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

(DS471)

COMMENTS OF THE UNITED STATES ON CHINA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

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INTRODUCTION

1. In this document, the United States comments on China's responses to the Panel's second set of questions. To a large extent, China's responses repeat arguments that the United States has addressed previously. Rather than also repeat prior U.S. arguments on these issues, the comments below contain additional points on China's arguments that the United States hopes the Panel finds useful. The absence of a U.S. comment on an aspect of China's response to any particular question should not be understood as agreement with China's response.

1 CHINA'S CLAIMS UNDER ARTICLE 2.4.2 OF THE AD AGREEMENT

1.1 China's claims under the "pattern clause" of the second sentence of Article 2.4.2

1.1.1 Alleged SAS programming errors

Question 90 (China): The Panel refers to the SAS programming error (1st SAS programming error) which is described in paragraph 78 of China's first written submission and which allegedly occurred in the application of the price gap test in the *OCTG* and *Coated Paper* investigations. The Panel understands that as a result of this SAS programming error, when comparing the alleged target price gap in an examined CONNUM with the weighted average non-target price gap in that CONNUM, the USDOC mistakenly compared the alleged target price gap with each of the individual non-target price gaps which made up this weighted average non-target price gap.[1] Thus, it is argued that, as a result of this SAS programming error, the USDOC did not compare the alleged target price gap with the weighted average non-target price gap, taken as a whole, as it was required to do under the Nails test. As a result of this error, the requirements of the price gap test were met in the examined CONNUM, when the alleged target price gap was higher than any of the individual non-target price gaps, even the smallest one.[2]

The Panel also notes that the United States agrees with China's description of this alleged error and the fact that this error occurred in the *OCTG* and *Coated Paper* investigations.[3]

Is the Panel therefore correct in understanding that in these two investigations there was at least one individual non-target price gap in an examined CONNUM which was lower than the weighted average non-target price gap in that CONNUM?

2. China suggests in its response to question 90 that the "1st SAS programming error … had the effect of *increasing the likelihood* of an alleged target ('AT') passing the Price Gap Test by overstating the frequency by which the AT price gap was found to be greater than the weighted

[1] China's first written submission, para. 78.

[2] China's first written submission, para. 78.

[3] United States' response to Panel question No. 4(c), para. 4.

average NT price gap."[4] The qualified nature of China's answer confirms that China, in fact, has no legal basis for asserting that the clerical error amounts to any breach of any obligation under the WTO Agreement. China is challenging three applications of the *Nails* test, in three specific investigations. To meet its burden, China must show that based on the facts of those investigations, Commerce's determinations breached a specific WTO obligation. But here, the most China can assert is that a certain clerical error "increased the likelihood" of a certain result. This vague statement – even if correct – fails to show that, in fact, in any of the three challenged determinations, the clerical error affected the outcome, or – more to the point – affected the outcome to such an extent that it resulted in some breach of the WTO Agreement.

3. Furthermore, aside from the fact that China fails to prove its assertions, the United States recalls that China has previously acknowledged that "correction of the two types of programming errors does *not* lead to a situation in which the Price Gap Test would no longer be passed for at least one CONNUM in *OCTG* OI and *Coated Paper* OI."[5] Ultimately, China seeks from the Panel a finding related to the alleged 1st SAS programming error that is advisory and not necessary to secure a positive solution to the dispute.[6]

Question 91 (China): The Panel refers to the alleged SAS programming error (2nd SAS programming error) which is described in the second sentence of footnote 133 to China's first written submission and in paragraphs 1-3 of the Appendix of the expert statement by Ms. Lisa Tenore. The Panel understands that this error allegedly occurred in the application of the price gap test in the *OCTG* and *Coated Paper* investigations. China states that the "common element" of this error and the 1st SAS programming error was that "they both increased the likelihood of an AT passing the Price Gap Test by overstating the frequency by which the AT price gap was found to be greater than the weighted average NT price gap".[7]

a. Can China please confirm, with the support of a hypothetical example, whether, as a result of this 2nd SAS programming error, the weighted average non-target price gap was found to be higher (or lower) than what it would have been had the 2nd SAS programming error not occurred during the application of the price gap test in the *OCTG* and *Coated Paper* investigations? If as a result of this error the weighted average non-target price gap became higher than it would have been, would this not have made

[4] China's Responses to Questions from the Panel following the Second Substantive Meeting with the Parties (December 4, 2015) ("China's Responses to the Second Set of Panel Questions"), para. 3 (emphasis added).

[5] China's Responses to Questions from the Panel following the First Substantive Meeting with the Parties and Third Parties (August 4, 2015) ("China's Responses to the First Set of Panel Questions"), para. 24.

[6] *See* DSU, Article 3.7, second sentence ("The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."). *See also* U.S. Second Written Submission, paras. 52-56.

[7] China's response to Panel question No. 4(a), para. 21.

it less likely that the alleged target price gap would be found to be higher than the weighted average non-target price gap? Please comment.

b. The Panel notes that, in response to the Panel's oral question at the second substantive meeting of the Panel with the parties, China clarified that it is as a result of the 1st SAS programming error described above, and not the 2nd SAS programming error, that it became more likely that the USDOC would find a significantly differing pricing pattern, under the Nails test, in the *OCTG* and *Coated Paper* investigations. In this light, please clarify whether China continues to pursue the part of its claim taking issue with the 2nd SAS programming error?

4. In its response to question 91, China repeats its assertion that the alleged errors in USDOC's SAS programming code "amount to a failure by USDOC to provide [a] reasoned and adequate explanation," and China also again asserts that "[t]he significance of the SAS programming errors in *OCTG* OI and *Coated Paper* OI is that USDOC's evaluation of the relevant facts was not unbiased and objective."[8] China's assertions utterly lack merit.

5. While China "refers the Panel to the detailed explanation … provided in China's Second Written Submission,"[9] no such detailed explanation exists. The referenced portion of China's second written submission, paragraphs 10 through 26, largely consists of a general discussion of Article 17.6(i) of the AD Agreement. Near the end of that discussion, at paragraphs 24 to 26, China sets forth its assertions that the SAS programming errors are inconsistent with the requirements of Article 17.6(i). However, as the United States has explained, a clerical error in no way implicates whether an authority's evaluation of the facts was – in the terms of Article 17.6(i) – "unbiased and objective." Furthermore, China has never explained how a clerical error can be seen as a resulting in any breach of the AD Agreement, and its second written submission provided nothing that can credibly be called a "detailed explanation" of any legal argument in support of its position. Rather, China just repeats its prior assertions, in nearly identical terms, in both its second written submission and in its response to the Panel's question.[10]

6. In contrast, the U.S. first written submission, the U.S. responses to the Panel's first set of questions, and the U.S. second written submission demonstrate that China has failed to establish that ministerial errors in USDOC's SAS programming code in the coated paper and OCTG antidumping investigations support a finding by the Panel that USDOC's determinations in those investigations are inconsistent with the AD Agreement.[11] Moreover, the United States has

[8] China's Responses to the Second Set of Panel Questions, paras. 10-11.

[9] China's Responses to the Second Set of Panel Questions, para. 10.

[10] Compare China's Second Written Submission, paras. 24-25 and China's Responses to the Second Set of Panel Questions, para. 10-11.

[11] *See* U.S. First Written Submission, paras. 139-140; U.S. Responses to the Panel's First Set of Questions, paras. 4-8; U.S. Second Written Submission, paras. 52-56.

demonstrated – and China does not contest – that USDOC has a process through which it discloses its calculations to interested parties and provides interested parties an opportunity to request correction of such errors.[12] In its response to this question, China once again confirms that it is challenging the SAS programming errors, but once again China offers the Panel nothing that would support a finding that an inadvertent error, of a type that is routinely corrected through a readily available process, amounts to a breach of any provision of the WTO Agreement.

7. As a final observation, the United States notes that China's argument is internally incoherent. In its response to this question, China acknowledges that "the 2nd SAS programming error decreased the likelihood of the Price Gap Test being passed" and "it indeed appears that only the 1st SAS programming error, but not the 2nd, increased the likelihood of an AT passing the Price Gap Test."[13] Yet, China argues that both of the alleged SAS programming errors reflect that "USDOC's evaluation of the relevant facts was not unbiased and objective."[14] China never explains, though, how the presence of two errors that would potentially affect the outcome of the analysis in opposite ways reflects *bias* and *lack of objectivity* on the part of the investigating authority. On its face, China's argument is nonsensical.

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

Question 94: In paragraph 36 of its second written submission, China states as follows:

> **It emerges from the analysis undertaken by Professor Egger that, across the three challenged determinations, the observed export prices were not generally single-peaked and symmetric around the mean; often a large mass of data points lay below the threshold of a single standard deviation. (footnotes omitted)**

In support of this statement, China cites to the second expert statement by Professor Dr. Peter Egger, (Exhibit CHN-498) (BCI), paragraphs 3-6 and Figures 1-4, and to China's response to the Panel's question No. 6(a) following the first substantive meeting of the Panel with the parties, paragraph 37.

d.)To China and the United States. Can the parties please explain whether a similar observation was made by the USDOC in the Coated Paper and OCTG investigations? Please respond by referring to the relevant parts of the record. Can the United States please confirm whether the USDOC examined whether or not the data were normally distributed in the Coated

[12] 19 C.F.R. § 351.224 (Exhibit USA-7).

[13] China's Responses to the Second Set of Panel Questions, paras. 6-7.

[14] China's Responses to the Second Set of Panel Questions, para. 11.

Paper and OCTG investigations? Please respond by referring to the relevant parts of the USDOC's record.

8. The United States welcomes China's acknowledgement that a "similarly explicit observation" related to normal distribution, such as that contained in the steel cylinders issues and decision memorandum, "cannot be found in the records of *OCTG* OI and *Coated Paper* OI."[15]

9. China nevertheless contends that its "argument that the Nails Test rested on the untested assumption that the examined export prices were distributed in a specific way does not depend upon statements such as the quote found in *Steel Cylinders* OI."[16] China suggests that "the fact that the Nails Test rested on an untested assumption is evident from an objective, step-by-step, scrutiny of the operation of the Nails Test."[17] China, however, presents no evidence or argument to demonstrate how China's assertion is "evident." To the contrary, objective, step-by-step scrutiny shows that the *Nails* test does *not* rely on any untested assumptions about the distribution of prices. For example, the United States refers the Panel to the detailed step-by-step discussion of the operation of the *Nails* test in the comments below on China's response to question 97(b).

10. Furthermore, nothing in the records of the challenged investigations supports the conclusion that USDOC assumed a normal distribution of the data, or even evaluated the distribution of the data at all. Nothing in the records of the challenged investigations supports the conclusion that USDOC undertook a statistical probability analysis such as that discussed by China throughout this dispute. As we have shown, the *Nails* test does not involve the type of statistical analysis discussed by China. USDOC explicitly stated in its determinations that it "is not using the standard deviation measure to make statistical inferences."[18] It is thus clear on the face of the challenged determinations that USDOC did not utilize statistical probability analysis, despite China's suggestion to the contrary.

