

177. *Aluminum Extrusions* exemplifies the above, general discussion of the challenged determinations. In selecting from the facts available for the China-government entity for the preliminary results, USDOC considered the available rates on the record. USDOC preliminarily selected the cooperating respondent, the Guang Ya Group's, calculated rate of 59.31 percent.[210]

178. After the publication of the preliminary determination, USDOC determined that it had made ministerial errors in the preliminary determination and published an amended preliminary determination to give parties, including the China-government entity, a full opportunity to comment on the changes.[211] USDOC recalculated the Guang Ya Group's rate to reflect these ministerial changes to 32.04 percent. USDOC also recalculated the rates from the application to reflect a revised labor methodology. In the amended preliminary determination, USDOC again considered the universe of facts on the record, including these recalculated rates, in selecting which facts available to apply to the China-government entity.[212] USDOC selected the revised application rate of 33.18 percent.[213] This rate was *lower* than the rate applied as facts available in USDOC's preliminary determination. To ensure that the selected rate had probative value, USDOC examined transactional information from the Guang Ya Group and determined that this information supported the relevance and reliability of the rate selected.

179. Another example from is the 2011 administrative review of *Wooden Bedroom Furniture* (Furniture AR7). In selecting from the facts available for the mandatory respondent Maoji, as part of the China-government entity for the preliminary results, USDOC considered the available

[210] *Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,410 (Exhibit CHN-111).

[211] A "ministerial error" is an arithmetical or clerical error. *See Aluminum Extrusions from the People's Republic of China, Notice of Amended Preliminary Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 323 (Dep't of Commerce Jan. 4, 2011) (Exhibit CHN-459).

[212] *Id.*

[213] *Id.*

rates on the record. USDOC preliminarily selected the highest previously calculated weighted-average dumping margin as facts available.[214]

180. For the final results, USDOC re-evaluated the information on the record.[215] USDOC explicitly considered a rate calculated on remand in the litigation arising out of the 2009 administrative review of the proceeding.[216] Unlike in the *Aluminum Extrusions OI* example discussed above, USDOC determined that its preliminarily selected rate had more probative value than this other remand rate because transactional information supported the reliability and relevance of the previously selected rate.

181. These examples demonstrate both how USDOC considered all of the information on the record at the preliminary and final stages of the investigations and reviews at issue, and how USDOC continued to examine the information and changed its determination where it found that more relevant or reliable information is on the record.

Question 73 (United States): Could the United States please clarify if it contests that the FA Norm is attributable to the United States, assuming it is found to exist?

Response:

182. The United States contests that a norm, including in particular the precise content of a "FA norm", has been properly articulated by China at all. In other words, the question of attribution does not arise because of the deficiencies in the purported norm itself preclude any attribution analysis.

183. Consider the following two examples. In one instance, a complaining party alleges that its exporter finds that all importers in a particular Member are categorically refusing to accept its wares. If that condition – the denial of market access – is established, then the question proceeds as to whether the denial is attributable to the Member, such as through a government import prohibition, or perhaps due to another reason such as private commercial agreements in the importing market. An alternative situation is that the complaining party alleges that a Member refuses to be "welcoming" to its exporters. No one would dispute that a Member is responsible for its actions, but the notion of "welcoming" is so vague and inchoate that this failure as to the content of the norm precludes its establishment and renders any subsequent attribution analysis moot. The United States submits the situation here is akin to the second example.

[214] *Id.*

[215] *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).

[216] Furniture AR7 Final issues and Decision Memorandum (Exhibit CHN-151), p. 9-11.

184. China asserts that "[t]he norm at issue arises from acts or omissions of USDOC, when it administers the framework under US law for use of adverse facts."[217] The United States does not dispute that USDOC's acts and omissions are attributable to the United States.[218] The problem is that China has not explained the precise acts or omissions for which USDOC is responsible. According to China, "USDOC systematically selects adverse facts from the available secondary information when it finds non-cooperation by an NME entity." China fails to explain or identify in that sentence – or elsewhere – in what acts or omissions is USDOC engaging. The notion that USDOC is selecting "adverse facts" provides no clarification. Specifically, as the United States has already explained, there is no such a thing as an "adverse fact" but only the inference that may be drawn when selecting from among the available facts.[219] USDOC, like any investigating authority, is not in a position to know whether the information it selects is truly favorable or unfavorable to the interests of a particular party because the party in question has withheld material facts. Thus, when China claims USDOC selects "adverse facts", the assertion is simply a *non-sequitur*. In short, the central issue here is not whether the conduct China has articulated is attributable to the United States, but that China has failed to identify what the discernible conduct is.

Question 74 (United States): In paragraph 141 of its report in *EC – Bananas III*, the Appellate Body stated:

> **We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.**

In light of this statement, could the United States elaborate on its assertion that China's second and third arguments regarding the alleged WTO-inconsistency of the FA Norm "as such" fall outside the scope of the Panel's terms of reference?

Response:

185. To be precisely clear, the United States is asserting that China is expanding its claims with respect to USDOC's decision to apply facts available to the China-government entity as

[217] China's First Written Submission, para. 431.

[218] *US – Corrosion Resistant Steel Sunset Review*, para. 81.

[219] *See e.g.*, U.S. First Opening Statement, paras. 56-60; U.S. First Written Submission, paras. 455-458.

stated in its panel request from an as applied claim to an as such claim. To permit China to do so would be in contravention of DSU Article 6.2.

186. As an initial matter, the United States restates the three "as such" claims made by China:

> [1] The Use of Adverse Facts Available norm is inconsistent with the requirements of Article 6.8 and Annex II because the norm prevents USDOC from undertaking the comparative, evaluative process required to identify the best facts from the universe of secondary source information available, in favor of a process designed to select adverse facts, whenever there is a finding of non-cooperation in relation to the NME-wide entity.[220]
>
> [2] [E]ven were it permissible (*quod non*) under Article 6.8 and Annex II(7) to select *adverse* facts that are not the best facts available, the norm also prevents USDOC from properly exercising 'special circumspection'. Specifically, pursuant to the norm, USDOC selects adverse facts from the universe of secondary source information on the basis of the "procedural circumstance" of non-cooperation alone – a circumstance that is, moreover, frequently based on *presumption* rather than fact.[221]
>
> [3] as a result of the Use of Adverse Facts Available norm, USDOC resorts to adverse facts available even where it failed to request the necessary information."[222]

Although the United States may have continued with China's nomenclature of labelling these assertions "arguments" in its First Written Submission, they are all in fact considered claims for purposes of dispute settlement. A claim is the legal basis for the complaint.[223] An argument by contrast is presented by the complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[224] As is clear, these "arguments" are not an analysis or demonstration of why particular provisions have been breached, i.e., arguments, but rather claims broadly asserting that Article 6.8 and Annex II of the AD Agreement have been breached by the United States.

187. The second and third claims are asserting the United States has, with respect to the NME entity, respectively breached its obligations under the AD Agreement because it ignores the

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[220] China's First Written Submission, para. 642.

[221] China's First Written Submission, para. 640 (emphasis in original) (internal footnotes omitted). *See* also *id.* at paras. 458-462, 480-491, and 645-660, and Table AFA2 in Annex 10 and Table AFA3 in Annex 11.

[222] *Id.* at para. 640. *See* also *id.* at paras. 475-479 and 661-666.

[223] *Guatemala – Cement I (AB)*, para. 72.

[224] *Korea – Dairy (AB)*, para. 139.

special circumspection requirement in paragraph 7 of Annex II and the requirement to specify required information as required under paragraph 1 of Annex II. In other words, China is challenging USDOC's decision to apply facts available to the NME entity rather than simply how those facts were selected. Put differently, the second and third claim do not relate the operation of norm which is being challenged,[225] but rather, are related to the "trigger" conditions for the norm, i.e., non-cooperation and failure to specify necessary information. As discussed in the U.S. first written submission, however, China limited such a challenge to the "trigger" in its panel request to its as-applied claims.[226] Thus, to the extent that China argues that USDOC's decision to apply facts available to the China-government entity, based on the non-cooperation of one or more companies within the China-government entity, and USDOC's alleged failure to request necessary information before resorting to facts available, are as such inconsistent with Article 6.8 and Annex II, the Panel should reject these claims because they lack a basis in the Panel Request.

Question 75 (United States): Paragraph 26 of China's panel request reads:

> **China considers that these measures are inconsistent with the obligations of the United States under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, because, *inter alia*, in using adverse facts available, the United States fails to use the best information available and special circumspection when basing its findings on information from secondary sources.[227]**

In light of this statement, could the United States please elaborate on its assertion that China's second argument regarding the alleged WTO-inconsistency of the FA Norm "as such" – that the FA Norm prevents the USDOC from exercising special circumspection by imputing the behaviour of the non-cooperating exporter(s) on all other exporters within the NME-wide entity – falls outside the Panel's terms of reference?

Response:

188. As we noted in our response to Question 74, the United States submits that the second and third claims relate to the purported "trigger" rather than the operation of the norm itself. Although the second claim utilizes the terms "special circumspection" as does paragraph 26 of the Panel Request, the reference to these terms in the second claim relates to "USDOC{'s} select{ion of} adverse facts from the universe of secondary source information *on the basis of the "procedural circumstance" of non-cooperation alone."*[228] In other words, the second claim

[225] China's First Written Submission, para. 436-438

[226] U.S. First Written Submission, paras. 493-500; China's Panel Request, paras. 20(b) and (c).

[227] China's Panel Request, para. 26 (italics original; underlining added).

[228] Emphasis added.

concerns the recourse to facts available, which is made in the as-applied claim of its Panel Request. The relevant paragraph alleges that the United States breached:

> c) Article 6.8 and Annex II, because, inter alia, *with regard to the recourse* to facts available in the challenged measures, the USDOC did not assess the facts properly and objectively in finding that the NME-wide entity failed to cooperate in providing information necessary to determine a margin of dumping for that entity, failed to use the best information available, and failed to exercise special circumspection when basing its findings on information from secondary sources.[229]

In contrast, paragraph 26 of the Panel Request focuses simply on the operation of the norm itself and is untied from the failure to cooperate trigger:

> …in using adverse facts available, the United States fails to use the best information available and special circumspection when basing its findings on information from secondary sources.

Question 76 (United States): Does the United States submit substantive responses to China's second and third arguments regarding the alleged WTO-inconsistency of the FA Norm "as such"?[230] Or is the United States' response to these arguments limited to its terms of reference objection?

Response:

189. The United States understands the Panel's reference to "China's second and third arguments under the 'as such' aspect of China's third claim" to refer to China's second and third as such *claims* as identified and discussed in response to Question 74. As discussed above in our responses to Questions 74 and 75, the United States continues to challenge that these claims are not appropriately within the Panel's terms of reference. However, that is not the United States' only objection to these claims.

190. First, because the second and third claims are being challenged within the scope of China's as such challenge, it is incumbent on China to satisfy its *prima facie* case with respect to these claims. At the very least, this would require China to establish that USDOC's alleged selection of "adverse facts from the universe of secondary source information on the basis of the 'procedural circumstance' of non-cooperation alone" (the second claim) and USDOC's alleged failure to request necessary information before resorting to facts available (the third claim) form part of the alleged "Use of Adverse Facts Available norm". As discussed in the United States' First Written Submission, China makes no attempt to make such a demonstration, repeatedly asserting that the norm at issue is limited to USDOC's selection of adverse facts in determining a

[229] China, Panel Request, para. 20(c) (emphasis added).