11. As explained in the U.S. response to question 93, as well as in earlier U.S. submissions, statements, and responses to panel questions, China's arguments related to statistical probability analysis are not relevant to the Panel's review of the challenged determinations because the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis, and USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations.

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[15] China's Responses to the Second Set of Panel Questions, para. 18.

[16] China's Responses to the Second Set of Panel Questions, para. 18.

[17] China's Responses to the Second Set of Panel Questions, para. 18.

[18] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); *see also* Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66) ("As we stated before, we do not use the standard deviation measure to make statistical inferences but, rather, use the standard deviation as a relative standard against which to measure differences between the price to the alleged target and non-targeted group. For this purpose, one standard deviation below the average price is sufficient to distinguish the alleged target from the non-targeted group").

Question 95 (China): In paragraph 39 of its second written submission, China states as follows:

> **Prices that fall just +1 standard deviation from the mean are not significantly different from the mean in a statistical sense. In his second expert statement, Professor Egger cites to several authoritative texts from the statistics literature that demonstrate that this view is indeed commonly regarded as sound practice in the field of statistics and may therefore be considered as a recognized statistical convention. (footnotes omitted; emphasis added)**

The Panel notes that the second sentence of Article 2.4.2 refers to "a pattern of export prices which differ significantly among different purchasers, regions or time periods". In this regard, does China contend that under the second sentence of Article 2.4.2, an investigating authority is required to determine whether the export prices differ significantly from the "mean" rather than from each other? To illustrate this point, assume that an exporter makes only two sales of one unit each, one to a targeted purchaser A and another to a non-targeted purchaser B. The export price to A is 4 and that to B is 10. The simple average or mean of the prices is 7 ([4+10]/2).[19] In China's view is the relevant enquiry under the second sentence of Article 2.4.2, whether the export price of 4 (to targeted purchaser A) differs significantly from the export price of 10 (to non-targeted purchaser B)? Or is the relevant enquiry whether the export price of 4 differs significantly from the mean price of 7?

12. The United States welcomes China's agreement that the mean is "a suitable reference point for determining whether a given set of prices differ significantly from each other, which is the relevant enquiry under Article 2.4.2, second sentence."[20] As we have explained,[21] the *Nails* test used by USDOC in the challenged investigations relies on the weighted-average export price – that is, the mean export price – to all purchasers (or regions or time periods) as a central part of the analysis in determining whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods."[22]

13. The United States does not agree with China, however, that the *Nails* test is "a statistical type of probability test."[23] We have demonstrated that Article 2.4.2 does not require the use of a statistical probability test, such as that described by China, and that USDOC, in applying the *Nails* test, did not engage in the kind of statistical probability analysis China discusses. In its response to this question, China summarizes arguments it has made previously related to

[19] In this regard, please note that because the quantity of sales to A and B is 1 unit each, there is only a simple average of the price to A and to B and no weighted average.

[20] China's Responses to the Panel's Second Set of Questions, para. 19.

[21] *See* U.S. First Written Submission, paras. 89-100.

[22] AD Agreement, Art. 2.4.2, second sentence.

[23] China's Responses to the Panel's Second Set of Questions, para. 19.

statistical probability analysis.[24] We have demonstrated that China's arguments are premised on the unsupportable proposition that a statistical probability analysis – or China's own version of such an analysis – is the standard against which the *Nails* test is to be measured.

14. We have shown that USDOC makes *no* assumptions (whether implicit or explicit) concerning the distribution of export prices, let alone assume the existence of a particular type of distribution,[25] and we have not suggested that the *Nails* test is somehow equivalent to the statistical probability analysis discussed by China. That, of course, is not the standard against which the *Nails* test is to be measured. The question before the Panel, which China continues to misunderstand, is whether USDOC's application of the *Nails* test in the challenged investigations is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. We have shown that it is.[26]

15. In sum, China's arguments are not relevant because USDOC did not undertake a statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations, and the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis.

Question 97 (China): China states that no matter which analytical tool an investigating authority applies in order to identify a relevant pricing pattern, the purpose of that assessment must be to analyse the data to identify "unusually low export prices".[27] In this regard, can China please respond to the following questions:

a. How does China respond to the United States' argument that Article 2.4.2 does not refer to "unusually low" export prices and therefore does not require an investigating authority to find export prices which are unusually low in order to find a "pattern of export prices which differ significantly" among purchasers, regions or time-periods?[28]

16. The United States welcomes China's clarification that its "reference to 'unusually low export prices' is merely a short-hand reference to the requirement under Article 2.4.2, second sentence," and not an invitation for the Panel to impose upon WTO Members a far more stringent standard than that provided in the text of the second sentence of Article 2.4.2.[29] In light of China's clarification, and to avoid any further confusion, it would be most appropriate to use

[24] *See* China's Responses to the Panel's Second Set of Questions, para. 20.

[25] *See* U.S. First Written Submission, paras. 123 and 125, and note 136.

[26] *See* U.S. First Written Submission, paras. 84-155.

[27] China's response to Panel question No. 8, para. 56.

[28] United States' second written submission, para. 26.

[29] China's Responses to the Second Set of Panel Questions, para. 22.

the terms of the second sentence of Article 2.4.2 themselves – "differ significantly" – rather than China's alternative formulation – "unusually low."

17. Of course, any alleged "misunderstanding"[30] on the part of the United States with regard to China's position has stemmed from China's own use of the term "unusually low" instead of the term used in Article 2.4.2 of the AD Agreement, coupled with China's persistence in discussing statistical probability analysis throughout this dispute. Statistical probability analysis is, indeed, a tool that may be used to identify random, "unusually low" data points, or outliers. Such an analysis, though, is neither called for nor required by the second sentence of Article 2.4.2 (as China apparently now agrees), and USDOC did not rely on statistical probability analysis in the challenged investigations. With China's clarification, it is now clear – as the United States has asserted throughout this proceeding – that the relevant legal issue is whether USDOC's analysis in the three challenged investigations complied with the requirements of Article 2.4.2.

b. In its second written submission, the United States submits that dumping may be "targeted" even when low-priced export sales are not unusual or outliers, such as when an exporter regularly engages in targeting regions, purchasers or time-periods.[31] The United States provides a hypothetical example to illustrate this point.[32] Can China please comment on this statement by the United States as well as the hypothetical example provided in support of that statement?

18. In its response to question 97(b), China acknowledges that "it appears likely in the US hypothetical that the relevant export prices differ significantly in a quantitative sense."[33] Given this acknowledgment, it is even more evident that China has no basis for arguing that USDOC's application of the *Nails* test in the challenged investigations is somehow inconsistent with Article 2.4.2 of the AD Agreement. As the United States will spell out in detail below, applying the *Nails* test to the data in the U.S. hypothetical shows that the *Nails* test results in the same conclusion as that agreed to by China – namely, that the export prices do, in fact, "differ significantly" as between the alleged target, Purchaser A, on the one hand, and the non-targets, Purchasers B and C on the other. Furthermore, this detailed example again shows that the *Nails* test does not – as China asserts – involve any *a priori* assumptions about the distribution of prices.

19. We recall that in the U.S. hypothetical, an exporter sells one hundred units of a product (only one model) during the period of investigation. Forty-nine units are sold to Purchaser A, each at a price of $25. Twenty-five units are sold to Purchaser B, each at a price of $75. The remaining twenty-six units are sold to Purchaser C, each at a price of $80. The domestic

[30] China's Responses to the Second Set of Panel Questions, para. 21.

[31] United States' second written submission, para. 27.

[32] United States' second written submission, para. 28.

[33] China's Responses to the Second Set of Panel Questions, para. 28.

industry alleges that an exporter's sales to Purchaser A are "targeted." Thus, our data are as follows:

	Purchaser A	Purchaser B	Purchaser C
Weighted-Average Export Price:	$25	$75	$80
Units:	49	25	26

20. The U.S. first written submission explains in detail how the *Nails* test operated in the three challenged investigations.[34] Applying the *Nails* test to the data in the U.S. hypothetical, first we conduct the "standard deviation" test.

21. To calculate the variance and the standard deviation for the weighted-average export prices, the first step is to calculate the weighted average of the weighted-average export prices to each purchaser. The total quantity sold (*i.e.*, 100) is in the denominator of the weighted average.

$$\frac{(25\ x\ 49) + (75\ x\ 25) + (80\ x\ 26)}{100} = 51.8$$

22. The next step is to calculate the difference between the weighted-average export prices to each purchaser and the weighted-average export price to all purchasers.

$$25 - 51.8 = -26.8$$
$$75 - 51.8 = 23.2$$
$$80 - 51.8 = 28.2$$

23. Then, the square of each of these differences is calculated.

$$(-26.8)^2 = 718.24$$
$$(23.2)^2 = 538.24$$
$$(28.2)^2 = 795.24$$

24. The following step is to calculate the weighted average of these results to determine the variance. The total quantity sold (*i.e.*, 100) is once again in the denominator of the weighted average.

$$\frac{(718.24\ x\ 49) + (538.24\ x\ 25) + (795.25\ x\ 26)}{100} = 693.26$$

25. Finally, the *Nails* test calls for the calculation of the standard deviation as the square root of the variance.

[34] *See* U.S. First Written Submission, paras. 85-104.

$$\sqrt{693.26} = 26.33$$

26. Thus, in this example, the standard deviation is 26.33. The *Nails* test would then consider whether Purchaser A's weighted-average export price is more than one standard deviation below than the weighted-average export price to all purchasers (*i.e.,* 51.8).

$$51.8 - 26.33 = 25.47$$

27. Then, the *Nails* test involves a determination of the volume of the allegedly "targeted" purchaser's sales of subject merchandise that are at weighted-average export prices that are more than one standard deviation below the weighted-average export price to all purchasers during the period of investigation. If the volume of sales to the allegedly "targeted" purchaser that are priced at more than one standard deviation below the weighted-average export price to all purchasers exceeds 33 percent of the total volume of the respondent's sales of subject merchandise to the allegedly "targeted" purchaser, then the *Nails* tests involves an evaluation of these sales, which have satisfied the standard deviation test, under the "gap test."

28. In the U.S. hypothetical, which only included the sale of a single model, 100 percent of the volume of export sales to Purchaser A are priced at more than one standard deviation below the weighted-average export price to all purchasers. Recall that the weighted-average export price to Purchaser A is 25, which is more than one standard deviation (26.33) below the weighted-average export price to all purchasers (51.8).

29. Turning to the "gap test," the price gap between the weighted-average export price to the alleged target, $25 to Purchaser A, and the next higher weighted-average export price to a non-target, $75 to Purchaser B, is $50. The only non-target price gap in the data set is the price gap between Purchaser B and Purchaser C, which is $5. If the volume of the export sales to the allegedly "targeted" group that met this test exceeded five percent of the total volume of export sales of subject merchandise to the allegedly "targeted" group, then the sales that satisfy this five percent threshold pass the gap test.[35] In the U.S. hypothetical example, the volume of the sales to Purchaser A that met this threshold is 100 percent, and thus exceeds five percent of the total volume of sales of subject merchandise to Purchaser A. Accordingly, since sales to Purchaser A passed both the standard deviation test and the gap test, these sales would pass the *Nails* test and would be considered as "targeted."

30. As noted above, the United States welcomes China's agreement that "it appears likely in the US hypothetical that the relevant export prices differ significantly in a quantitative sense."[36] With this statement, China appears to have, in effect, acknowledged that the *Nails* test can be used to ascertain whether export prices differ significantly in a quantitative sense.

[35] *See* Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, at 6 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 23 (Exhibit CHN-66).

[36] China's Responses to the Second Set of Panel Questions, para. 28.

31. Additionally, we recall that China has proposed during this dispute that it would have been more appropriate for USDOC to use a threshold of 1.96 times the standard deviation, rather than using a threshold of one standard deviation.[37] In the U.S. hypothetical, however, using a threshold of 1.96 times the standard deviation (meaning, in the hypothetical, that the weighted-average export price to Purchaser A must be more than $51.61 below than the weighted-average export price to all purchasers) would result in the conclusion that the sales to Purchaser A would not pass the first part of the test and would not be found to "differ significantly." Incongruously, China's proposed threshold would fail to identify prices that China agrees appear, on their face, to "differ significantly." This is further indication that China's quantitative arguments lack merit.

32. In its response to this question, China also repeat its argument that "the authority must examine whether there is a qualitative aspect to the numerical price differences at issue" and raises, yet again, the concepts of "seasonal pricing fluctuations, the perishable nature of the product at issue, or geographic distinctions."[38] There was, of course, no evidence in the challenged investigations – which concerned coated paper, steel cylinders, and oil country tubular goods – that seasonality, the perishable nature of the product, or geographic distinctions were issues of concern to the interested parties or of any relevance to USDOC's examination. Furthermore, the United States has demonstrated that nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. The United States respectfully refers the Panel to the portions of previous U.S. submissions that set forth the arguments we have already made in this regard.[39]

Question 98 (China): In relation to China's argument that the USDOC erred by attributing "significance" to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean because this is an inherent feature of every peaked distribution with tails, the Panel refers to the following statement in paragraph 62 of the first statement by Professor Dr. Peter Egger (Exhibit CHN-1):

> **In this distribution I assume that prices are normally distributed, consistent with a single-peaked density function as indicated. In this distribution, the average (or mean) price is located where the distribution peaks. For illustrative purposes, I portray the price data horizontally (indicating lower to the left and higher prices to the right) and vertically (indicating *larger numbers of transactions of prices* in the center of the distribution than in the tails. (emphasis added)**

a. Can China please explain what the reference to "transactions" of prices means in this statement? Is it a reference to individual export transactions of the exporter or something else? If it is a reference to individual export

[37] *See, e.g.*, China's First Written Submission, para. 245.

[38] China's Responses to the Second Set of Panel Questions, paras. 29-30.

[39] *See* U.S. First Written Submission, paras. 67-82; U.S. Second Written Submission, paras. 42-51.

transactions, does this statement suggest that there will be more individual export transactions (assuming normal distribution) closer to the peak of the export price distribution and fewer individual export transactions at the tail of the export price distribution? Does this analysis consider the quantity of each transaction? If yes, please explain how.

Please provide a hypothetical example in support of your response. In that hypothetical example, please assume that exporter Z makes export sales to four purchasers, namely, A, B, C and D. Assume that the details of these export sales are as provided in the table below.

Purchaser	**No. of transactions**	**Total quantity sold (in kilograms) in these transactions**	**Per unit export price of each individual export transaction**
Purchaser A	**5**	**150**	**3**
Purchaser B	**6**	**152**	**4**
Purchaser C	**15**	**90**	**10**
Purchaser D	**15**	**90**	**10**

If you need to make further assumptions in this hypothetical example, or need to make any changes, in order to illustrate your point, please do so, after explaining the reasons therefor. Please explain, through this example, whether the location of the prices to these purchasers in the distribution, i.e. whether the prices will be closer to the peak or closer to the tail, will be based on the number of transactions or the total quantity of sales contained in these transactions to purchasers A, B, C and D. Will the price to purchaser A be found to be closer to the tail of the distribution or closer to the peak?

33. In responding to question 98(a), China repeats arguments it has made previously concerning USDOC's use of weighted-average export prices in its application of the "standard deviation" test.[40] As it has before, China once again contends that it is important to not disregard

[40] *See* China's Responses to the Second Set of Panel Questions, paras. 33-37.

the "variation of prices per purchaser (or region or time period)"[41] and China criticizes USDOC for doing so.[42] China's argument continues to lack merit.

34. The United States has demonstrated previously that using purchaser-specific weighted averages (or region-specific or time period-specific weighted averages) allows USDOC to focus on meaningful price variation *among* (*i.e.*, across) the purchasers (or regions or time periods) rather than price variation *within* the sales to each purchaser (or region or time period), which is not relevant to the analysis. The United States has likewise demonstrated that this approach is just what the "pattern clause," by its terms, calls upon an investigating authority to do.[43]

35. In contrast, nothing in the text of the second sentence of Article 2.4.2 supports China's position that the article requires that the pattern be based on individual export prices, and nothing in that provision prohibits the use of weighted averages in connection with an investigating authority's analysis of a "pattern" within the meaning of the "pattern clause." Rather, China's argument that an investigating authority's analysis of a "pattern" "must" focus on individual export transactions,[44] as well as China's unsupported assertion that "[i]ndividual export prices are [the] best basis upon which to identify a pattern among export prices,"[45] stem from China's mistaken belief that the second sentence of Article 2.4.2 requires investigating authorities to apply particular statistical analyses when examining whether a "pattern" exists within the meaning of the "pattern clause." We have demonstrated that China's arguments in this regard lack any merit.[46]

Question 99 (China): The Panel refers to China's argument that the "USDOC erred by attributing 'significance'' to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean, because this is an inherent feature of every peaked distribution with tails".[47] The Panel notes that there are some differences in the way in which China describes this argument in its first written submission and the way in which it describes this argument in its response to the Panel's question No. 6(c) following the first substantive meeting of the Panel with the parties. In its first written submission, China describes this argument in the following way:

> **[F]or any probability distribution with a "tail" – including the *normal, unimodal distribution with one peak (as assumed by USDOC), a bimodal***

[41] China's Responses to the Second Set of Panel Questions, para. 33.

[42] *See* China's Responses to the Second Set of Panel Questions, para. 37.

[43] *See* U.S. First Written Submission, paras. 57-61, 146-155; U.S. Second Written Submission, paras. 32-41.

[44] China's First Written Submission, para. 130.

[45] China's First Written Submission, para. 134.

[46] *See, e.g.*, U.S. First Written Submission, paras. 62-66, 114-138; U.S. Second Written Submission, paras. 17-31.

[47] China's second written submission, para. 15.

> ***distribution with two peaks, or even a multi-peaked distribution*** **– it holds true that gaps between any two price observations in the "tails" of the distribution are likely to be larger than pairwise gaps that are situated towards the peak (or peaks) of the distribution.[48]**

In its response to the Panel's question No. 6(c) following the first substantive meeting of the Panel with the parties, China describes this argument in the following way:

> **[I]t was inappropriate, in the three challenged determinations, for USDOC to attribute "significance" to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean, because this is *an inherent feature of not only every normal distribution but, more generally, of any single-peaked distribution with tails*.[49]**

a. To China. Please clarify whether China's argument that "gaps between any two price observations in the 'tails' of the distribution are likely to be larger than pairwise gaps that are situated towards the peak of the distribution" applies only when there is "normal distribution" or "single-peaked distribution with tails", as is suggested in China's response to the questions posed by the Panel, or does it apply when there is normal, unimodal distribution with one peak, a bimodal distribution with two peaks, or a multi-peaked distribution, as is suggested in its first written submission?

b. To China. The Panel refers to the first expert statement by Professor Dr. Peter Egger (Exhibit CHN-1). In paragraph 64 of that statement, Professor Dr. Peter Egger provides evidence relating to export prices in one CONNUM in the *Coated Paper* investigation and also provides an illustration in Figure 3 of that statement of how the export price data in that CONNUM was distributed. Referring to Figure 3, he notes that the "figure clearly indicates that the empirical distribution is bimodal (has two peaks)". If China contends that its argument relating to larger gaps in the tails of the distribution compared to gaps situated towards the peak applies in cases of any "single-peaked distribution with tails", could China explain how its argument holds when there is no single-peaked distribution, as appears to be the case, in relation to export price data in the CONNUM illustrated in Figure 3?

c. To China. Is China arguing that in each of the three challenged investigations, the alleged target price gap (which according to China was based on prices from the tail of the price distribution) was always found to be

[48] China's first written submission, para. 231. (emphasis added)

[49] China's response to Panel question No. 6(c), para. 46. (emphasis added)

wider than the individual non-target price gaps at the peak of the price distribution? Please respond by referring to the relevant parts of the record.

d. To China. Is the Panel correct in understanding that in some examined CONNUMs in the three challenged investigations, the requirements of the price gap test were not met because the alleged target price gap was not found to be higher than the weighted average non-target price gap? If yes, would that not show that the alleged target price gap is not always wider (because it results from a comparison of prices at the tail of the distribution) than the weighted average non-target price gap, which is based on the differences between prices closer to the peak where such differences are smaller than those in the tail?

36. In response to subparts (a) through (d) of question 99, China reiterates arguments that it has made throughout this dispute related to statistical probability analysis. The United States has demonstrated previously that China's arguments related to statistical probability analysis are not relevant to the Panel's review of the challenged determinations because the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to utilize statistical probability analysis, and because USDOC did not undertake that type of statistical probability analysis when it applied the *Nails* test in the challenged antidumping investigations. That being said, the United States will take this opportunity to make some final observations about China's arguments related to statistical probability analysis.

37. As an initial matter, it is striking how China persistently qualifies its arguments related to statistical analysis. For example, China argues that "[b]y definition, there are fewer data points in the tails of a distribution,"[50] and that this is "an inherent property of distributions with tails."[51] China asserts that "the feature that gaps between data points in the tails of a given distribution are wider than the gaps between data points closer to the peak(s) of the distribution holds for all distributions with tails, including distributions with multiple peaks."[52] China has similarly qualified its statistical arguments throughout this dispute.[53] Such qualification highlights the theoretical nature of China's contentions, which are divorced from the facts of the challenged investigations.

38. For China, the actual evidence in the underlying investigations about which it has pursued "as applied" claims, *i.e.*, the actual export sales data reported by respondent interested parties, does not matter. Indeed, China explicitly states that its "argument in this regard is based

[50] China's Responses to the Second Set of Panel Questions, para. 42 (emphasis added).