[230] China's First Written Submission, paras. 645-666.

rate for the China-government entity, and does not include the finding of non-cooperation – the so-called "trigger" for the norm.[231]

191. Nor does China argue that these claims in and of themselves are challengeable measures which establish a rule or norm of general and prospective application. Moreover, even assuming arguendo that USDOC's alleged selection of "adverse facts from the universe of secondary source information on the basis of the 'procedural circumstance' of non-cooperation alone" (the second claim) and USDOC's alleged failure to request necessary information before resorting to facts available (the third claim) are challengeable measures, China's description of these measures undermine any demonstration of a norm or rule of general and prospective application.

192. For instance, China's description of USDOC's alleged selection of "adverse facts from the universe of secondary source information on the basis of the 'procedural circumstance' of non-cooperation alone – a circumstance that is, moreover, *frequently* based on presumption rather than fact{,}" concedes that there are instances in which USDOC's determinations are based on facts, not – as China alleges – solely "presumption." In addition, in arguing that USDOC fails to request the necessary information before resorting to facts available, China also states that USDOC "typically" includes two categories of companies in the China-government entity.[232] Thus, China's own characterization of the possible instances which lead USDOC to find non-cooperation of the China-government entity does not demonstrate any rigid application, but rather, demonstrates that a finding of non-cooperation is based on the facts and circumstances at hand. In sum, China has not demonstrated that there is a rule which always leads USDOC to apply facts available to the China-government entity.[233]

193. Finally, notwithstanding the fatal defects with China's arguments as described above, the United States has provided a substantive response to these two arguments at issue. To avoid repetition, the United States' substantive response to these two arguments is found in Section VII.D.1 of its first written submission, the same section in which the United States addresses China's as applied claims.[234] In short, to address China's argument that USDOC's alleged selection of "adverse facts from the universe of secondary source information on the basis of the 'procedural circumstance' of non-cooperation alone – a circumstance that is, moreover, *frequently* based on presumption rather than fact{,}" the United States demonstrates in the cited section of its First Written Submission that USDOC's use of facts available for the China-government entity in each of the challenged investigations and reviews at issue was not based on the "procedural circumstances of non-cooperation" or mere "presumptions," but rather,

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[231] *See, e.g.*, China's First Written Submission, para. 436.

[232] China's First Written Submission, para. 661. *See* also *id.* paras. 475-479 and 661-666.

[233] U.S. First Written Submission, para. 501; *see also id.* Section VII.A.

[234] *See* U.S. First Written Submission, para. 493 ("In any event, as demonstrated in the next section, USDOC's decision to apply facts available to the China-government entity is based on the facts and circumstances of each proceeding and is consistent with Article 6.8 and Annex II of the AD Agreement.")

appropriately took into account the factual circumstances of each proceeding.[235] Also, to address China's argument concerning USDOC's alleged failure to request necessary information before resorting to facts available, that section of the U.S. First Written Submission also demonstrates that USDOC properly notified companies within the China-government entity of the necessary information required before resorting to facts available in each of the challenged investigations and reviews at issue.[236]

194. Moreover, as discussed in the United States' First Written Submission, the use of an adverse or unfavorable inference in selecting from the available facts is consistent with Article 6.8 and Annex II, as expressly recognized in panel and AB reports, as discussed in paras. 446-461 of the US submission. Furthermore, the United States has shown that the manner in which USDOC selects information to replace the missing information from the available facts has not prevented it from exercising special circumspection.[237] And, that USDOC's determinations demonstrate that no rule or norm prevented it from engaging in such a process.[238]

Question 79 (To the United States): Could the United States please explain if it contests that the USDOC selected adverse facts available in the challenged 26 determinations; or if it acknowledges that the USDOC selected adverse facts available but asserts that the USDOC was entitled to do so?

Response:

195. The United States contests that USDOC applied facts available in some of the challenged determinations. Indeed, there are seven (7) instances where USDOC did not apply facts available at all. They are Diamond Sawblades AR1, Diamond Sawblades AR2, Diamond Sawblades AR3, Retail Bags AR3, Flooring AR1, Furniture AR8, and Ribbons AR1. For these determinations, USDOC made no facts available determination, but rather applied a rate established in a prior determination.

196. The United States agrees with the analysis of the *Shrimp II* panel that a rate carried forward is not a facts available rate. In particular, continuing to apply a rate determined in an earlier proceeding is not the same as making a determination in the later proceeding, and, therefore, does not give rise to a possible violation of Article 6.8.

197. With respect to the aspect of this question asking about whether the United States is entitled to apply "adverse facts available," the United States emphasizes the precise issue is the use of inferences. The provisions of Annex II and Article 6.8 of the AD Agreement allow

[235] *See id.*, para. 514; *see also id.* Section VII.D.1.

[236] *See id.*, para. 514; *see also id.* Section VII.D.1.

[237] U.S. First Written Submission, paras. 462-472.

[238] U.S. First Written Submission, paras. 473 -492.

investigating authorities to take a party's non-cooperation into account in selecting from the available facts by applying an inference in selecting from the available information that *may be* unfavorable or adverse to the interests of the non-cooperative party. Annex II(7) notes that:

> It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

Thus, the last sentence of Annex II(7) confirms that the term "facts available" includes the ability of authorities to apply inferences that could lead to unfavorable results.[239]

198. The Appellate Body recently addressed this very issue in *US – Carbon Steel (India)* where it found:

> 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. This is to be determined in the light of the particular circumstances of a given case."[240]

In issuing this finding, the Appellate Body recognized that an investigating authority cannot know whether the selected rate is unfavorable or adverse. The missing information is unknown. Applying an adverse inference should not be equated with applying "adverse information". However, the Appellate Body has also recognized that the use of an inference that is "adverse to the interests of a non-cooperating party" is not inconsistent with the facts available provision, provided it comports with the standards of Annex II.[241]

199. Thus, under the provisions of Annex II and Article 6.8, investigating authorities, like USDOC, are permitted to take a party's non-cooperation into account in selecting from the available facts.

Question 81 (To China and the United States): Could both parties please provide their understanding of the following factual issues regarding the selection of facts available in the challenged 26 determinations:

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[239] *See* Section VII.C.1.a. of the US First Written Submission for a full discussion of this issue.

[240] *US – Carbon Steel (India) (AB)*, para. 4.469. Although that dispute involved the meaning of Article 12.7 of the SCM Agreement, the Appellate Body has recognized that the facts available provisions are almost identically worded and that Annex II of the AD Agreement is considered relevant context for interpreting the facts available provision contained in Article 12.7 of the SCM Agreement. *See id.*, at para. 4.423.

[241] *US- Carbon Steel (AB)*, para. 4.469.

a. Can both parties confirm that the initially selected facts available were corroborated in all but one of the challenged 26 determinations?[242]

Answer:

200. As an initial matter, and for the sake of clarity, the United States notes that "corroborate" is a term utilized in U.S. domestic law rather than found in the AD Agreement. Where USDOC relies on secondary information, domestic instruments direct that USDOC "shall, to the extent practicable, corroborate that information from independent sources reasonably at [its] disposal."[243] The relevant regulation defines the term "corroborate" to mean that USDOC "will examine whether the information to be used has probative value."[244] The United States understands China to be claiming that "USDOC sought, at most, simply to "corroborate" that the high margin it had selected as sufficiently adverse facts was consistent with at least one piece of evidence."[245]

201. China's characterization, including the assertion that USDOC in all but one of the 26 determinations corroborated the initially selected facts, is incorrect. As explained below, USDOC re-selected facts available in several challenged determinations.

202. First, the Panel correctly identified that in the antidumping duty investigation of *Wood Flooring*, USDOC initially selected information from the application as facts available.[246] The application rates ranged from 194.49 percent to 280.50 percent.[247] In its preliminary determination, USDOC explained that because "none of the mandatory respondents had normal values within the range of the normal values alleged in the {application}" the normal value information did not have probative value.[248] USDOC therefore selected other information, specifically information from a cooperating respondent, as facts available for the China-

[242] *Wood Flooring* OI.

[243] 19 U.S.C. §1677e(c) (Exhibit CHN-153); 19 CFR §351.308(d) (Exhibit CHN-152).

[244] *Uruguay Round Agreement Act, Statement of Administrative Action*, H.R. Rep. 103-316, vol. 1, at 870 (1994). (Exhibit USA-51); 19 C.F.R. § 351.308(d) (Exhibit CHN-152)

[245] China's First Written Submission, para. 683.

[246] *See Flooring Final Determination*, 76 Fed. Reg. at 64,322. (Exhibit CHN-49).

[247] Wood Flooring OI, Initiation, 75 Fed. Reg. at 70717-18 (Exhibit CHN-179).

[248] *See Flooring Preliminary Determination*, 76 Fed. Reg. at 30,657. (Exhibit CHN-158).

government entity's rate.[249] Based on this information, in the final determination USDOC assigned a rate of 58.84 percent.[250] This rate was *lower* than the initial selection.

203. This process of evaluation and selection was not limited to the *Wood Flooring* investigation. For example, in the investigation of *Aluminum Extrusions*, USDOC selected information from a cooperating respondent as facts available for the China-government entity in its preliminary determination.[251] After the publication of the preliminary determination, USDOC determined that it had made arithmetical errors in calculating the rate for the cooperating respondent.[252] In response, USDOC re-calculated the cooperating respondent's rate and re-evaluated its selection of facts available.[253] In its amended preliminary determination, USDOC reconsidered the facts on the record and selected information from the application, which had been revised to account for a new labor methodology, as the facts available.[254] Again, this rate was *lower* than the initially selected information.[255]

204. In the *Retail Bags* investigation, USDOC revised the application rate in its preliminary and final determinations to account for the surrogate values chosen in each determination.[256] USDOC also revised the application rates in three (3) of the challenged determinations based on a new methodology developed to account for labor: *Aluminum Extrusions OI*, *Coated Paper OI*, and *Ribbons OI*. Thus, in four (4) of the challenged determinations USDOC determined that the initially selected rate did not have probative value and re-selected the facts available for the China-government entity rate.

[249] *Id.*

[250] *See Flooring Final Determination*, 76 Fed. Reg. at 64,322. (Exhibit CHN-49).

[251] *Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,411 (Exhibit CHN-111)

[252] *See Aluminum Extrusions from the People's Republic of China: Notice of Amended Preliminary Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 323 (Dep't of Commerce Jan. 4, 2011) (Exhibit CHN-459)

[253] *Id.*

[254] *Id.*

[255] Compare *Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,411 (Exhibit CHN-111) with *Aluminum Extrusions from the People's Republic of China: Notice of Amended Preliminary Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 323 (Dep't of Commerce Jan. 4, 2011) (Exhibit CHN-459)

[256] *See Retail Bags Preliminary Determination*, 69 Fed. Reg. at 3548. (Exhibit CHN-267).; *Retail Bags Final Determination*, 69 Fed. Reg. at 34,127. (Exhibit CHN-53).

b. In which of the challenged 26 determinations did the record only contain one rate?

Answer:

205. There are no challenged determinations in which there was only one facts available rate. In the *Aluminum Extrusions OI*, no parties cooperated with USDOC's investigation. Therefore, USDOC was left with information from the application as the only information on the record. However, in that case the application contained a range of rates from 32.57 percent to 33.32 percent.[257] In two cases the application contained only one rate: *Diamond Sawblades OI*[258] and *PET Film OI*[259]. However, in both of these cases one or more respondents cooperated with the investigation so the record contained calculated rates for these cooperating companies as well as their transactional information.

c. In which of the challenged 26 determinations was the rate assigned to the PRC-wide entity based on the highest rate on the record?

Response:

206. The United States summarizes below the facts available rate assigned to the PRC-wide entity in the various proceedings. As an initial matter, however, the United States notes that no facts available rate was assigned to the China-government entity in seven (7) of the challenged determinations, as explained fully in our First Written Submission. In these determinations a previously determined rate was pulled-forward and USDOC did not make a facts available determination.

207. Second, in eleven (11) of the challenged determinations, USDOC did not assign a facts available rate to the China-government entity based on the highest rate on the record. In the *Aluminum Extrusions OI*, *Aluminum Extrusions AR1*, *Aluminum Extrusions AR2*, *Furniture OI*, *Furniture AR7*, *Retail Bags OI*, *Shrimp OI*, *Shrimp AR7*, *Shrimp AR8*, *Steel Cylinders OI*, and *Wood Flooring OI*, the record contained higher application rates than the rate chosen for the China-government entity. In *Aluminum Extrusions OI*, *AR1*, and *AR2*, the application rates ranged from 32.57 to 33.32 percent.[260] However, USDOC recalculated the application rates to reflect a revised labor methodology and applied a rate of 33.28 percent as facts available for the China-government entity.[261] Similarly, USDOC recalculated the application rates in *Retail Bags*,

[257] Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185).

[258] Diamond Sawblades OI, Initiation, 70 Fed. Reg. at 35625 (Exhibit CHN-186).

[259] *See PET Film Preliminary Determination*, 73 Fed. Reg. at 24,560. (Exhibit CHN-112).

[260] Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185).

[261] *See Aluminum OI Final Determination*, 76 Fed. Reg. at 18,528 (Exhibit CHN-32); *Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12* (2 January 2014), 79 Fed. Reg. 96 (Exhibit CHN-35); *Aluminum Extrusions From the People's Republic of*

ranging from 83.81 to 129.86 percent,[262] and applied a revised rate of 80.52 percent as facts available.[263]

208. Third, in *Furniture OI* and *Furniture AR7*, the application rates ranged from 158.74 to 440.96 percent.[264] After considering all of the information on the record, USDOC applied a facts available rate of 198.08 percent to the China-government entity, which was not based on the highest rate on the record in the *Furniture OI*.[265] In *Furniture AR7*, USDOC applied a facts available rate of 216.01 percent to the China-government entity, which was based on a calculated rate for a cooperative respondent from a previous period of review.[266] Similarly, in *Shrimp OI*, *Shrimp AR7*, and *Shrimp AR8*, where the application rates ranged from 112.81 to 263.68 percent,[267] USDOC did not choose the highest rate as the basis for its facts available rate. Instead, USDOC selected the lowest application rate as facts available for the China-government entity.[268]

209. Finally, in both the *Steel Cylinders OI* and *Wood Flooring OI*, USDOC determined that the application rates did not have probative value. In *Steel Cylinders OI*, the application rates ranged from 17.04 to 176.25 percent,[269] and USDOC determined that the highest application rate did not have probative value.[270] Instead, USDOC selected a rate based on the cooperating respondent's transactional information of 31.21 percent, significantly lower than the highest rate on the record.[271] Similarly in *Wood Flooring OI*, where application rates ranged from 194.49 to

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China: Final Results of Antidumping Duty Administrative Review; 2012–2013 (31 December 2014), 79 Fed. Reg. 78784 (Exhibit CHN-36).

[262] Retail Bags OI, Initiation, 68 Fed. Reg. at 42002 (Exhibit CHN-188).

[263] *Retail Bags Final Determination*, 69 Fed. Reg. at 34,127. (Exhibit CHN-53).

[264] Furniture OI, Initiation, 68 Fed. Reg. at 70228 (Exhibit CHN-189).

[265] *See Furniture Final Determination*, 69 Fed. Reg. at 67,315 (Exhibit CHN-58).

[266] *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)

[267] Shrimp OI, Initiation, 69 Fed. Reg. at 3876 (Exhibit CHN-187).

[268] *Shrimp Final Determination*, 69 Fed. Reg. at 70997 (Exhibit CHN-37); *Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results of Administrative Review; 2011–2012* (12 September 2013), 78 Fed. Reg. 56209 (Exhibit CHN-38)

[269] Steel Cylinders OI, Initiation, 76 Fed. Reg. at 33216-17 (Exhibit CHN-180).

[270] *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77973. (Exhibit CHN-65).

[271] *See Steel Cylinders Final Determination*, 77 Fed. Reg. at 26742. (Exhibit CHN-14).

280.50 percent,[272] USDOC assigned a rate based on a cooperating respondent's transactional information which was significantly lower than the application rates.[273]

210. For eight (8) determinations, Coated Paper OI, Diamond Sawblades OI, OCTG OI, PET Film OI, Ribbons OI, Solar OI, Tires OI, and Ribbons AR3, USDOC applied the highest rate on the record. Thus contrary to China's assertion, USDOC did not consistently apply the highest rate possible. In only eight (8) instances was that the situation. In eleven (11) instances, USDOC did not apply the highest rate on the record and in seven (7) determinations, USDOC did not apply facts available.

Question 85 (To the United States): Could the United States please specify how the USDOC, in each of the challenged 26 determinations, explained both how it exercised special circumspection and how it selected the "best" facts available? Please explain by referring to the relevant record evidence.

Response:

211. The United States will sequentially address each of the challenged determinations:

1. *Aluminum Extrusions OI*

212. On April 27, 2010, USDOC initiated an investigation into aluminum extrusions from China based upon an application from the domestic industry.[274] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[275] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity. [276]

213. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[277] USDOC considered all of the information on the record, which included application rates ranging from

[272] Wood Flooring OI, Initiation, 75 Fed. Reg. at 70717-18 (Exhibit CHN-179).

[273] *See Flooring Final Determination*, 76 Fed. Reg. at 64,322. (Exhibit CHN-49).

[274] *See Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,410 (Exhibit CHN-111).

[275] *Id.*

[276] USDOC requested Q&V information from 130 identified Chinese exporters and received timely responses from only 45 producers/exporters. *See Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,410 (Exhibit CHN-111).

[277] *Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,410 (Exhibit CHN-111)

32.57 to 33.32 percent,[278] transactional information from the sole cooperating respondent, the Guang Ya Group, and the Guang Ya Group's calculated rate of 59.31 percent.[279] USDOC preliminarily selected the Guang Ya Group's calculated rate as facts available.[280]

214. After the publication of the preliminary determination, USDOC determined that it had made ministerial errors in the preliminary determination and published an amended preliminary determination to give parties, including the China-government entity, a full opportunity to comment on the changes.[281] USDOC recalculated the Guang Ya Group's rate to reflect these ministerial changes to 32.04 percent. USDOC also recalculated the rates from the application to reflect a revised labor methodology. In the amended preliminary determination, USDOC again considered the universe of facts on the record, including these recalculated rates, in selecting which facts available to apply to the China-government entity.[282] USDOC selected the revised application rate of 33.18 percent.[283] This rate was lower than the rate applied as facts available in USDOC's preliminary determination. To ensure that the selected rate had probative value, USDOC examined transactional information from the Guang Ya Group and determined that this information supported the relevance and reliability of the rate selected because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[284]

215. After issuing its preliminary determination, USDOC proceeded to verify the Guang Ya Group's data, and found that the data Guang Ya Group's supplied were unreliable.[285] Therefore, for the final determination, USDOC was left without any reliable information from cooperating

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[278] Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185).

[279] *Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,410 (Exhibit CHN-111). Because New Zhongya, part of the Guang Ya Group, failed to provide necessary information on certain inputs (Additive, Aluminum sealant, Chromaking agent, Deslagging agent, Long life additive for alkaline etching, and Refining agent rate was), USDOC used other facts available on the record for this missing information. USDOC applied an adverse inference when choosing what facts to apply. *Id.* at 69,411.

[280] *Aluminum OI Preliminary Determination*, 76 Fed. Reg. at 69,411 (Exhibit CHN-111)

[281] A "ministerial error" is an arithmetical or clerical error. See Aluminum Extrusions from the People's Republic of China, Notice of Amended Preliminary Determination of Sales at Less Than Fair Value, 76 Fed. Reg. 323 (Dep't of Commerce Jan. 4, 2011) (Exhibit CHN-459).

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] The Guang Ya Group's narrative questionnaire responses did not comport with the data section of those same responses and the factors of production data submitted post-verification did not reflect the data verified by USDOC at the Guang Ya Group's facilities. New Zhongya and Xinya, two affiliated companies, also failed to provide verifiable data. *See Aluminum OI Final Determination*, 76 Fed. Reg. at 18,528 (Exhibit CHN-32)

respondents to use as facts available.[286] USDOC was precluded from examining reliable evidence pertaining to their experience.[287] After comparing the facts that were available, namely the rates contained in the application, USDOC continued to apply the rate chosen in the amended preliminary determination as facts available for the China-government entity.[288]

216. To ensure that the selected rate had probative value, USDOC re-examined the application and the evidence supporting its calculations.[289] In particular, USDOC examined information provided in the application or in supplements to the application, such as Global Trade Atlas data and petitioners' experience with selling and producing the subject merchandise.[290] USDOC then determined that no evidence on the record impugned the reliability or relevance of the rate calculated in the application, as adjusted. In addition, no party commented on the relevance or probative value of the rate selected in the amended preliminary determination.[291]

217. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

2. *Coated Paper OI*

218. On October 13, 2009, USDOC initiated an investigation of coated paper from China based upon an application from the domestic industry.[292] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[293] USDOC determined the China-government entity did not cooperate in providing

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *See Coated Investigation Preliminary Determination*, 75 Fed. Reg. at 24,900 (Exhibit CHN-63).

[293] *Id.*

necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[294]

219. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[295] USDOC considered all of the information on the record, which included application rates ranging from 25.7 to 135.8 percent,[296] transactional information from two cooperating respondents, and the calculated rates of the cooperating respondents.[297] The cooperating respondents' rates were 89.71 and 30.82 percent respectively.[298] USDOC considered the cooperating companies' rates to have less probative value because their circumstance of cooperation did not correspond to the China-government entity's non-cooperation, and because there was no evidence showing the cooperating companies' rates were more probative. After considering all of the information on the record, USDOC preliminarily selected the highest application rate as facts available for the China-government entity.[299] To ensure the selected rate had probative value, USDOC examined transactional information from one of the cooperating respondents and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[300]

220. In May 2010, one of the mandatory respondents ceased cooperating in the investigation.[301] Therefore, for the final determination, the facts available on the record originated from the application and one cooperating respondent, including transactional information and its calculated rate of 7.60 percent.[302] After comparing the facts that were available on the record, USDOC continued to apply the application rate selected in the preliminary determination as facts available for the China-government entity.[303] Again, USDOC

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[294] USDOC requested Q&V information from 56 identified Chinese exporters and received timely responses from only five (5). USDOC also posted its Q&V questionnaire to its website. *See Coated Investigation Preliminary Determination*, 75 Fed. Reg. at 24,900 (Exhibit CHN-63).

[295] *Id.*

[296] *See* Coated Paper OI, Initiation, 74 Fed. Reg. at 53714-15 (Exhibit CHN-184).