[51] China's Responses to the Second Set of Panel Questions, para. 44 (emphasis added); *see also id.*, para. 45.

[52] China's Responses to the Second Set of Panel Questions, para. 42 (emphasis added).

[53] *See, e.g.*, China's First Written Submission, paras. 229, 237-239; China's Opening Statement at the First Panel Meeting, paras. 18-19; China's Responses to the First Set of Panel Questions, paras. 34-40, 42, 46, 57; China's Second Written Submission, paras. 32, 43, 45, 54; China's Opening Statement at the Second Panel Meeting, para. 6.

on an inherent property of price distributions with tails, and does not depend on how the export prices in the three challenged determinations were actually distributed (other than the existence of a tail)."[54] China acknowledges that "there is no specific evidence in the record to which the Panel could usefully refer when examining this aspect of China's argument."[55] China's acknowledgment, however, means that it has not and cannot meet its burden of showing that the *Nails* test – **as applied in the three challenged investigations** – is somehow inconsistent with Article 2.4.2 of the AD Agreement. That is, under China's theoretical arguments, certain presumed sets of data may yield certain results under certain statistical tests; those hypothetical situations, however, are not pertinent to an examination of a different type of test applied to specific data sets, which China has not shown to exhibit the distributions that China assumes.

39. Moreover, there is evidence, which China has provided, that demonstrates that China's statistical arguments fail when applied to the challenged investigations. In Exhibit CHN-522, China provides a number of graphs that purport to show "the distributions of all 12 CONNUMs across the challenged determinations that either did not pass the Price Gap Test (in *Steel Cylinders* OI) or that would not have passed the Price Gap Test upon correction of the two SAS programming errors (in *OCTG* OI and *Coated Paper* OI)."[56] As China explains, "[a]s can be seen from the graphs … none of the 12 distributions in those CONNUMs even came close to being single-peaked and symmetrical around the mean, let alone to being normally distributed."[57] China does not mention, though, that, in addition, its graphs show that none of those dozen distributions had a left-hand tail. As noted in the preceding paragraph, China stated that its "argument in this regard is based on an inherent property of price distributions with tails, and does not depend on how the export prices in the three challenged determinations were actually distributed (other than the existence of a tail)."[58] So, China has demonstrated that the element on which its statistical argument depends, namely a distribution with a tail, was not present in the case of at least a dozen CONNUMs USDOC examined in the challenged investigations, and possibly more. For that reason, China's statistical argument fails, as China itself has shown.

40. Additionally, in criticizing USDOC's application of the *Nails* test, China suggests that "[f]or any given CONNUM, whether or not the AT price gap was found wider than the weighted-average NT price gap entirely depended on the underlying nature of the relevant price distributions."[59] Put another way, China appears to suggest that the outcome of the "price gap test" depended on the export price data reported by respondent interested parties. That

[54] China's Responses to the Second Set of Panel Questions, para. 45.

[55] China's Responses to the Second Set of Panel Questions, para. 45.

[56] China's Responses to the Second Set of Panel Questions, para. 47.

[57] China's Responses to the Second Set of Panel Questions, para. 47.

[58] China's Responses to the Second Set of Panel Questions, para. 45 (emphasis added).

[59] China's Responses to the Second Set of Panel Questions, para. 48.

proposition is self-evident and consistent with a fundamental requirement of the AD Agreement that determinations be based on the evidence.

41. Finally, it is clear that China is trying to have it both ways. China argues that "in order to be potentially meaningful as an analytical tool, the Nails test depends on the assumption that the distribution of the examined export prices was, at least, single-peaked and symmetric around the mean."[60] Yet, at the same time, China argues that "whenever USDOC applied the Nails Test to a CONNUM whose density function possessed a left-hand tail, the Price Gap Test did nothing more than confirm an inherent property of distributions with tails … and … it was therefore meaningless as an analytical tool."[61] So, China is arguing to the Panel both (i) that the *Nails* test could only work for a particular kind of distribution, and (ii) that the *Nails* test could never work for that very same kind of distribution. With its statistical arguments, China obfuscates rather than clarifies the matters at issue.

42. Accordingly, as we have shown, China's arguments related to statistical probability analysis are not relevant to the Panel's review of USDOC's determinations in the challenged investigations, in which USDOC made no assumptions about the distribution of the data and made no attempt to undertake the kind of statistical probability analysis that China has spent so much time discussing throughout this dispute.

Question 100 (China): In its first written submission, in questioning the USDOC's price gap test, which compares an alleged target gap price with a weighted average non-target price gap, China states that gaps between any two price observations in the tails of the distribution are likely to be higher than pairwise gaps that are situated towards the peak (or peaks) of the distribution.[62] The Panel understands that in China's view because the alleged target price gap was based on prices located at the tail of the distribution and the weighted average non-target price gap was based on prices closer to the peak of the distribution, the differences between the alleged target price gap and the weighted average non-target price gap only "reflect[ed] a mathematical property of all peaked distributions".[63]

If this understanding is correct, can China please clarify on what basis China concludes that the alleged target price gap was located at the tail of the price distribution in the three challenged investigations? In this regard, the Panel notes the statement in China's first written submission that "[a]ssuming a normal distribution, as USDOC does", the sales price to an alleged target is "*by definition* in the tail of the distribution, because they are one standard deviation below the mean".[64] Considering that China itself shows that the

[60] China's Responses to the Second Set of Panel Questions, para. 47.

[61] China's Responses to the Second Set of Panel Questions, para. 44.

[62] China's first written submission, para. 231.

[63] *See, e.g.* China's first written submission, para. 235.

[64] China's first written submission, para. 234. (emphasis original)

export data at issue in the three challenged investigations were not always normally distributed, can China please clarify whether the alleged target price will always be at the tail of the price distribution, in case of data which are not normally distributed?

43. In lieu of commenting on China's response to question 100, which presents arguments similar to those presented in China's response to question 99, the United States would respectfully refer the Panel to the U.S. comments presented above related to China's response to question 99.

Question 102 (China): Please provide Microsoft Word versions of Figures 1-4 provided in the first expert statement by Professor Dr. Peter Egger (Exhibit CHN-1) and Figures 1-4 provided in the second expert statement by Professor Dr. Peter Egger (Exhibit CHN-498).

44. The United States observes that the CONNUMs China identifies in Figures 1 and 2 of Exhibit CHN-498 (110709024453010000 and 110710017783010000, respectively), which are reproduced in paragraphs 61 and 62 of China's response to question 102, do not appear to exist in the U.S. sales data reported by respondent interested parties during the course of the OCTG investigation.[65] It is thus unclear what the basis is for China's representation of the distribution of prices in those figures.

45. Additionally, we note that Figures 1 and 2 of Exhibit CHN-498 purport to represent the distribution of prices for "all customers," but in OCTG, the allegation of "targeted dumping," and USDOC's finding of "targeted dumping," was based on time periods (*i.e.*, months during the period of investigation).[66] It is thus unclear why China has chosen to represent the data in this manner, whatever the source of the data may be.

1.3 Application of the WA-T methodology to all sales of the exporter to the United States

Question 108 (China): In response to China's statement that, applying the Nails test, the USDOC found a pattern by reference to models, as well as by time-period, or by customer, the United States asserts that the USDOC did not seek to find patterns by reference to models in the challenged investigations. Instead, the United States argues that the results of model-specific comparisons were aggregated to make a determination about the respondent's (i.e. foreign exporter or producer) sales of the subject merchandise, i.e. the

[65] *See* Exhibit CHN-2, to which China has attached the SAS program logs and outputs for the challenged investigations, which contain references to all of the CONNUMs in the U.S. sales data reported by respondent interested parties.

[66] *See Certain Oil Country Tubular Goods from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 74 Fed. Reg. 59,117, 59,118 (November 17, 2009) ("OCTG OI Preliminary Determination") (Exhibit CHN-62); *Oil Country Tubular Goods from the People's Republic of China: Post Preliminary Determination Analysis of targeted Dumping: results for Tianjin Pipe (Group) Co. ("TPCO")*, at 3 (March 2, 2010) ("OCTG OI Post-Preliminary Analysis Memo") (Exhibit CHN-6) (BCI); OCTG OI Final I&D Memo, at Comment 2 (p. 11 of the PDF version of Exhibit CHN-77).

product under investigation. Can China please comment on these statements by the United States?

46. The first paragraph of China's response to question 108 asserts that "the description of the factual operation of the Nails Test that the United States has provided in order to rebut China's argument is flawed."[67] However, in the paragraphs that follow, China points to no flaws in the U.S. description of the factual operation of the *Nails* test. Instead, China describes the operation of the *Nails* test in a manner that is consistent with the U.S. description of its operation, and China then simply asserts, once again, that "USDOC's Nails Test identified the existence of a 'pattern' within particular 'models' but not in others."[68] China's response is circular and not supported by the evidence before the Panel.

47. The U.S. second written submission demonstrates, with specific references to USDOC's determinations themselves, that both the "standard deviation test" and the "gap test" utilized model-specific comparisons, while the conclusions USDOC drew from its application of the *Nails* test in the challenged investigations were made with respect to the "subject merchandise," *i.e.*, the product under investigation.[69] Although given the opportunity to do so, China has failed to respond to the U.S. argument and the evidence to which we have pointed.

Question 110 (China): The Panel refers to the Panel's question No. 22(b) following the first substantive meeting of the Panel with the parties. In posing that question, the Panel noted that in paragraph 41 of China's opening statement at the first substantive meeting of the Panel with the parties, China had argued that the extension of the WA-T methodology to all exports, "when the pattern appear[ed] only in specific models" and "in a defined sub-set of sales within those models" was disproportionate, arbitrary and potentially punitive.

In order to seek further clarification from China as to what it meant by its statement that the "pattern" appeared in a "defined sub-set of sales within those models" in the three challenged investigations, the Panel presented a hypothetical example to China in the Panel's question No. 22(b). The question is repeated below for the ready reference of the parties.

> **Can China please elaborate as to which data set it is referring to, when it refers to "a defined sub-set of sales within those models"? Is China referring to those CONNUMs where the alleged target price is not one standard deviation below the weighted average mean price? To illustrate this point, assume there are 10 CONNUMs of an investigated product. Of the 10, CONNUMs 1-5 are sold to both alleged targets and non-targets and therefore are included in the Nails test. CONNUMs 6-10 are excluded from the Nails test because they are not sold to both alleged targets and non-targets. Of the CONNUMs 1-5 that are used in the Nails test, the prices of CONNUMs 1 and**

[67] China's Responses to the Panel's Second Set of Questions, para. 65.

[68] China's Responses to the Panel's Second Set of Questions, para. 69.

[69] *See* U.S. Second Written Submission, paras. 73-78.