[297] *See Coated Investigation Preliminary Determination*, 75 Fed. Reg. at 24,900 (Exhibit CHN-63).

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *See Coated Paper Investigation Final Determination*, 75 Fed. Reg. at 59,210. (Exhibit CHN-12).

[302] *Id.*

[303] *Id.*

determined that the cooperating company's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation.

221. To ensure that the selected rate had probative value, USDOC re-examined the application rate and revised the application rate to reflect a more accurate labor rate.[304] USDOC reviewed the description of the production processes, material inputs, and processing described in the application, which indicated it was not materially different for a producer from China.[305] USDOC also analyzed the sales experience of the sole cooperating party, APP-China, and found that APP-China had transactional information demonstrating it sold the product in excess of [[* * *]].[306] USDOC then determined that no evidence on the record impugned the reliability or relevance of the rate calculated in the application, as adjusted.

222. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

3. *Diamond Sawblades OI*

223. On June 21, 2005, USDOC initiated an investigation of diamond sawblades from China based upon an application from the domestic industry. [307] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[308] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[309]

[304] *Id.* at 59,222.

[305] *Id.*

[306] *Corroboration of the PRC-Wide Entity Rate and for the Final Determination in the Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet Fed Presses from the People's Republic of China*, Lindsey Novom, (Sep. 20, 2010). (Exhibit USA-60)

[307] *See Diamond Sawblades Preliminary Determination*, 70 Fed. Reg. at 77,121. (Exhibit CHN-135).

[308] *Id.*

[309] USDOC requested Q&V information from 23 identified Chinese exporters and received timely responses from only 13 companies. USDOC also sent a request to the Chinese Ministry of Commerce and Bureau of Fair Trade for Imports & Exports asking the government to transmit USDOC's request for information to all Chinese companies that manufacture and export subject merchandise to the United States. *See Diamond Sawblades Preliminary Determination*, 70 Fed. Reg. at 77,121. (Exhibit CHN-135).

224. In its preliminary determination, USDOC considered the universe of facts on the record, including an adjusted application rate of 164.09 percent,[310] transactional information from three cooperating respondents, and the cooperating respondents' calculated rates of 0.11 percent, 16.34 percent, and 10.07 percent respectively.[311] USDOC considered the cooperating companies' rates to have less probative value because their circumstance of cooperation did not correspond to the China-government entity's non-cooperation, and because there was no evidence to show the cooperating companies' rates were more probative. USDOC preliminarily selected the rate from the application as facts available for the China-government entity.[312] To ensure the selected rate had probative value, USDOC examined transactional information from the cooperating respondents and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[313]

225. Although no party commented on the facts selected as facts available for the China-government entity after the publication of the preliminary determination, the domestic industry commented on USDOC's decision not to rely on facts available, or apply an adverse inference, to one of the respondents.[314] Despite the domestic applicant's argument that a party failed to cooperate by misreporting sales, USDOC specifically found that the party's data were not so incomplete as to be unusable and continued to rely on the information.[315]

226. For the final determination, USDOC again compared the facts available on the record, including the rate from the application, transactional information from cooperating parties, and cooperating parties' calculated rates of 2.50 percent, 34.19 percent, and 48.50 percent.[316] Again, USDOC determined that the cooperating companies' calculated rates had less probative value because they did not account for the non-cooperation of the China-government entity. USDOC continued to apply the rate chosen in the preliminary determination as facts available for the China-government entity.[317] To ensure the selected rate continued to have probative value, USDOC examined the cooperating respondent's transactional information and found that this information reflected the pricing behavior for the subject merchandise sold in the U.S. market

[310] Diamond Sawblades OI, Initiation, 70 Fed. Reg. at 35625 (Exhibit CHN-186).

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] *See Diamond Sawblades Final Determination*, 71 Fed. Reg. at 29,308 (Exhibit CHN-45), and accompanying Issues & Decision Memorandum at cmt. 19 (Exhibit CHN-136).

[315] *See Diamond Sawblades Final Determination*, 71 Fed. Reg. at 29,308 (Exhibit CHN-45).

[316] *Id*.

[317] *Id.*

during the time period of the investigation and thus supported the reliability and relevance of the application rate.[318] USDOC found that [* * *] of the cooperating parties made transactions like the transactions that supported the domestic industry's application. In particular, USDOC found [* * *] made sales that would reflect dumping rates as high as, and higher than, the rates from the application. USDOC looked at the percentage of each cooperating party's sales as a percentage of total sales, finding that [* * *] percent of [* * *] sales, [* * *] percent of [* * *] sales, and [* * *] percent of [* * *] sales were like the transactions that supported the application.[319]

227. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

4. *Furniture OI*

228. On December 17, 2003, Commerce initiated an investigation on wooden bedroom furniture from China based upon an application from the domestic industry.[320] Commerce determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[321] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[322]

229. In its preliminary determination, USDOC considered the universe of facts on the record, including application rates ranging from 158.74 to 440.96 percent,[323] transactional information from cooperating respondents, and the cooperating respondents' calculated rates of 7.04, 19.24,

[318] *Id.*

[319] The brackets with asterisks inside reflect a redaction of business confidential information for which the United States has not received authorization to use in this dispute.

[320] *See Furniture Preliminary Determination*, 69 Fed. Reg. at 35,312. (Exhibit CHN-283).

[321] *Id.*

[322] USDOC requested Q&V information from 211 identified Chinese exporters and received timely responses from 137 companies. USDOC also sent a full antidumping duty questionnaire to the Chinese Ministry of Commerce but never received a response. *See Furniture Preliminary Determination,* 69 Fed. Reg. at 35,321. (Exhibit CHN-283)

[323] Furniture OI, Initiation, 68 Fed. Reg. at 70228 (Exhibit CHN-189).

4.90, 8.38, 6.59, 24.34, and 29.72 percent respectively.[324] USDOC considered the cooperating companies' rates to have less probative value because their circumstance of cooperation did not correspond to the China-government entity's non-cooperation, and because there was no evidence showing the cooperating companies' rates were more probative. After considering all of the information on the record, USDOC preliminarily selected the application rate of 198.08 percent as facts available for the China-government entity.[325] This rate was lower than the highest application rate on the record. To ensure that the selected rate had probative value, USDOC examined transactional information from two of the cooperating respondents, Tech Lane and Kee Jia Wood Mfg., and determined that this information supported the relevance and reliability of the selected application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[326]

230. After the publication of the preliminary determination, USDOC determined that the respondent Tech Lane did not provide financial statements covering its reported subject merchandise or a reconciliation of the sales it made during the period of investigation.[327] Therefore, USDOC concluded that Tech Lane's data were unreliable and could not be used for the final determination.[328] For the final determination, USDOC reconsidered the available facts, including the rates from the application, the remaining cooperating respondents' transactional information and calculated rates of 2.22, 16.70, 6.95, 0.79, 5.07, and 15.64 percent.[329] After comparing the facts that were available on the record, USDOC continued to apply the application rate selected in the preliminary determination as facts available for the China-government entity.[330] Again, USDOC determined that the cooperating companies' calculated rates had less probative value because they did not account for the non-cooperation of the China-government entity.

231. To ensure that the selected rate had probative value, USDOC analyzed the sales experience of the six (6) cooperating respondents and found that this information reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of

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[324] *See Furniture Preliminary Determination*, 69 Fed. Reg. at 35,312. (Exhibit CHN-283), as amended by *Notice of Amended Preliminary Antidumping Duty Determination of Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 47,417 (Aug. 5, 2004) (Exhibit USA-91).

[325] *Id.*

[326] *Id.*

[327] *See Furniture Final Determination*, 69 Fed. Reg. at 67,315 (Exhibit CHN-58).

[328] *Id.*

[329] *Id.*

[330] *Id.*

the investigation and thus supported the reliability and relevance of the application rate.[331] In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

5. *OCTG OI*

232. On April 28, 2009, USDOC initiated an investigation of oil country tubular goods from China based upon an application from the domestic industry.[332] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[333] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[334]

233. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[335] USDOC considered all of the information on the record, including application rates ranging from 36.94 to 99.14 percent.[336] USDOC also considered transactional information from two cooperating respondents and their respective calculated antidumping duty rates of zero and 36.53 percent.[337] USDOC considered the cooperating companies' rates to have less probative value because their circumstance of cooperation did not correspond to the China-government entity's non-cooperation, and because there was no evidence showing the cooperating companies' rates were more probative. After considering all of the information on the record, USDOC preliminarily selected the highest application rate as facts available for the China-government entity.[338] To ensure the selected rate had probative value, USDOC examined transactional information from both cooperating respondents and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing

[331] *Id.*

[332] *See OCTG Preliminary Determination*, 74 Fed. Reg. at 59,117. (Exhibit CHN-62).

[333] *Id.*

[334] USDOC requested Q&V information from 212 identified Chinese exporters and received only 43 timely responses. USDOC also posted its Q&V questionnaire to its website. *See OCTG Preliminary Determination*, 74 Fed. Reg. at 59,117 (Exhibit CHN-62).

[335] *Id.*

[336] OCTG OI, Initiation, 74 Fed. Reg. at 20676 (Exhibit CHN-182).

[337] *See OCTG Preliminary Determination*, 74 Fed. Reg. at 59,117 (Exhibit CHN-62).

[338] *Id.*

behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[339]

234. After the preliminary determination, USDOC determined that one of the mandatory respondents, Changbao, withheld material information and that its submissions of data were not credible or reliable.[340] Therefore, for the final determination, USDOC was left with information from the application and one cooperating respondent on the record, including transactional information and its calculated rate of 29.94 percent. After comparing the available facts, USDOC continued to apply the application rate selected in the preliminary determination as facts available for the China-government entity.[341] Again, USDOC determined that the cooperating companies' calculated rates had less probative value because they did not account for the non-cooperation of the China-government entity.

235. To ensure that the selected rate had probative value, USDOC analyzed the sales experience of the sole cooperating respondent, TPCO, and found that TPCO had transactional information demonstrating that it sold the product within the range of the selected rate.[342] TPCO made sales that would reflect dumping rates as high, and higher than, the selected application rate.

236. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

6. *PET Film OI*

237. USDOC initiated an investigation of PET film from China on October 18, 2007 based upon an application from the domestic industry.[343] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[344] USDOC determined the China-government entity did not cooperate in providing

[339] *Id.*

[340] *See OCTG Final Determination*, 75 Fed. Reg. at 20,340. (Exhibit CHN-13).

[341] *Id.*

[342] *Id.*

[343] *See PET Film Preliminary Determination*, 73 Fed. Reg. 24,552. (Exhibit CHN-112).

[344] *Id.*

necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[345]

238. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[346] USDOC considered all of the information on the record, including the application rate of 76.72 percent,[347] transactional information from the sole cooperating respondent, and the cooperating respondent's calculated rate of 46.82 percent.[348] USDOC determined that the cooperative respondent's calculated rate had less probative value because it was a cooperative rate and thus did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative. After considering all of the evidence on the record, USDOC preliminarily selected the application rate as facts available for the China-government entity.[349] To ensure the rate had probative value, USDOC examined transactional information from the cooperating respondent and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[350]

239. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[351] USDOC examined the application rate, transactional information from the cooperative respondent, and the cooperative respondent's calculated rate of 3.49 percent.[352] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation.

240. For the final determination, USDOC applied the application rate as facts available.[353] To ensure that the selected rate had probative value, USDOC examined the evidence on the record that supported the calculation of the application rate, such as information from the Association of Synethic Fibre Industry of India, import statistics from the World Trade Atlas, and the

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[345] The mandatory respondent, JJ New Material refused to cooperate, stating that it would not respond to USDOC's antidumping questionnaire. *See PET Film Preliminary Determination*, 73 Fed. Reg. at 24,557. (Exhibit CHN-112).

[346] *Id.*

[347] *See PET Film Preliminary Determination*, 73 Fed. Reg. at 24,560. (Exhibit CHN-112).

[348] *Id.*

[349] *Id.*

[350] *Id.* at 24,558.

[351] *See PET Film Final Determination*, 73 Fed. Reg. at 55,041. (Exhibit CHN-56).

[352] *Id.*

[353] *Id.*

International Energy Agency's list of energy prices and taxes provided in the application or supplements thereto.[354] No parties commented on the probative value of the rate selected in the preliminary determination and USDOC determined that no information presented during the investigation called into question the relevance of the information.[355]

241. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

7. *Retail Bags OI*

242. USDOC initiated an investigation into polyethylene retail carrier bags from China based upon an application from the domestic industry.[356] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[357] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[358]

243. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties. USDOC considered all of the information on the record, which included application rates ranging from 83.81 to 129.86 percent,[359] transactional information from seven (7) cooperating respondents, and the cooperating respondents' calculated rates of ranging from 0.12 percent to 57.09

[354] *Id. See also PET Film Initiation Checklist* (Exhibit USA-92).

[355] *Id.*

[356] *See Retail Bags Preliminary Determination*, 69 Fed. Reg. at 3548. (Exhibit CHN-267).

[357] *Id.*

[358] USDOC sent a partial questionnaire to all of the producers/exporters named in the petition and to the exporters who represented 80 percent of the U.S. imports according to U.S. Customs and Border Protection data. USDOC also sent the questionnaire to the Chinese government and asked for assistance in delivering the questionnaire to all producers and exporters of the subject merchandise. USDOC received 39 responses from firms that reported exports during the period of investigation. However, the U.S. import data indicated that there were a number of companies that exported subject merchandise to the United States that did not respond to USDOC's questionnaire. Furthermore, the mandatory respondents Tai Chiuan Plastic Products Company and Senetex refused to respond to USDOC's antidumping questionnaires and supplemental questionnaires. *See Retail Bags Preliminary Determination*, 69 Fed. Reg. at 3545-48. (Exhibit CHN-267).

[359] Retail Bags OI, Initiation, 68 Fed. Reg. at 42002 (Exhibit CHN-188).

percent.[360] USDOC determined that the cooperative respondents' calculated rates had less probative value because these cooperative rates did not correspond with the China-government entity's non-cooperation and because there was no evidence showing the cooperating company's rate was more probative. USDOC revised the rates in the application by recalculating them using the surrogate values selected for the preliminary determination.[361] After considering all of the evidence on the record, USDOC preliminarily selected a revised application rate of 80.52 percent as facts available for the China-government entity.[362] To ensure the rate had probative value, USDOC examined transactional information from one of the cooperating respondents and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[363]

244. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[364] USDOC examined the application rates, transactional information from the cooperating respondents, and the cooperating respondents' rates, which ranged from 0.20 percent to 41.21 percent.[365] USDOC again revised the application rates by recalculating them using the surrogate values selected for the final determination.[366] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation. USDOC applied a revised application rate of 77.57 percent as facts available.[367] This rate was lower than the rate applied in the preliminary determination. No parties commented on the probative value of the rate selected in the preliminary determination and USDOC determined that no information presented during the investigation called into question the relevance of the information.

245. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-

[360] *See Retail Bags Preliminary Determination*, 69 Fed. Reg. at 3551. (Exhibit CHN-267).

[361] *Id.* at 3548.

[362] *Id.*

[363] *Id.*

[364] *Retail Bags Final Determination*, 69 Fed. Reg. at 34,127. (Exhibit CHN-53).

[365] The cooperative rates were: 0.20, 23.19, 2.29, 23.81, 19.73, 35.23, and 41.21 percent respectively. *Id.*

[366] *Id.*

[367] *Id.*, as amended by *Notice of Amended Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 Fed. Reg. 42,419 (July 15, 2004).

cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

8. *Ribbons OI*

246. USDOC initiated an investigation into narrow woven ribbons from China on July 29, 2009, based upon an application from the domestic industry.[368] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[369] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[370]

247. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application ranging from 208.80 to 231.40 percent,[371] transactional information from the sole cooperating respondent, Yama Ribbons and Bows Co., Ltd., and Yama's calculated rate of zero percent.[372] USDOC determined that the cooperative respondent's calculated rate had less probative value because it was a cooperative rate and thus did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative. After considering all of the evidence on the record, USDOC preliminarily selected the application rate as facts available for the China-government entity.[373] To ensure the rate had probative value, USDOC examined transactional information from the cooperating respondent and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[374]

[368] *Ribbons Preliminary Determination*, 75 Fed. Reg. at 7244. (Exhibit CHN-170).

[369] *Id.*

[370] USDOC requested Q&V information from 86 companies identified as Chinese exporters or producers of subject merchandise and received responses from only 19 companies. Furthermore, the mandatory respondent Ningbo Jintian Import & Export Co. failed to respond to USDOC's antidumping questionnaire. *Ribbons Preliminary Determination*, 75 Fed. Reg. at 7244, 7250. (Exhibit CHN-170).

[371] Ribbons OI, Initiation, 74 Fed. Reg. at 39296-97 (Exhibit CHN-178).

[372] *Ribbons Preliminary Determination*, 75 Fed. Reg. at 7253. (Exhibit CHN-170).

[373] *Id.*

[374] *Id.*

248. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[375] USDOC re-examined the application rates, Yama's transactional information and its calculated rate of zero percent.[376] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation, as above. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[377]

249. To ensure that the selected rate had probative value, USDOC analyzed the sales experience of the sole cooperating respondent, Yama. USDOC examined model-specific data from Yama and found that [[* * *]] models had calculated dumping rates within the range of the rates from the application.[378] In fact, USDOC found that [[* * *]] models had rates that were higher than the rate contained in the application. USDOC also considered the total sales quantity represented by the [[* * *]] models, finding they represented [[* * *]] percent of Yama's total sales during the period of investigation.[379]

250. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

9. *Shrimp OI*

251. On January 20, 2004, USDOC initiated an investigation into frozen and canned shrimp from China based upon an application from the domestic industry.[380] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[381] USDOC determined the China-government entity did

[375] *See Ribbons Final Determination*, 75 Fed. Reg. at 41,811. (Exhibit CHN-33).

[376] *Id.*

[377] *Id.*, as amended by *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 51,979 (Aug. 24, 2010) (USA Exhibit-93).

[378] *Proprietary Memorandum regarding Corroboration: Final Determination of the Antidumping Duty Investigation of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, Karine Gziryan, (July 12, 2010), at 2. (Exhibit USA-58).

[379] *Proprietary Memorandum regarding Corroboration: Final Determination of the Antidumping Duty Investigation of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, Karine Gziryan, (July 12, 2010), at 2. (Exhibit USA-59).

[380] *See Shrimp Preliminary Determination*, 69 Fed. Reg. at 42,661. (Exhibit CHN-215).

[381] *Id.*

not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[382]

252. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[383] USDOC considered all of the information on the record, which included application rates ranging from 112.81 to 263.68 percent,[384] transactional information from four cooperating respondents, and the cooperating respondents' calculated rates of 90.05, 0.04, 7.67, and 98.34 percent.[385] After considering all of the evidence on the record, USDOC preliminarily selected the *lowest* application rate as facts available for the China-government entity.[386] USDOC determined that the cooperative respondent's calculated rate had less probative value because it was a cooperative rate and thus did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative.

253. To ensure the rate had probative value, USDOC examined transactional information from the largest cooperating respondent, Allied, and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[387] USDOC analyzed Allied's production process and found that it used all of the factors of production to produce subject merchandise that were included in the application, specifically: whole live shrimp, tripolyphosphate, labor, electricity, water, carton boxes, plastic bags and inner boxes.[388] USDOC also examined Allied's model-specific data and

[382] On January 29, 2004, USDOC sent a letter to all interested parties requesting Q&V information and also sent a letter notifying the Commercial Secretary of the People's Republic of China of its request for Q&V information.[382] USDOC received information from 57 Chinese exporters but record evidence demonstrated that there were other companies that failed to respond to USDOC's request for information. USDOC also issued its antidumping questionnaire to the Chinese Ministry of USDOC but received no response. *See Shrimp Preliminary Determination*, 69 Fed. Reg. at 42,655. (Exhibit CHN-215).

[383] *See Shrimp Preliminary Determination*, 69 Fed. Reg. at 42,661. (Exhibit CHN-215).

[384] Shrimp OI, Initiation, 69 Fed. Reg. at 3876 (Exhibit CHN-187).

[385] *See Shrimp Preliminary Determination*, 69 Fed. Reg. at 42,671. (Exhibit CHN-215).

[386] *Id.*

[387] *Id.* at 42,662.

[388] Public Memorandum regarding Corroboration of the PRC-Wide Adverse Facts-Available Rate, Antidumping Duty Investigation on Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, Preliminary Determination, (USA Exhibit-94).

found that [* * *] models had calculated dumping rates within the range of the rate from the application and that [* * *] models had dumping margins exceeding the 112.81 selected rate.[389]

254. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[390] USDOC re-examined the application rates, the cooperating respondents' transactional information, and the cooperating respondents' calculated rates of 80.19, 82.27, 27.89, and 0.07 percent.[391] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation, as above. USDOC continued to apply the lowest application rate of 112.81 percent as facts available.[392]

255. To ensure that the selected rate had probative value, USDOC re-analyzed the sales experience of the largest cooperating respondent, Allied and found that the information supported the reliability and relevance of the selected rate, as above.[393]

256. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

10. *Solar OI*

257. On November 8, 2011, USDOC initiated an investigation into solar cells from China based upon an application from the domestic industry.[394] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[395] USDOC determined the China-government entity did not cooperate in providing

[389] *Id.* The brackets with asterisks inside reflect a redaction of business confidential information for which the United States has not received authorization to use in this dispute.

[390] *Shrimp Final Determination*, 69 Fed. Reg. at 70997 (Exhibit CHN-37).

[391] *Id.*, as amended by *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Fed. Reg. 5149 (Feb. 1, 2005) (Exhibit CHN-216).

[392] *Id.*

[393] *Id*. at 71,002.

[394] *See Solar Preliminary Determination*, 77 Fed. Reg. at 31,309. (Exhibit CHN-168).

[395] *Id.*

necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[396]

258. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[397] USDOC considered all of the information on the record, which included application rates ranging from 49.88 to 249.96 percent,[398] transactional information from two cooperating respondents, and the cooperating respondents' calculated rates of 31.14 and 31.22 percent respectively.[399] USDOC determined that the cooperative respondents' calculated rates had less probative value because they were cooperative rates and thus did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative, and because there was no evidence showing the cooperating companies' rates were more probative. After considering all of the evidence on the record, USDOC preliminarily selected the highest application rate as facts available for the China-government entity.[400] To ensure the rate had probative value, USDOC examined transactional information from both cooperating respondents and determined that this information supported the relevance and reliability of the selected rate.[401]

259. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[402] USDOC re-examined the application rates, the cooperating respondents' transactional information, and the cooperating respondents' calculated rates of 18.32 and 29.14 percent. Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation as above. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[403] To ensure the selected rate had probative

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[396] USDOC issued a request for Q&V information to 75 identified Chinese exporters of the subject merchandise and over 30 of the identified Chinese exporters failed to respond to USDOC's request for information. *See Solar Preliminary Determination*, 77 Fed. Reg. at 31,317. (Exhibit CHN-168).