2 are not one standard deviation below the CONNUM-specific weighted average mean price and are therefore excluded from the price gap test. Ultimately, the USDOC finds that the alleged target prices in CONNUMs 3, 4 and 5 are one standard deviation below the CONNUM-specific weighted average mean price and that their aggregate volume represents more than 33% of total imports of the investigated product (represented by CONNUMs 1-5 that are sold to both alleged targets and non-targets). This satisfies the pattern test. In a hypothetical case like this, to which CONNUMs in China's view should the USDOC apply the WA-T methodology? To CONNUMs 1-5? Or to CONNUMs 3, 4 and 5? Or to some other combination? Please explain.

In paragraph 114 of its written response to this question, China stated that, in relation to this hypothetical example provided by the Panel, the WA-T comparison methodology "may only be applied to a *subset* of CONNUMs 3, 4 and 5, specifically, only to the targeted sales in the targeted CONNUMS 3, 4 and 5".

a. When China states that the WA-T methodology may be applied only to a "subset" of CONNUMs 3, 4 and 5 and specifically "targeted sales" in targeted CONNUMs 3, 4 and 5, what does China mean?

b. In the hypothetical example that was presented in the Panel's question No. 22(b) quoted above, the Panel assumed that the price to the alleged target in CONNUMs 1 and 2 were not 1 standard deviation below the CONNUM-specific weighted average mean price. Therefore, these CONNUMs were excluded from the price gap test. Accordingly, under the price gap test, the USDOC would examine only CONNUMs 3, 4 and 5.

Now, assume that in CONNUM 3, the alleged target price gap is lower than the weighted average non-target price gap. However, in CONNUMs 4 and 5, the alleged target price gap is higher that the weighted average non-target price gap. Therefore, the requirements of the price gap test are met in CONNUMs 4 and 5 but not in CONNUM 3.

Assume that the volume of export sales to the alleged target in CONNUMs 4 and 5 are more than 5% of the total volume of export sales made by the concerned exporter to the alleged target (represented by quantity of exports in CONNUMs 1-5 that are sold to both the alleged target and to non-targets). Therefore, the price gap test is passed.

In this hypothetical situation, will the WA-T methodology be applied to CONNUMs 3, 4 and 5 or only to CONNUMs 4 and 5?

c. Is it China's view that, where an investigating authority finds a pattern within the meaning of Article 2.4.2 of the AD Agreement based on a determination that only covers certain models of the investigated product,

the pattern would be limited to such models and the WA-T methodology would only be applied with respect to imports of such models? If so, please explain the legal basis for such an argument under Article 2.4.2 of the AD Agreement.

In China's view, could an investigating authority aggregate the results of such model-specific comparisons in order to make a determination for the entirety of the investigated product sold to an alleged target such that the WA-T methodology could be applied with respect to all exports of the investigated product to that alleged target? If so, please explain how such an aggregation is to be made. Please also explain in detail why in your view the USDOC's aggregation did not suffice to permit the application of the WA-T methodology to all exports of the subject product to the relevant targets.

48. In its responses to subparts (a) and (b) of question 110, China confirms that it takes the view that the permissible scope of application of the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is exceedingly limited. In its response to subpart (c), China reiterates the argument it has made since the beginning of this dispute, stating again that "China's position is that the exceptional W-T comparison methodology may only be applied to a *subset* of sales in those CONNUMs, namely to the AT sales only" because, in China's view, "it is only for those sales that a relevant pricing pattern, and thus targeted dumping, has been identified."[70] China suggests that it "spelt out in detail the legal basis for its position" in China's first written submission.[71]

49. The U.S. first written submission responded to the arguments presented in China's first written submission and demonstrated that they lack merit.[72] We respectfully refer the Panel to the detailed arguments presented previously in prior U.S. submissions.

50. We would emphasize, though, that when the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is further constrained, as China proposes. Rather, when the conditions have been met, the second sentence of Article 2.4.2 simply provides that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions."

51. Furthermore, as we have shown, China's position is premised on a flawed understanding of the meaning of the term "pattern."[73] A "pattern of export prices which differ significantly," in

[70] China's Responses to the Second Set of Panel Questions, para. 77 (emphasis in original).

[71] China's Responses to the Second Set of Panel Questions, para. 78.

[72] *See* U.S. First Written Submission, paras. 199-210; *see also* U.S. Second Written Submission, paras. 72-80.

[73] *See* U.S. First Written Submission, paras. 52-56.

the context of the second sentence of Article 2.4.2, 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 be different from something else. Thus, lower export prices, which likely do not differ significantly from one another, cannot form a "pattern of export prices which differ significantly" without reference to the higher export prices from which they differ significantly. Additionally, the relevant "pattern" cannot be exclusively the lower-priced export sales to one particular purchaser, or the "AT," as China suggests,[74] but instead must be the difference or differences between export prices to one purchaser and export prices to another purchaser, or the differences among multiple purchasers.[75] The term "pattern" cannot be understood to be synonymous with "target," as China argues it is.

52. Because China's understanding of the term "pattern" is flawed, its contentions concerning the scope of application of the alternative, average-to-transaction comparison methodology, which are premised on that flawed understanding, likewise are flawed themselves, and accordingly they must fail.

1.4 Use of zeroing under the WA-T methodology

Question 111: In paragraphs 91 and 92 of its second written submission, the United States asserts that:

> **It is crucial to recognize that, when the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, such as the meaning of the term "margin of dumping", those interpretations, on a basic level, are rooted in the text of the first sentence of Article 2.4.2 of the AD Agreement. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions." The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis".(footnotes omitted)**
>
> **There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met. Nothing in the text of Article 2.4.2 of the AD Agreement or the Appellate Body's prior interpretations of that provision supports China's proposed interpretation.**

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

[75] The same is true, of course, for regions and time periods.

b. To China. The Panel understands that the United States' argument is that the Appellate Body found the use of zeroing to be impermissible in the context of the WA-WA methodology and the T-T methodology on the basis of its interpretation of the text of the first sentence of Article 2.4.2. In particular, the United States submits that the Appellate Body found the use of zeroing under the WA-WA methodology to be impermissible on the basis of its interpretation of the phrase "all comparable transactions" in the first sentence of Article 2.4.2. The United States also contends that the Appellate Body found the use of zeroing under the T-T methodology to be impermissible on the basis of its interpretation of the phrases "a comparison" and "basis" in the first sentence of Article 2.4.2. The United States' argument is that these phrases which were interpreted by the Appellate Body to find zeroing to be impermissible under the first sentence of Article 2.4.2 are unique to the first sentence of Article 2.4.2 and are not repeated in the second sentence of Article 2.4.2, which is at issue in this dispute.

In this regard, can China please comment on this argument of the United States that because there is no "textual basis" in the second sentence of Article 2.4.2 similar to that found in the first sentence of Article 2.4.2, nothing in the "text of Article 2.4.2 of the AD Agreement or the Appellate Body's prior interpretations of that provision" supports China's proposed interpretation that the use of zeroing is impermissible under the second sentence of Article 2.4.2? Further, can China please also clarify how the text of the second sentence of Article 2.4.2 supports China's view that the use of zeroing is impermissible under the WA-T methodology described in the second sentence? In particular, can China please explain why in China's view the drafters of the AD Agreement did not include in the second sentence of Article 2.4.2 the textual elements of the first sentence of Article 2.4.2 on the basis of which zeroing has been found to be inconsistent under the WA-WA and T-T methodologies?

53. China begins its response to question 111(b) by asserting that "[t]he United States errs when it argues that there is no textual basis in Article 2.4.2, second sentence, for China's proposed interpretation that the use of zeroing is impermissible when applying the exceptional W-T comparison methodology under that provision."[76] China then, as it did during the second panel meeting, fails to point to anything in the *second sentence* of Article 2.4.2 that would support its proposed interpretation. Ultimately, China declines to answer the questions that the Panel has asked about the text of the *second sentence* of Article 2.4.2.

[76] China's Responses to the Second Set of Panel Questions, para. 83.

54. Instead, China makes a generalized reference to the "text and architecture" of Article 2.4.2 as a whole and the meaning of the terms "dumping" and "margin of dumping," even noting that the United States has acknowledged that those two terms have the same meaning across all provisions of the AD Agreement, including the second sentence of Article 2.4.2.[77] For complete clarity, the United States confirms, as it has before, that it agrees entirely with everything China has written in paragraphs 84 and 85 of its response to question 111(b).

55. However, it does not follow at all, as China suggests in the final two paragraphs of its response, that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is prohibited,[78] nor is it the case that the Appellate Body has previously made findings in this regard. The United States has discussed this matter extensively in prior submissions, statements, and responses to panel questions, and we respectfully refer the Panel to the arguments we have made before.[79] China has not rebutted the U.S. arguments, nor has China seriously attempted to grapple with the complicated interpretative questions before the Panel.

Question 112 (China): The Panel notes China's statement that the application of the WA-T methodology is authorized by the second sentence of Article 2.4.2 for the purpose of unmasking targeted dumping.[80] The Panel also notes China's argument that using different temporal bases in the determination of normal values means that mathematically different results will generally arise from the application of the WA-T methodology and the WA-WA methodology.[81] Can China please explain how, in its view, changing the temporal basis for calculating the normal value used in the application of the WA-T methodology or the WA-WA methodology, or both, will enable an investigating authority to unmask targeted dumping?

56. As we have stated previously, the United States seeks to assist the Panel in completing its task by explaining the reasoning underlying the challenged determinations and by articulating the proper interpretative analysis of the provisions of the covered agreements under consideration. China's arguments, on the other hand, do not assist the Panel in its efforts, nor does China meet its burden of establishing any alleged breach of the WTO Agreement.

[77] China's Responses to the Second Set of Panel Questions, paras. 84-85.

[78] *See* China's Responses to the Second Set of Panel Questions, paras. 86-87.

[79] *See* U.S. First Written Submission, paras. 211-316; U.S. Opening Statement at the First Panel Meeting, paras. 5-20; U.S. Responses to the First Set of Panel Questions, para. 52; U.S. Second Written Submission, paras. 81-105; U.S. Opening Statement at the Second Panel Meeting, paras. 7-12; U.S. Responses to the Second Set of Panel Questions, paras. 52-59.

[80] China's first written submission, para. 181.

[81] See, e.g. China's second written submission, para. 110.

57. In particular, the Panel's efforts are not assisted when China mischaracterizes the USDOC determinations in the challenged investigations, or distorts the arguments of the United States in this dispute, or misstates the findings of the Appellate Body in previous disputes.

58. China's approach to this dispute makes the Panel's work more difficult and places a tremendous, additional burden on the Panel to sort through the accuracy of China's assertions and arguments before even being able to evaluate their merits. This is not an efficient use of the resources of the dispute settlement system, which is under serious stress from the number and scope of disputes, as the Panel is well aware. China has maintained the same approach throughout the dispute, including in its final response to the Panel's final question on the use of zeroing under the alternative, average-to-transaction comparison methodology.