[397] *Id.*

[398] Solar OI, Initiation, 76 Fed. Reg. at 70963 (Exhibit CHN-181).

[399] *See Solar Preliminary Determination*, 77 Fed. Reg. at 31,322. (Exhibit CHN-168).

[400] *Id.*

[401] *Id.*

[402] *See Solar Final Determination*, 77 Fed. Reg. 63,795. (Exhibit CHN-44).

[403] *Id.*, as amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 77 Fed. Reg. 73,018 (Exhibit CHN-242)

value, USDOC analyzed the sales experience of the two cooperating respondents.[404] USDOC examined the prices and normal value used to derive the selected application rate were within the range of the U.S. prices and normal values for the cooperating respondents.[405]

260. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

11. Steel Cylinders OI

261. On June 8, 2011, USDOC initiated an investigation into steel cylinders from China based upon an application from the domestic industry.[406] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[407] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[408]

262. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[409] USDOC considered all of the information on the record, which included application rates ranging from 17.04 to 176.25 percent,[410] transactional information from one cooperating respondent, BTIC, and BTIC's calculated rate of 5.08 percent.[411] After considering all of the evidence on the record, USDOC determined that the application rates had no probative value and preliminarily selected a rate of 26.23 percent based on BTIC's sales experience.[412] USDOC also determined that the cooperative respondent's calculated rate had less probative value because it was a

[404] *Id.* at 63,795.

[405] *Id.*

[406] *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77964. (Exhibit CHN-65).

[407] *Id.*

[408] USDOC requested Q&V information from ten (10) identified Chinese exporters but received responses from only two (2). *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77964. (Exhibit CHN-65).

[409] *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77964. (Exhibit CHN-65).

[410] Steel Cylinders OI, Initiation, 76 Fed. Reg. at 33216-17 (Exhibit CHN-180).

[411] *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77973. (Exhibit CHN-65).

[412] *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77971. (Exhibit CHN-65).

cooperative rate and thus did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative.

263. To ensure the selected rate had probative value, USDOC examined BTIC's transactional information and found that the rate selected was not unusual in terms of quantities and was not aberrational. USDOC found that "there are significant numbers of sales with quantities similar to that in the underlying transaction."[413] 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.[414] USDOC also stated that the rate "represents an actual rate at which a cooperating respondent sold the subject merchandise during the {period of investigation}".[415]

264. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[416] USDOC re-examined the application rates, BTIC's transactional information, and its calculated rate of 6.62 percent. Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation and because there was no evidence showing the cooperating company's rate was more probative. USDOC continued to apply a rate based on BTIC's transactional data, which was re-calculated to 31.21 percent. USDOC noted that no parties had commented on the relevance or probative value of the rate selected in the amended preliminary determination.[417]

265. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

12. *Tires OI*

266. On July 30, 2007, USDOC initiated an investigation into aluminum extrusions from China based upon an application from the domestic industry.[418] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the

[413] *Id.* (Exhibit CHN-65).

[414] *Id.* (Exhibit CHN-65).

[415] *Id.* (Exhibit CHN-65).

[416] *See Steel Cylinders Final Determination*, 77 Fed. Reg. at 26742. (Exhibit CHN-14).

[417] *Id.*

[418] *See Tires Preliminary Determination*, 73 Fed. Reg. at 9278. (Exhibit CHN-122).

dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[419] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[420]

267. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[421] USDOC considered all of the information on the record, which included application rates ranging from 30.49 to 210.48 percent,[422] transactional information from four cooperating respondents, and the cooperating respondents' calculated rates of 16.35, 19.73, 10.98 and 51.81 percent respectively.[423] USDOC determined that the cooperative respondents' calculated rates had less probative value because they were cooperative rates and thus did not correspond with the China-government entity's non-cooperation. After considering all of the evidence on the record, USDOC preliminarily selected the application rate of 210.48 percent as facts available for the China-government entity.[424] To ensure the rate had probative value, USDOC examined transactional information from the cooperating respondents and determined that this information supported the relevance and reliability of the application rate.[425]

268. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[426] USDOC re-examined the application rates, the cooperating respondents' transactional information, and calculated rates of 5.25, 29.93, 8.44, and zero percent.[427] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation, as

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[419] *Id.*

[420] USDOC requested Q&V information from 94 identified Chinese exporters and asked China's Ministry of Commerce to assist it in transmitting the Q&V questionnaire to all companies that exported subject merchandise. USDOC received timely responses from only 30 exporters. *Id.*

[421] *Id.*

[422] Tires OI, Initiation, 72 Fed. Reg. at 43594-95 (Exhibit CHN-183).

[423] *See Tires Preliminary Determination*, 73 Fed. Reg. at 9291 (Exhibit CHN-122).

[424] *Id.*

[425] *Id.* at 9286.

[426] *See Tires Final Determination*, 73 Fed. Reg. at 40,488. (Exhibit CHN-41).

[427] *Id.*, as amended by *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Orde*r, 73 Fed. Reg. 51,624 (Sept. 4, 2008) (Exhibit CHN-231)

above. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[428]

269. To ensure that the selected rate had probative value, USDOC "compared the U.S. prices and normal values from the {application} to the U.S. prices and normal values for the respondents."[429] USDOC determined that the U.S. prices and normal values used to calculate the application rate were within the range of the net U.S. prices and normal values, respectively, used in the calculations of the cooperative respondents' rates.[430] USDOC also noted that no parties had commented on the relevance or probative value of the rate selected in the preliminary determination.[431]

270. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

13. *Wood Flooring OI*

271. On November 10, 2010, USDOC initiated an investigation into multilayered wood flooring from China based upon an application from the domestic industry.[432] USDOC determined the application was supported with evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury after examining the accuracy and adequacy of the evidence provided in the application.[433] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[434]

272. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application and information supplied by cooperating parties.[435] USDOC considered all of the information on the record, which included application rates ranging from

[428] *Id.*

[429] *See Tires Final Determination*, 73 Fed. Reg. at 40,488. (Exhibit CHN-41).

[430] *Id.*

[431] *Id.*

[432] *See Flooring Preliminary Determination*, 76 Fed. Reg. at 30,657. (Exhibit CHN-158).

[433] *Id.*

[434] USDOC requested Q&V information from 190 identified Chinese exporters and posted its Q&V questionnaire on its website. USDOC received timely responses from only 80 exporters. *Id.*

[435] *Id.*

194.49 to 280.50 percent,[436] transactional information from three cooperating respondents, and the cooperating respondents' calculated rates of zero and 0.29, respectively.[437] USDOC determined that the cooperative respondents' calculated rates had less probative value because they were cooperative rates and thus did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating companies' rates were more probative. After considering all of the evidence on the record, USDOC rejected the application rates because it determined that the normal value information contained in the application did not have probative value.[438] Instead, USDOC preliminarily selected a rate of 27.12 percent, based on the transactional information of one of the cooperating respondents.[439] This rate was *lower* than the rates in the application.

273. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[440] USDOC re-examined the application rates, the cooperating respondents' transactional information, and calculated rates of 3.97, 2.63, and zero percent.[441] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation, and again because there was no evidence showing the cooperating companies' rates were more probative. USDOC continued to apply the rate based on the transactional information of cooperating respondents selected in the preliminary determination as facts available.[442] As this information was obtained during the investigation and verified, there was no other information on the record with which to check this information.

274. Since the publication of the final determination, two of the cooperative respondents challenged USDOC's findings in domestic court.[443] USDOC voluntarily recalculated the rate

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[436] Wood Flooring OI, Initiation, 75 Fed. Reg. at 70717-18 (Exhibit CHN-179).

[437] *See Flooring Preliminary Determination*, 76 Fed. Reg. at 30,657. (Exhibit CHN-158), as amended by *Multilayered Wood Flooring From the People's Republic of China: Notice of Amended Preliminary Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 37,316 (June 27, 2011) (Exhibit CHN-466)

[438] *Id*.

[439] *Id.*

[440] *See Flooring Final Determination*, 76 Fed. Reg. at 64,322. (Exhibit CHN-49).

[441] *Id.*, as amended by *Multilayered Wood Flooring From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 76 Fed. Reg. 76,690 (Dec. 8, 2011) (Exhibit USA-95)

[442] *Id.*

[443] *See Multilayered Wood Flooring From the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Determination and Amended Final Determination of the Antidumping Duty Investigation*, 80 Fed. Reg. 44,029 (July 24, 2015) (Exhibit USA-96)

applicable to the China-government entity as a result of this litigation and the rate is now 25.62 percent.[444]

275. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

14. *Aluminum Extrusions AR1*

276. On July 10, 2012, USDOC initiated an administrative review of the antidumping duty order on aluminum extrusions from China after receiving timely requests for a review.[445] The period of review covered November 12, 2010, through April 30, 2012.[446] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[447]

277. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application, calculated rates from the investigation, and information supplied by the sole cooperating party, Kromet.[448] USDOC considered all of the information on the record, which included application rates ranging from 32.57 to 33.32 percent, [449] Kromet's transactional information, and Kromet's calculated rate of zero percent.[450] USDOC determined that Kromet's calculated rate had less probative value because it did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative. After considering all of the evidence on the record, USDOC preliminarily selected the application rate of 33.28 percent as facts available for the China-government entity.[451] To ensure the rate had probative value, USDOC examined Kromet's transactional information and determined that this information supported the relevance

[444] *Id.*

[445] *Aluminum Extrusions From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12* (11 June 2013) 78 Fed. Reg. 34986 (Exhibit CHN-465).

[446] *Id.*

[447] Guang Ya submitted a letter stating it would not participate in the administrative review. Guang Ya failed to demonstrate its independence from the China-government entity. *Id.*

[448] *Id.*

[449] Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185).

[450] *Aluminum Extrusions From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12* (11 June 2013) 78 Fed. Reg. 34986 (Exhibit CHN-465)

[451] *Id.*

and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[452]

278. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[453] USDOC re-examined the application rates, the cooperating respondent's transactional information, and its calculated rate of 0 percent.[454] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[455] No parties had commented on the relevance or probative value of the rate selected in the preliminary determination.[456]

279. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

15. *Aluminum Extrusions AR2*

280. On June 28, 2013, Commerce initiated an administrative review of the antidumping duty order on aluminum extrusions from China after receiving timely requests for a review.[457] The period of review covered May 1, 2012, through April 30, 2013.[458] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[459]

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[452] See Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Aluminum Extrusions from the People's Republic of China, 2010/ 12 (June 3, 2013) at 16 (Exhibit CHN-205).

[453] *Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12* (2 January 2014), 79 Fed. Reg. 96 (Exhibit CHN-35).

[454] *Id.*

[455] *Id.*

[456] *Id.*

[457] See *Aluminum Extrusions From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission, in Part; 2012/2013* (25 June 2014), 79 Fed. Reg. 36003 (Exhibit CHN-118).