59. Yet again, China asserts that the Appellate Body "has repeatedly rejected in prior disputes" the U.S. mathematical equivalence argument.[82] The United States addressed the Appellate Body's prior findings related to mathematical equivalence in the U.S. first written submission, at the very beginning of this dispute.[83] There, we demonstrated that the Appellate Body's consideration of the mathematical equivalence argument in previous disputes neither supports rejection of the mathematical equivalence argument here nor compels it. China has steadfastly avoided responding to the U.S. arguments in this regard. Instead, China pretends that the United States never made them, and China even suggests that the United States itself ignores previous Appellate Body findings. China's approach is telling. China has no answer to the U.S. arguments, so it misrepresents them and misleads the Panel concerning what the Appellate Body has said previously.

60. China also makes a misleading argument when it contends that "it does not follow that, as a practical matter, an investigating authority would need to make sure that the application of the W-W and W-T comparison methodologies leads to different calculation results in every instance."[84] In the U.S. second written submission, the United States explained that:

> The United States does not argue that the alternative, average-to-transaction comparison methodology necessarily must yield a different outcome. The outcome may or may not be different, depending on the facts.
>
> As we have explained before, even if an investigating authority uses zeroing in connection with the alternative, average-to-transaction comparison methodology, as it should, there will be situations where the average-to-average and average-to-transaction comparison methodologies yield identical results. If individual export prices, despite differing significantly from each other, nevertheless are all above normal value, then both the average-to-average and average-to-transaction comparison methodologies would lead to a finding of no dumping, or a zero margin of dumping. Alternatively, if all of the export prices are below normal

[82] China's Responses to the Second Set of Panel Questions, para. 92.

[83] *See* U.S. First Written Submission, paras. 276-307.

[84] China's Responses to the Second Set of Panel Questions, para. 94.

> value, and thus no "masking" of dumping is occurring, the weighted average margin of dumping calculated under both the average-to-average and average-to-transaction comparison methodologies would be the same. In exceptional situations, however, where there is a pattern of export prices that differ significantly, with higher export prices above normal value and lower export prices below normal value, it is possible, as the Appellate Body has recognized, that dumping may be "masked."[85]

China simply ignores this passage from the U.S. second written submission.

61. China likewise ignores the extensive discussion in the U.S. first written submission and elsewhere regarding the correct interpretation of the second sentence of Article 2.4.2 that follows from a proper application of the customary rules of interpretation. In its response to question 112, China asserts again, as it did in its second written submission, that "the United States does not provide an interpretative pathway for the Panel to reconcile zeroing under the W-T methodology with the established jurisprudence that rejects the notion of dumping as a transaction-specific concept."[86] As we explained in the U.S. opening statement at the second panel meeting, "[e]verything about China's assertion is wrong."[87] China simply misrepresents to the Panel what the United States has argued. The logical explanation for this is that China has no answer to the U.S. argument.

62. As per Article 3.2 of the DSU and Article 31 of the Vienna Convention, the Panel's task is to arrive at a good faith reading of the ordinary meaning of the terms of the second sentence of Article 2.4.2 of the AD Agreement, in their context, and in light of the object and purpose of the AD Agreement. Throughout this dispute, China has utterly failed to explain how the second sentence of Article 2.4.2 *should* be applied. China never describes what an investigating authority should do to identify a pattern of export prices which differ significantly. Nor does China describe what an investigating authority should do to apply the alternative comparison methodology in a manner that would actually, in the words of the Appellate Body, "unmask targeted dumping."[88] Instead of working to help the Panel give meaning to the terms of the second sentence of Article 2.4.2, China aims to deprive that provision of any meaning at all. That has been China's approach all along, even in its final response to the Panel's final question on this issue.

63. For the reasons the United States has given, the Panel should reject China's flawed approach to interpretation, and should conclude that the text of the AD Agreement permits the

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[85] U.S. Second Written Submission, paras. 85-86 (citations omitted) (emphasis added).

[86] China's Responses to the Second Set of Panel Questions, para. 95; *see also* China's Second Written Submission, para. 111.

[87] *See* U.S. Opening Statement at the Second Panel Meeting, paras. 7-12.

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

use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

2 THE ALLEGED SINGLE RATE PRESUMPTION

Question 114: To China and the United States. What is the proper characterization of China's Working Party Report under Articles 31 and 32 of the Vienna Convention on the Law of Treaties? In responding to this question, please distinguish the paragraphs of China's Working Party Report that contain binding commitments from those that do not.

64. The United States and China appear to be in agreement that certain commitments in the Working Party Report are integrated into the WTO Agreement by virtue of Section 1.2 of China's Accession Protocol – and are thus treaty text.[89] Moreover, China appears to recognize, at least in principle, that the unincorporated portions may be relevant to interpreting the Accession Protocol as a subsidiary means of interpretation under Article 32 of the Vienna Convention on the Law of the Treaties (VCLT).[90] Thus, both parties appear to be espousing relatively similar interpretative frameworks.

65. Where the parties diverge though is in the application of that framework with respect to the Working Party Report in connection with the particular legal matters at issue in the current dispute. In particular, China appears to argue that the statements in the Working Party Report discussed in prior U.S. submissions have "no relevance for the interpretative question before a panel."[91] The United States of course disagrees. The United States also notes that China, in making this assertion, does not analyze or otherwise examine any of the specific language in the Working Party that has been cited by the United States in this dispute.

66. With China's lack of analysis in mind, the United States will summarize below the various ways that the Working Party Report is relevant to the interpretative issues in this dispute. The starting point is a fact that China itself acknowledges: namely, that a central question in this dispute is whether USDOC is entitled to presume, based on the legal and factual predicated provided by China's Accession Protocol and Working Party Report, that "Chinese respondents are part of a single entity."[92] The Working Party Report speaks to this question in two respects.

[89] China's Response to Panel Question 114, para. 97.

[90] China's Response to Panel Question 114, paras. 98-99. Indeed, China goes on to assert that certain passages in the Working Party Report, such as paragraph 151, reflect the "quid pro quo for the special rules set forth in Paragraph 15." China's Response to Panel Question 114, n. 70. The United States does not understand what a "quid pro quo" means in terms of an interpretative framework, and would not agree with this particular statement by China. Nonetheless, China's statement would appear to further confirm that China views non-incorporated language in the Working Party Report as potentially relevant in interpreting a party's obligations under the WTO Agreement.

[91] China's Response to Panel Question 114, para. 99.

[92] China's Response to Panel Question 114, para. 96.

67. First, portions of the Working Party Report provides specific context to Section 15 of China's Accession Protocol – and confirm the meaning ascribed to it by the United States: that the provision reflects that non-market economy conditions prevail in China – and the logical corollary that Members should therefore be entitled to presume that Chinese respondents are under the control of the Chinese state absent contrary evidence.[93] Indeed, China's position that the Working Party Report is irrelevant because it does not contain "some pertinence to the language being interpreted" is striking considering that the Working Party Report directly refers to Section 15 of the Accession Protocol and provide context as to the specific concerns that led to that provision.[94] For example, in its response to Panel Question 113(b), the United States discussed how paragraph 150 of the Working Report discussed Members' concerns with non-market economy conditions in China and paragraph 151 reflected how those concerns would be addressed by Members.[95] The text of paragraph 151 explicitly notes that it was in "response to these concerns … [that] members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following …." In other words, the Working Part Report is pertinent because it *explicitly* provides context on the rationale and operation of Section 15 of the Accession Protocol.[96]

68. Second, the Working Party Report also speaks directly to the nature of the Chinese economy, indicating, for example, that China *planned* to develop an economy where the State continued to play a predominant role.[97] While the United States will not repeats it prior arguments on this point, the United States does note that China even now has failed to address the text of specific paragraphs cited by United States to explain why they do not support a Member's treatment of firms as part of a China-government entity until established otherwise.

3 CHINA'S CLAIMS UNDER ARTICLES 6.1 AND 6.8, THE FIRST SENTENCE OF ARTICLE 9.4 AND PARAGRAPHS 1 AND 7 OF ANNEX II TO THE AD AGREEMENT

3.1 The alleged AFA Norm

Question 115: The Panel understands that, in China's view, the precise description of the alleged AFA Norm, as stated, among others, in paragraph 62 of China's opening statement at the second substantive meeting of the Panel with the parties, is:

[93] *See e.g.*, U.S. First Written Submission, para. 369.

[94] China's Response to Panel Question 114, para. 99.

[95] Para. 67.

[96] Indeed, the United States notes that the section heading for paragraphs 147-153 of the Working Party Report is "Anti-Dumping, Countervailing Duties." Working Party Report Section 13. These paragraphs are explicitly demarcated as having relevance for understanding the use of antidumping and countervailing measures with respect to Chinese imports.

[97] *See e.g.*, U.S. First Written Submission, paras. 369-371; U.S. Second Written Submission, paras. 195-197.

> **[W]henever [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it. (emphasis original)**
>
> **a. Please confirm whether the Panel's understanding is correct.**
>
> **b. Please explain whether the Antidumping Manual shows the precise content of the alleged AFA Norm.**
>
> **c. Please explain whether the US court decisions referred to in China's first written submission show the precise content of the alleged AFA Norm.**

69. The United States will first comment on China's response to part (a) of this question and then provide comments that collectively address China's response to parts (b) and (c).

Part (a)

70. China responds that the language quoted by the panel – which is taken from China's *seventh* submission in this dispute – is (finally) the accurate description of China's view of the precise content of China's alleged "Use of Adverse Facts Available Norm."[98] What China does not do is explain that if this is in fact a precise description of its norm, then how – as a procedural matter – can the alleged norm be sustained for purposes of dispute settlement? In particular, China does not address (i) how this alleged norm is within the panel's terms of reference, given that it was not identified in the request for panel establishment; (ii) how this formulation is sufficiently precise in stating the content of the alleged norm; and (iii) why China's failure to make a *prima facie* case with respect to this alleged measure by the time of the first panel meeting is consistent with the working procedures in this dispute.

71. Before turning to these procedural issues, the United States would emphasize that China *has no colourable legal argument* on how the conduct described in this most recent formulation – be it with respect to the as-applied claims within the scope of this dispute, or with respect to some type of "as such" challenge (which would not be within the scope of this dispute) – is inconsistent with the Antidumping Agreement. Rather than repeat all of the substantive U.S. arguments here, the United States would simply recall two points. First, the plain text of the AD Agreement, specifically Annex II, paragraph 7, states 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." China's alleged norm, which of course China itself drafted, seems to be

[98] *See* China's Response to Panel Question 115(a), para. 127. Prior to this submission, China had presented a request for panel establishment, a first written submission, an opening statement at the first meeting of the panel, a closing statement at the first meeting of the panel, answers to panel questions, and a second written submission. In other words, the Panel and the United States are trying to discerne the description of the alleged norm after no less than *six* prior submissions by China.

the same as what the AD Agreement explicitly authorizes. And second, in applying this language in the *US – Carbon Steel (India)* dispute, the Appellate Body confirmed that USDOC facts available determinations were not inconsistent with the AD Agreement.[99]

1. Inconsistent with the Measure Presented in China's Consultation and Panel Requests

72. First, China's response confirms that the alleged norm it is challenging in this dispute is not the same norm China listed in its Request for Consultations[100] and its Panel Request.[101] In those documents, China described the alleged norm as follows:

> When the USDOC considers that a producer or exporter has failed to cooperate by not acting to the best of its ability, it uses inferences that are "adverse to the interests of that party in selecting from among the facts otherwise available". China refers to USDOC's approach as the "Use of Adverse Facts Available".

73. There are two principal discrepancies. First, it appears there was no distinction between a trigger for the alleged norm and the norm itself, like China contends now. Second, the content of the alleged norm in the Request for Consultations and Panel Request concerned USDOC's use of adverse inferences – period; that is, it addressed the process used in reaching a decision. In contrast, the current description is not only about process, it also adds a new allegation with respect to the results of the process. In particular, China added the contention that under the alleged norm USDOC "selects … *facts* that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it...." Thus, China appears to expand its claim to encompass not simply the use of adverse inferences, but the use of adverse facts.

74. In pointing out this procedural deficiency, the United States does not intend to imply that adding a "results" element to the alleged norm somehow strengthens China's substantive arguments. To the contrary, it most certainly does not. Indeed, the United States recalls that the pertinent language in the AD Agreement explicitly authorizes a particular type of result: "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."[102]

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[99] *US – Carbon Steel (AB)*, paras. 4.425-4.22, 4.483, and 6-5.1(f).

[100] China's Request for Consultations, para. 19.

[101] China's Panel Request, para. 21.

[102] AD Agreement, Annex II, para. 7 (emphasis added).

75. Given that China now states that the selection of purportedly adverse facts is a key aspect of the alleged norm[103] – China is seeking findings on a measure that was not identified in China's Panel Request and thus is not within the panel's terms of reference.[104] This failure cannot be cured by China's progressive clarification in its submissions and responses to the Panel's questions.[105] To the contrary, such a failure is jurisdictional and must result in the dismissal of China's claims against the alleged AFA norm.[106]

2. Lack of Precise Content

76. As described in more detail below, throughout this dispute, China has modified the contents of its alleged norm, in an apparent attempt to save its "as such" challenge in response to each time the United States points out that a prior formulation had major legal and/or factual deficiencies. As noted above, the newest formulation – as a substantive matter – supports no colorable legal claim under the AD Agreement. In addition, even this final allegation is deficient in terms of alleging an unwritten measure in that it lacks a precise description of the alleged norm. Or put another way, it remains clear that the content of China's alleged norm remains impermissibly vague.[107]

77. Specifically, among other issues touched upon in the U.S. response to this question and as discussed at length in U.S. submissions, China has failed to explain what renders a selected

[103] *See e.g.*, China's Response to Panel Question 66, para. 363 ("Indeed, China considers that the making of inferences is a natural part of any adjudicative or quasi-adjudicative process. China's claims instead focus on the process under which USDOC selects adverse facts…")

[104] *See US – Carbon Steel*, para. 8.11; *Brazil – Aircraft*, para. 7.10 ("we consider that a panel may consider whether consultations have been held with respect to a 'dispute', and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute."); .

[105] *US – Continued Zeroing*, para. 169 ("Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submission of the parties during the panel proceedings."); *EC and certain member States – Large Civil Aircraft (AB)*, para. 642 (""[A] party's submissions during panel proceedings cannot cure a defect in a panel request. We consider this principle paramount in the assessment of a panel's jurisdiction. Although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing.")

[106] *US – 1916 Act (AB)*, para. 54 ("However, we also agree with the Panel's consideration that 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.' We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'. The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings."); *see also EC – Fasteners (AB)*, para. 561.

[107] *See* U.S. First Written Submission, paras. 411-419; U.S. Second Written Submission, paras. 164-175.

fact adverse – or even pointed to any selected fact as an example of an "adverse fact."[108] China's newest description of its alleged norm only serves to confirm this deficiency.

3. Failure to Make a *Prima Facie* Case by the Time of the First Panel Meeting.

78. It is notable that China is confirming that its opening statement *at the Second Panel Meeting* – in its seventh submission (counting the panel request) in this dispute – sets forth the precise description of its alleged norm. As explained below, China's position regarding the content of its purported norm has been ambiguous or shifting throughout this dispute, undermining the United States' rights to due process. Moreover, this is not the first time that China has attempted to develop its arguments at a fairly late phase in a dispute – or to clarify a fundamental aspect of its claim through a response to a panel question rather than its submissions. The Appellate Body's analysis in *EC – Fasteners* addressed a similar situation and is instructive in explaining that why such conduct is impermissible in WTO dispute settlement:

> Rule 4 of the Panel's Working Procedures requires that, "[b]efore the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments." As described above, the Panel record shows that China asserted its claim under Article 6.5 regarding the lack of a "good cause" showing for the confidential treatment of Pooja Forge's questionnaire response only in response to questions from the Panel, and articulated this claim only after the parties had provided the Panel with written submissions and had attended a substantive meeting. We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law. …
>
> In the light of the above, we find that China failed to substantiate its claim under Article 6.5 of the Anti-Dumping Agreement that the confidential treatment of the "product type" information submitted by Pooja Forge in its questionnaire response was improper. Therefore, we *reverse* the Panel's finding, in paragraph 7.525 of the Panel Report that the European Union acted inconsistently with its obligations under Article 6.5 of the Anti-Dumping Agreement "with respect to the treatment of confidential information submitted by Pooja Forge"[109]

Like *EC – Fasteners*, China here is belatedly attempting to present a key component of its *prima facie* case – the description of the alleged unwritten measure at issue – principally in response to questions from the Panel, well after the first panel meeting. Because such an attempt is

[108] *See e.g.*, U.S. First Written Submission, paras. 457-458; U.S. First Opening Statement, paras. 59-60; U.S. Second Written Submission, paras. 166-172.

[109] *EC – Fasteners (AB)*, paras. 574-575.

inconsistent with the Panel's Working Procedures[110], China's claim against the alleged AFA norm cannot be sustained for this reason as well.

79. To be clear, the United States recognizes that a party's *arguments* may evolve over the course of a dispute. The problem here is that a party must make out its *prima facie* case by the time of the first panel meeting, and the *prima facie* case with respect to an unwritten measure must necessarily **start** with the alleged content of the unwritten measure. Given that China had not even identified the alleged unwritten measure at issue until the second panel meeting – and even then left it insufficiently precise – China most certainly did not make out a *prima facie* case by the first panel meeting. Instead, China has made vague allegations regarding a supposed and unspecified unwritten measure, and then repeatedly adjusted the alleged content of that measure in an (unsuccessful) attempt to respond to U.S. explanations with regard to why China in prior submissions has shown neither the existence of any unwritten measure, nor any breach of the WTO Agreement. Enforcement of the Working Procedures in this regard, as the Appellate Body found in *EC-Fasteners* – is particularly important because otherwise the responding party would be deprived of notice of the claims against it and, correspondingly, of an opportunity to address those claims.

80. Here, the United States has been deprived of notice because China has failed to identify the precise content of the alleged norm in any defined manner. Specifically, as shown below, China speaks of its purported norm as encompassing a "process" where by purportedly "adverse facts" are selected, but provides no indicia as to any aspect of the "process" or what constitutes an "adverse fact" selected by it – other than that USDOC utilized an adverse inference and considered a respondent's non-cooperation, which the Appellate Body has recognized is perfectly permissible.[111]

- Under this norm, whenever USDOC finds non-cooperation by the NME-wide entity, it follows a process that is designed to select adverse information, i.e., information resulting in high rates, from amongst the available secondary source information.[112]

- In anti-dumping proceedings involving NMEs, USDOC applies this authority in a particular manner: namely, whenever USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically uses inferences that are adverse to the interests of the NME-wide entity, and each of the producers/exporters included within that fictional entity, by selecting adverse information from amongst the

[110] Working Procedure Rule 6 ("Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.").

[111] *US – Carbon Steel (India)*, paras. 4.468 & 4.483.

[112] China's First Written Submission, para. 404

> secondary source information available. China refers to this practice as the "Use of Adverse Facts Available" norm.[113]

To address this deficiency, China has since the first panel meeting provided various "Visual Aids"[114] and other exhibits and explanations to try and clarify its position. The United States submits these subsequent materials are deficient on their face as they fail to address any aspect of the purported process or what rendered a particularly selected fact "adverse," but in any event, they were not submitted by the time of the first panel meeting.

81. Indeed, the failure by China to articulate the precise content of the alleged norm can also be established in its response to panel question 115(c). China notes that that under the alleged norm, there happen to be multiple "selection methods" through which USDOC uses adverse facts available, but provides no boundaries on what those selection methods may be.[115] For example, China explains that the Antidumping Manual[116] "reveals one way in which USDOC uses adverse inferences and selects adverse facts available for NME-wide entities."[117] According to China, "the norm's *precise content is not limited to this specific selection method*…"[118] But then what is it limited to or consist of? Essentially, China argues that the purported process in the alleged norm is any multitude of undefined ways through which USDOC applies facts available. The United States cannot reasonably be expected to defend against a variety of undefined scenarios whenever facts available is applied. Indeed, rather than demonstrating the existence of a norm, such a broad assertion simply confirms that China has not articulated a norm, but is simply complaining about any instance where facts available was applied.

82. China as master of its claim may frame it as it see fits, but (i) the content of the alleged unwritten measure must be set out in China's request for panel establishment, and cannot be modified throughout the proceeding; (ii) the *prima facie* case with respect to the alleged measure must be made by the time of the first panel meeting, and no *prima facie* case can be made without a full identification of the measure, and (iii) China must still prove – that as a factual matter – there exists an unwritten measure consisting of a rule or norm of general application that meets China's description. If China cannot identify with the requisite precision the content of

[113] China's First Written Submission, para. 428.

[114] *See e.g.*, Visual Aids NME 4 & 5.

[115] *See* China's Response to Panel Question 115, paras. 130-133.

[116] As the United States notes in its comments to China's response to Question 115, that particular statement from the Antidumping Manual is facially deficient in proving anything regarding the norm because it does not relate to the norm, but the supposed finding of non-cooperation by the China-government entity.

[117] *See* China's Response to Panel Question 115, para. 130.

[118] *See* China's Response to Panel Question 115, para. 131 (internal footnote omitted) (emphasis added).

the alleged norm, then China has failed to demonstrate that there exists an unwritten measure that consists of a rule or norm of general and prospective application.[119]

Parts (b) and (c)

83. China's response demonstrates that neither the Antidumping Manual nor the referenced court cases support the existence of an unwritten rule or norm that matches China's description of the supposed U.S. measure. Specifically, rather than address what specific content in the Antidumping Manual or court cases goes to establishing the content of the alleged norm, China simply states that the "Antidumping Manual helps confirm this understanding of the precise content of the norm"[120] and that both the Antidumping Manual and court cases "lend weight" to the "understanding of the precise content of the norm."[121] Such a statement though is contingent on China having clearly articulated the precise content of them and then showing what precisely in the Antidumping Manual or court cases establish that such content indeed exists. China has not done so.