[458] *Id.*

[459] Both mandatory respondents failed to cooperate in the review. The Guang Ya Group submitted a letter stating it was unable to participate and Jangho also withdrew from the review. *Id.*

281. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application, calculated rates from the investigation, and information supplied by the voluntary respondent, Kromet.[460] USDOC considered all of the information on the record, which included application rates ranging from 32.57 to 33.32 percent, [461] Kromet's transactional information, and Kromet's calculated rate of zero percent.[462] USDOC determined that Kromet's calculated rate had less probative value because it did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative. After considering all of the evidence on the record, USDOC preliminarily selected the application rate of 33.28 percent as facts available for the China-government entity.[463] To ensure the rate had probative value, USDOC examined Kromet's transactional information and determined that this information supported the relevance and reliability of the application rate because it showed that the application rate reflected the pricing behavior for the subject merchandise sold in the U.S. market during the time period of the investigation.[464]

282. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[465] USDOC re-examined the application rates, the cooperating respondent's transactional information, and its calculated rate of zero percent.[466] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[467] No parties had commented on the relevance or probative value of the rate selected in the preliminary determination.[468]

283. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In

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[460] *Id.*

[461] Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185).

[462] *Aluminum Extrusions From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12* (11 June 2013) 78 Fed. Reg. 34986 (Exhibit CHN-465)

[463] *Id.*

[464] See *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Aluminum Extrusions from the People's Republic of China; 2012/2013*, (18 June 2014) at 18-20 (Exhibit CHN-205).

[465] *Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review;* 2012–2013 (31 December 2014), 79 Fed. Reg. 78784 (Exhibit CHN-36).

[466] *Id.*

[467] *Id.*

[468] *Id.*

selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

16. Diamond Sawblades AR1

284. On December 28, 2010, USDOC initiated an administrative review of the antidumping duty order on diamond sawblades from China based on timely requests for review.[469] The period of review was January 23, 2009, through October 31, 2010.[470]

285. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity.[471] Rather, USDOC pulled-forward the rate that was previously applied to the China government entity and did not make a facts available determination. Therefore, there was not occasion for USDOC to special circumspection, as that term is used in Annex II, because USDOC did not apply facts available under Article 6.8 of the Agreement.

17. *Diamond Sawblades AR2*

286. On December 31, 2012, USDOC initiated an administrative review of the antidumping duty order on diamond sawblades from China based on timely requests for review.[472] The period of review was November 1, 2011, through October 31, 2012.[473]

287. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity.[474] USDOC did not make any determination and merely pulled-forward the rate that was previously applied to the China government entity. Therefore, USDOC did not apply special circumspection, as stated in Annex II, because it did not apply facts available under Article 6.8 of the Agreement.

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[469] *Diamond Sawblades AR1 Preliminary Results*, 76 Fed. Reg. at 76,135. (Exhibit CHN-249)

[470] *Id.*

[471] *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results) (Exhibit CHN-46) (Diamond Sawblades AR1)

[472] *See Diamond Sawblades AR2 Preliminary Results*, 77 Fed. Reg. at 73,417. (Exhibit USA-97)

[473] *Id.*

[474] *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 78 Fed. Reg. 36166 (June 17, 2013) (final results) (Exhibit CHN-47) (Diamond Sawblades AR2)

18. *Diamond Sawblades AR3*

288. On December 31, 2012, USDOC initiated an administrative review of the antidumping duty order on diamond sawblades from China based on timely requests for review.[475] The period of review was November 1, 2011, through October 31, 2012.[476]

289. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity.[477] USDOC did not make any determination and merely pulled-forward the rate that was previously applied to the China government entity. Therefore, USDOC did not apply special circumspection, as stated in Annex II, because it did not apply facts available under Article 6.8 of the Agreement.

19. *Furniture AR7*

290. On February, 29, 2012, USDOC initiated an administrative review of the antidumping duty order on wooden bedroom furniture from China based on timely requests for review.[478] The period of review was January 1, 2011, through December 31, 2011.[479] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[480]

291. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application, calculated rates from the investigation and previous administrative reviews, and transactional information from the investigation and previous administrative reviews.[481] USDOC considered all of the information on the record, which included application rates ranging from 158.74 to 440.96 percent,[482] calculated rates ranging from zero to 216.01 percent, and transactional information from cooperating parties in previous periods of review.[483] After considering all of the evidence on the record, USDOC preliminarily

[475] *Diamond Sawblades and Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012* (20 December 2013), 78 Fed. Reg. 77098 (Exhibit CHN-254).

[476] *Id.*

[477] *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 79 Fed. Reg. 35723 (June 24, 2014) (final results) (Exhibit CHN-48) (Diamond Sawblades AR3)

[478] *See Furniture AR7 Preliminary Results*, 78 Fed. Reg. at 8493.

[479] *Id.*

[480] Both of the mandatory respondents refused to cooperate in the administrative review. *Id.*

[481] *Id.*

[482] Furniture OI, Initiation, 68 Fed. Reg. at 70228 (Exhibit CHN-189).

[483] *See Furniture AR7 Preliminary Results*, 78 Fed. Reg. at 8493.

selected the rate previously calculated for a new shipper of 216.01 percent as facts available for the China-government entity.[484] To ensure the rate had probative value, USDOC examined transactional information obtained during the course of the 2009 administrative review and determined that this information supported the relevance and reliability of the application rate.[485] (The 2009 review data were the most recent data obtained by USDOC because no parties cooperated in the 2010 administrative review.)

292. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[486] USDOC re-examined the application rates, calculated rates from the investigation and previous periods of review, and the transactional information on the record.[487] USDOC explicitly considered a rate calculated on remand in the litigation arising out of the 2009 administrative review of the proceeding, but determined that its preliminarily selected rate had more probative value than this other remand rate because transactional information supported the reliability and relevance of the previously selected rate.[488] Therefore, USDOC continued to apply the application rate selected in the preliminary determination as facts available.[489]

293. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

20. *Furniture AR8*

294. On February 28, 2013, USDOC initiated an administrative review of the antidumping duty order on wooden bedroom furniture from China based on timely requests for review.[490] The period of review was January 1, 2012, through December 31, 2012.[491]

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[484] *Id.*

[485] *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)

[486] *Id.*

[487] *Id.*

[488] Furniture AR7 Final issues and Decision Memorandum (Exhibit CHN-151), p. 9-11.

[489] *Id.*

[490] See Furniture AR8 Preliminary Results, 77 Fed. Reg. at 10769.

[491] *Id.*

295. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity.[492] Rather, USDOC pulled-forward the rate that was previously applied to the China government entity and did not make a facts available determination. Therefore, there was no occasion for USDOC to special circumspection, as that term is used in Annex II, because USDOC did not apply facts available under Article 6.8 of the Agreement.

21. *Retail Bags AR3*

296. On September 25, 2007, USDOC initiated an administrative review of the antidumping duty order on polyethylene retail carrier bags from China based upon timely requests for review.[493] The period of review was August 1, 2006, through July 31, 2007.[494]

297. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity.[495] Rather, USDOC pulled-forward the rate that was previously applied to the China government entity and did not make a facts available determination. Therefore, there was no occasion for USDOC to special circumspection, as that term is used in Annex II, because USDOC did not apply facts available under Article 6.8 of the Agreement.

22. *Ribbons AR1*

298. On October 31, 2011, USDOC initiated an administrative review of the antidumping duty order on narrow woven ribbons from China based upon timely requests for review.[496] The period of review was September 1, 2010, through August 31, 2011.

299. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity.[497] Rather, USDOC pulled-forward the rate that was previously applied to the China government entity and did not make a facts available

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[492] *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012*, 78 Fed. Reg. 35,245 (Sept. 2, 2014) (Exhibit CHN-60).

[493] See *Polyethylene Retail Carrier Bags From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review* (9 September 2008), 73 Fed. Reg. 52282 (Exhibit CHN-274).

[494] *Id*.

[495] *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review* (11 February 2009), 74 Fed. Reg. 6857 (Exhibit CHN-54)

[496] *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 (Exhibit CHN-171).

[497] *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010– 2011* (13 February 2013), 78 Fed. Reg. 10130 (Exhibit CHN-51)

determination. Therefore, there was no occasion for USDOC to special circumspection, as that term is used in Annex II, because USDOC did not apply facts available under Article 6.8 of the Agreement.

23. *Ribbons AR3*

300. On November 8, 2013, USDOC initiated an administrative review of the antidumping duty order on narrow woven ribbons based upon timely requests for review.[498] The period of review was September 1, 2012, through August 31, 2013.[499] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[500]

301. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application, calculated rates from the investigation and previous administrative reviews, and transactional information from the investigation and previous administrative reviews.[501] USDOC considered all of the information on the record, which included application rates ranging from 208.80 to 231.40 percent,[502] one calculated rate of 0 percent from the investigation, and transactional information from a cooperating party in the investigation.[503] After considering all of the evidence on the record, USDOC preliminarily selected the revised application rate as facts available for the China-government entity.[504] USDOC determined that the calculated rate had less probative value because it did not correspond with the China-government entity's non-cooperation and because there was no evidence showing the cooperating company's rate was more probative. To ensure the rate had probative value, USDOC examined the documents in the application supporting this calculation, including data from the World Trade Atlas, Central Electric Authority of the Government of India, and Gas Authority of India, and determined that this information supported the relevance and reliability of the application rate.[505] USDOC also noted that the Court of International Trade

[498] *See* Ribbons AR3 Preliminary Results, 79 Fed. Reg. at 32,912 (CHN-462).

[499] *Id*.

[500] One company failed to provide a response to USDOC's Q&V questionnaire and the individually selected respondent also failed to respond to USDOC's full antidumping questionnaire. *Id.*

[501] *Id.*

[502] Ribbons OI, Initiation, 74 Fed. Reg. at 39296-97 (Exhibit CHN-178).

[503]*See Furniture AR7 Preliminary Results*, 78 Fed. Reg. at 8493 (Exhibit CHN-469).

[504] *Id.*

[505] *See* Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Aluminum Extrusions from the People's Republic of China, 2010/ 12 (June 3, 2013) at 16 (Exhibit CHN-205); see also AD Investigation Initiation Checklist, Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China. (Exhibit USA -98)

affirmed the use of this rate as the facts available rate in the first administrative review of the order.[506]

302. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[507] USDOC re-examined the application rates, one calculated rate from the investigation, and the transactional information on the record.[508] Again, USDOC determined that the cooperative respondent's calculated rate had less probative value because it did not account for the China-government entity's non-cooperation, as above. Therefore, USDOC continued to apply the application rate selected in the preliminary determination as facts available.[509]

303. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

24. *Shrimp AR7*

304. On March 20, 2012, Commerce initiated an administrative review of certain frozen warmwater shrimp from China based upon timely requests for review.[510] The period of review was February 1, 2011, through January 31, 2012.[511] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[512]

305. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application, calculated rates from the investigation and previous administrative reviews, and transactional information from previous administrative reviews.[513] USDOC considered all of the information on the record, which included application rates

[506] *Id.* at 9.

[507] *Narrow Woven Ribbon With Woven Selvedge From the People's Republic of China: Final Results of Administrative Review; 2012–2013* (October 10, 2014), 79 Fed. Reg. 61,288 (Exhibit CHN-52).

[508] *Id.*

[509] *Id.*

[510] *See* Shrimp AR7 Preliminary Decision Memorandum at 1 (Exhibit CHN-167).

[511] *Id.*

[512] The mandatory respondent Hilltop refused to participate in the review. See Shrimp AR7 Preliminary Results, 78 Fed. Reg. 15,696 (March 12, 2013) (Exhibit CHN-166).

[513] *Id.*

ranging from 112.81 to 263.68 percent,[514] calculated rates ranging from zero to 53.88,[515] and transactional information on the record. USDOC determined that the calculated rates on the record had less probative value because they did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative. After considering all of the evidence on the record, USDOC preliminarily selected the lowest application rate of 112.81 percent as facts available for the China-government entity.[516] To ensure the rate had probative value, USDOC examined all information on the record and determined that no information impugned the relevance or reliability of the selected rate.[517]

306. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[518] USDOC re-examined the application rates, the previously calculated rates and transactional information from prior periods of review.[519] Again, USDOC determined that calculated rates had less probative value because they did not account for the China-government entity's non-cooperation. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[520]

307. USDOC noted that the rates for the cooperating mandatory respondents in the investigation, which had been used to corroborate the application rate during that period, had changed because of litigation. Therefore, to ensure the selected rate continued to have probative value, USDOC re-examined the record evidence that had supported the application rate. USDOC analyzed the sales experience data on the record determined that a significant percentage of the control-number-specific margins from the investigation continue to be higher than the application margin chosen after recalculation.[521]

308. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In

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[514] Shrimp OI, Initiation, 69 Fed. Reg. at 3876 (Exhibit CHN-187).

[515] *Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results of Administrative Review; 2011–2012* (12 March 2013), 78 Fed. Reg. 15696 (Exhibit CHN-166)

[516] *Id.*

[517] See *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Aluminum Extrusions from the People's Republic of China; 2012/2013*, (18 June 2014) at 18-20 (Exhibit CHN-205).

[518] *Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results of Administrative Review; 2011–2012* (12 September 2013), 78 Fed. Reg. 56209 (Exhibit CHN-38)

[519] *Id.*

[520] *Id.*

[521] *Id.*

selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

25. *Shrimp AR8*

309. On March 29, 2013, USDOC initiated an administrative review of certain frozen warmwater shrimp from China based upon timely requests for review.[522] The period of review was February 1, 2012, through January 31, 2013.[523] USDOC determined the China-government entity did not cooperate in providing necessary information, and therefore resorted to applying the facts available in determining a rate for the China-government entity.[524]

310. In its preliminary determination, USDOC considered the universe of facts on the record, including rates from the application, calculated rates from the investigation and previous administrative reviews, and transactional information from previous administrative reviews.[525] USDOC considered all of the information on the record, which included application rates ranging from 112.81 to 263.68 percent,[526] calculated rates ranging from zero to 53.88 percent,[527] and transactional information on the record.[528] USDOC determined that the calculated rates on the record had less probative value because they did not correspond with the China-government entity's non-cooperation, and because there was no evidence showing the cooperating company's rate was more probative. After considering all of the evidence on the record, USDOC preliminarily selected the lowest application rate of 112.81 percent as facts available for the China-government entity.[529] To ensure the rate had probative value, USDOC examined all information on the record and determined that no information impugned the relevance or reliability of the selected rate.[530]

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[522] See Shrimp AR8 Preliminary Decision Memorandum at 1.

[523] *Id*.

[524] The mandatory respondents Hilltop and Newpro refused to participate in the review. See Shrimp AR8 Preliminary Results, 79 Fed. Reg. 15,949.

[525] *Id*.

[526] Shrimp OI, Initiation, 69 Fed. Reg. at 3876 (Exhibit CHN-187).

[527] Shrimp 2004-2006 Final Results, 72 Fed. Reg. at 52,049 (Exhibit USA-99).

[528] *Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results of Administrative Review; 2011–2012* (12 March 2013), 78 Fed. Reg. 15696 (Exhibit CHN-166)

[529] *Id*.

[530] See *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Aluminum Extrusions from the People's Republic of China; 2012/2013*, (18 June 2014) at 18-20 (Exhibit CHN-205).

311. For the final determination, USDOC re-evaluated its selection of facts available for the China-government entity.[531] USDOC re-examined the application rates, the previously calculated rates and transactional information from prior periods of review.[532] Again, USDOC determined that calculated rates had less probative value because they did not account for the China-government entity's non-cooperation, as above. USDOC continued to apply the application rate selected in the preliminary determination as facts available.[533]

312. USDOC noted that the rates for the cooperating mandatory respondents in the investigation, which had been used to corroborate the application rate during that period, had changed because of litigation. Therefore, to ensure the selected rate continued to have probative value, USDOC re-examined the record evidence that had supported the application rate. USDOC analyzed the sales experience data on the record determined that a significant percentage of the control-number-specific margins from the investigation continue to be higher than the application margin chosen after recalculation.[534]

313. In determining which rate to apply as facts available, no information on the record indicated that any particular rate was more probative of the non-responding companies. In selecting the rate from among the available facts, USDOC took account of the parties' non-cooperation, followed the provisions of Annex II, and applied the rate from the application as the "best" facts available.

26. Wood Flooring AR1

314. On February 28, 2013, Commerce initiated an administrative review of multilayered wood flooring from China based on timely requests for review.[535] The period of review was May 26, 2011, through November 30, 2012.[536]

315. In this review, USDOC did not resort to applying the facts available on the record in determining a rate for the China-government entity.[537] Rather, USDOC pulled-forward the rate that was previously applied to the China government entity and did not make a facts available determination. Therefore, there was no occasion for USDOC to special circumspection, as that

[531] *Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results of Administrative Review; 2011–2012* (12 September 2013), 78 Fed. Reg. 56209 (Exhibit CHN-38)

[532] *Id.*

[533] *Id.*

[534] *Id*.

[535] See *Multilayered Wood Flooring From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011– 2012* (25 November 2013), 78 Fed. Reg. 70267 n.7 (Exhibit CHN-461).

[536] *Id.* at 70,267.

[537] *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012* (9 May 2014), 79 Fed. Reg. 26712 (Exhibit CHN-50).

term is used in Annex II, because USDOC did not apply facts available under Article 6.8 of the Agreement.

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316. As requested by the Panel, the United States has demonstrated, per above, how USDOC utilized special circumspection and how it selected the "best" facts available. The United States notes that China, conversely, has failed to point to any examples where the United States failed to use special circumspection or failed to choose the best facts available.

Question 86 (To the United States): The United States does not provide any arguments with respect to the consistency of the USDOC's selection of facts available in seven of the challenged administrative reviews[538] in addition to the assertion that the rates assigned to the PRC-wide entity in these administrative reviews fall outside the scope of Article 6.8. Assuming that these rates are found to fall within the scope of Article 6.8, does the United States wish to respond to China's argument that the rates assigned to the PRC-wide entity in these administrative reviews were inconsistent with Article 6.8 and paragraph 7 of Annex II?

317. The record is undisputed that USDOC did not make a facts available finding within the meaning of Article 6.8 in these seven reviews. Thus, it would be inappropriate to evaluate the rate assigned to the China-government entity in these reviews as subject to Article 6.8 and paragraph 7 of Annex II.

Question 88 (To the United States): In its responses to the Panel's questions during the first substantive meeting, the United States argued that the PRC-wide entity was chosen as a mandatory respondent in *PET Film* OI. Could the United States please identify where on the record of this investigation this is indicated?

Response:

318. In PET Film OI, the China-government entity was subject to individual examination by virtue of the fact that a company within the China-government entity, Jiangyin Jinzhongda New Material (JJ New Material), was selected as a mandatory respondent. In this investigation USDOC selected respondent companies for individual examination based on U.S. import data from U.S. Customs and Border Protection.[539] Based on the import data, USDOC selected JJ New Material as one of the respondents to be individually examined.[540] JJ New Material

[538] *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Bags* AR3, *Wood Flooring* AR1, *Furniture* AR8 and *Ribbons* AR1.

[539] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[540] *Id*. (Exhibit CHN-112), *Id*. (Exhibit CHN-56).

responded that it would not participate in the investigation or respond to USDOC's antidumping questionnaire.[541] JJ New Material submitted no information to USDOC during the investigation other than an email explaining that it would not participate.[542] Therefore, USDOC did not have the necessary information to calculate a dumping margin for JJ New Material or to determine its independence from the China-government entity:

> [T]here is no information on the record of this investigation with respect to JJ New Material. Because JJ New Material was selected as a mandatory respondent and failed to demonstrate its eligibility for separate–rate status, it remains subject to this investigation as part of the PRC–wide entity. Pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we find that it is appropriate to apply a dumping margin for the PRC–wide entity using the facts otherwise available on the record, because the PRC–wide entity (including JJ New Material) withheld information requested by the Department and impeded the proceeding. Specifically, the PRC–wide entity failed to respond to the Department's questionnaires and withheld or failed to provide information in a timely manner or in the form or manner requested by the Department.[543]

Question 89 (To the United States): Have there been any investigations or administrative reviews where the USDOC found an NME-wide entity to be cooperating? If so, what rate was assigned to such an NME-wide entity in such cases and on what legal basis? If not, can the United States please explain what duty rate would have been assigned to such an NME-wide entity and on what legal basis, had this situation arisen?

Response:

319. USDOC has determined an NME-wide entity to be cooperating. For example, in the antidumping duty investigation of *53-Foot Domestic Dry Containers from China*, USDOC determined that the mandatory respondent China International Marine Containers (Group) Co., Ltd. (CIMC) had not demonstrated its independence from government control.[544] Specifically, USDOC found that CIMC was owned and controlled by companies wholly owned by the State-owned Assets Supervision and Administration Commission of the State Council. CIMC fully

[541] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[542] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[543] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[544] *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)

participated in the investigation, providing USDOC with its sales and production data. Based on the information on the record, USDOC determined that CIMC represented the entirety of the China-government entity. Therefore, USDOC assigned CIMC's calculated dumping margin as the China-government entity rate. Thus, where USDOC has found the NME-entity to be cooperating, it has not resorted to facts available in making its determination as to the NME-entity.

320. USDOC has also found that parts of the NME-wide entity cooperated and took that information into account in assigning a rate to the whole. For example, in the most recent administrative review of *Certain New Pneumatic Off-the-Road Tires*, covering the period 2012-2013, USDOC determined that the mandatory respondent Double Coin[545] was part of the China-government entity.[546] 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.

321. 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 calculate a rate for the other parts of the China-government entity or determine Double Coin's portion of the China-government. 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.[547]

322. USDOC applied a similar analysis in its remand redeterminations in Diamond Sawblades AR1 and AR2.[548] Again, because USDOC determined that the SASAC wielded significant control over the mandatory respondent, ATM, USDOC found that ATM had not demonstrated the absence of government control. In those cases, USDOC accounted for ATM's questionnaire

[545] 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.

[546] *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 Fed. Reg. 20,197 (Dep't of Commerce Apr. 15, 2015). (Exhibit USA-102)

[547] *Id.*

[548] *See* Remand Redetermination: Diamond Sawblades Manufacturers' Coalition v. United States, Court No. 13-00078; Slip Op. 14-50 (Exhibit USA-103); Final Remand Redetermination: Diamond Sawblades Manufacturers Coalition v. United States, Court No. 13-00241, Slip Op. 14-112 (Exhibit USA-104).

response by calculating a simple average of ATM's calculated weighted-average dumping margin and the previously assigned China-government entity rate.[549]

[549] *Id.*