84. While China argues that the Antidumping Manual only "tends to confirm" its alleged norm,[122] even that limited contention is incorrect. Here, the specific statement in the Antidumping Manual that China finds probative provides that USDOC may use "adverse facts available" for NME-wide entities if it finds that "some exporters that are part of the NME-wide entity do not respond to the antidumping questionnaire." But such a statement only goes, at most, to what China describes as the trigger for the application of the alleged norm[123] – the finding of non-cooperation – rather than the content of the alleged norm itself.[124]

85. China fares no better with respect to the court cases it references.

- With respect to *Peer Bearing*, China states that it "lends weight to the understanding of the precise content of the norm" but admits that case, like the

[119] As discussed below with respect to China's responses to Questions 116 and 135, China's consistent references to the alleged "presumptions" upon which the alleged norm is triggered, while at the same time insisting that it is not challenging the trigger condition of the norm, only further confuses China's claims.

[120] *See* China's Response to Panel Question 115, paras. 130-131.

[121] China's Response to Panel Question 115, paras. 128 and 132.

[122] *See* China's Response to Panel Question 115, para. 131.

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

[124] The United States briefly notes again that the Antidumping Manual should not be construed as the type of evidence that can even be used to prove the existence of a norm and general and prospective application, particularly considering its explicit disclaimer against being construed as representing USDOC policy. Chapter 1, Department of Commerce 2009 Antidumping Manual, p. 1 (Exhibit USA-28). Import Administration has subsequently been renamed Enforcement & Compliance. See Import Administration; Change of Agency Name, 78 Fed. Reg. 62,417 (Oct. 22, 2013) (Exhibit USA-29).

Antidumping Manual, does not show norm's precise content.[125] Moreover, the statements in that case cut against the contentions China has made regarding the alleged norm. Specifically, the decision states that USDOC cannot assign a margin that is "punitive" by rejecting "low-margin information in favor of high-margin information that is demonstrably less probative of current conditions."[126]

- With respect to the *Hubbel Power Systems* decision, China asserts it "tends to confirm the rigidity of USDOC's use of adverse inferences to select adverse facts available." China conspicuously refrains though from stating that the case demonstrates the purported invariable application of the norm.[127] In *Hubbel Power Systems*, the court refrained from reaching the issue of the selection of facts available and thus, the court opinion cannot be construed as supporting the existence of the alleged norm.[128]

- With respect to the *East Sea Seafoods* decision, it notes that "USDOC *almost* always selects [NME entity rates] using an adverse inference."[129] As an initial matter, China forgets that the context of that statements is decisions to date, meaning the past, not the future. In any event, China's threshold is higher still. It must provide that the norm will *invariably* be applied. The caveat that USDOC "almost always" highlights that invariability does not exist.

86. Finally, China's reliance on the panel's finding in *US – Shrimp II (Viet Nam)* that "the very nature of a rule or norm of general application is that it *applies independently of the specific factual circumstances of a particular case*"[130] fails to support China's argument. Indeed, this finding is fully consistent with the U.S. view of what a complaining party needs to show in order to establish the existence of an unwritten rule or norm of general application. As the United States has explained, China's claim is seemingly based on the premise that whenever a particular set of circumstances presents itself, USDOC applies the same response.[131] But although USDOC may reach the same conclusion based on a similar set of facts, the determination to apply facts available to the China-government entity, and its selection of the rate to apply to the China-government entity, continues to be a case-by-case determination that will reflect the facts of a

[125] *See* China's Response to Panel Question 115, para. 132.

[126] *Peer Bearing Co. v. Changshan*, 587 F.Supp.2d 1319, 1329 (Ct. Int'l Trade 2008) (Exhibit CHN-163).

[127] *See* China's Response to Panel Question 115(c), para. 135.

[128] *Hubbell Power Systems, Inc. v. United States*, 884 F.Supp.2d 1283, 1294 (Ct. Int'l Trade 2012) ("The court, however, need not reach the merits of this issue at this stage....") (Exhibit CHN-148).

[129] *See* China's Response to Panel Question 115(c), para. 135 (emphasis added).

[130] *See* China's Response to Panel Question 115(c), para. 137 (citing *US – Shrimp II (Viet Nam)*, para. 7.128) (emphasis added).

[131] *See* U.S. First Written Submission, paras. 411-419.

given case. A rule or norm that is only "triggered" when a very particular set of facts present themselves, does not suffice to show the existence of "a rule or norm of general application …[which] applies independently of the specific factual circumstances of a particular case". Instead, China is simply describing a similar set of outcomes that result from *similar, and very specific, factual circumstances*. In these circumstances, the similarity of result is likely to follow from the similarity of the facts, and much more is needed to show that some separate, independent unwritten measure led to these results.

87. In contrast, for example, the Sunset Policy Bulletin at issue in *US – OCTG Sunset Reviews* was found to constitute a norm of general and prospective application, in part because it was found to apply in *all sunset reviews*. In other words, rather than the possibility of a particularized decision that might be contingent on specific facts and evidence in a given sunset review, the SPB would be applied "to all the sunset reviews conducted in the United States."[132] Likewise, the methodology at issue in *US – Zeroing (Japan)* was found to constitute a norm of general and prospective application, in part because, no matter the facts and circumstances, the methodology was found to apply in *all antidumping proceedings*.[133] Here, China is not alleging that the purported norm applies in *all NME proceedings*.[134] China instead is alleging that the purported norm applies in those specific NME proceedings in which USDOC finds the entity to be non-cooperative for one reason or another (or in some way "implies" non-cooperation"), and, in selecting from among the available information to determine a rate for the entity – a selection process that also depends entirely on the facts and circumstances – USDOC relies on some vague and undefined "adverse facts." China's alleged norm is thus merely a summarization of cases that have certain similar facts, and in which USDOC applied a similar result.

88. In short, China continues to try to use the unwritten nature of the alleged norm to its advantage by failing to identify the precise content of the alleged norm. However, as the United States has explained, the fact that China has chosen to allege the existence of an unwritten measure should raise, not lower, China's burden on its "as such" claim.[135]

[132] *US – OCTG Sunset Reviews (AB)*, para. 187.

[133] *See US – Zeroing (Japan)*, para. 7.50-7.54.

[134] *See* China's Response to Panel Question 115(c), para. 136.

[135] *See* U.S. First Written Submission, paras. 411-419; U.S. Second Written Submission, paras. 164-175.

Question 116: To China. Please list all the USDOC's anti-dumping determinations on the record of this dispute (both those that are challenged "as applied" in these proceedings and those that have been submitted exclusively in support of China's claim regarding the alleged AFA Norm) that, in China's view, constitute evidence of the general and prospective application of the alleged AFA Norm. In responding to this question, explain which of these determinations demonstrate the first, second and third presumptions described in paragraph 491 of China's first written submission. Please note that what the Panel expects in response to this question is a listing of the determinations on the basis of the presumptions to which they allegedly pertain.

89. China's response does not establish the existence of the purported presumptions Notably, while China insists that it is not challenging USDOC's resort to facts available as part of the AFA norm, China makes assertions with respect to the alleged presumptions upon which the resort to facts available was purportedly based. Yet, China has not explained how these alleged presumptions are relevant to its claims against the purported norm. In other words, China does not address why these alleged presumptions are relevant to establishing the existence of the purported norm

90. Furthermore, as the United States has previously explained, in the cited determinations USDOC's resort to facts available after finding necessary information was missing from the record *was supported by facts and circumstances in each case, and was not based on China's so-called presumptions.*[136] For instance, in 5 investigations[137] and 1 review,[138] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information. In 7 investigations,[139]

[136] *See, e.g.*, U.S. First Written Submission, Section VII.D.1.

[137] Shrimp OI, Solar OI, Steel Cylinders OI, Tires OI, and Wood Flooring OI. [Exhibits CHN-37, CHN-14, CHN-41, CHN-49] *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 141; U.S. Second Written Submission, paras. 273-276. In Shrimp OI, USDOC's recourse to facts available was also based in part on the failure of the Chinese government to respond to a request for information. *See* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 149.

[138] Ribbons AR3 (Exhibit CHN-52). *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 141; U.S. Second Written Submission, paras. 273-276. As discussed in paragraphs 142 and 143 of the U.S. Response to First Panel Questions, the failure of a mandatory respondent to cooperate was an additional ground for USDOC's finding of noncooperation of the China-government entity in Ribbons AR3. In Solar AR1, one of the new challenged determinations, USDOC found the China-government entity non-cooperative because of the failure of certain companies within the entity to respond to a request for quantity and value information. *See* Solar AR1 Preliminary Decision Memo at 2, 17-18 (Exhibit CHN-488), unchanged in Solar AR1 Final Determination, 80 FR at 40999 (Exhibit CHN-489). Assuming *arguendo* that the Panel finds this determination within its terms of reference, China's claims with respect to this determination are without merit.

[139] Aluminum OI, Coated Paper OI, Diamond Sawblades OI, Furniture OI, OCTG OI, Retail Bags OI, and Ribbons OI (Exhibits CHN-32, CHN-12, CHN-45, CHN-58, CHN-13, CHN-53, CHN-33). *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 141; U.S. Second Written Submission, para. 277. In Diamond Sawblades OI and Furniture OI, the recourse to facts available was also based in part on the failure of the Chinese government to respond to requests for information. *See* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 149.

USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information and to respond to the dumping questionnaire. In one investigation[140] and 5 reviews,[141] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to the dumping questionnaire.

91. In short, USDOC's resort to facts available was driven, in each case, by the facts and circumstances before it. China's characterizations otherwise that these determinations are based on presumptions are flatly contradicted by this record evidence, and should accordingly be disregarded by the Panel.[142]

Question 117: In a number of anti-dumping determinations placed on the record, the USDOC makes the following statements: (a) the USDOC's "practice, when selecting an [adverse facts available] rate from among the possible sources of information, has been to ensure that the rate is sufficiently adverse 'as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the [USDOC] with complete and accurate information in a timely manner'"; and/or (b) "[i]n selecting a rate based on [adverse facts available], the [USDOC] selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated". In such determinations, the USDOC also explains its "practice" to select as "adverse facts available" or "AFA" the higher of the highest margin alleged in the petition or the highest calculated rate of any respondent in the investigation.

> **a. To China. Without prejudice to any evidentiary value that the Antidumping Manual and the US court decisions may have with respect to the general and prospective application of the alleged AFA Norm, can China please explain whether the specific anti-dumping determinations on the record suffice to show the general and prospective application of the alleged AFA Norm? Please respond to this question in light of the Appellate Body's statement in *EC – Zeroing (EC)* that the evidence before the panel in that dispute to establish the existence of a norm of general and prospective application "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".**

[140] PET Film OI (Exhibit CHN-56). *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to Panel Questions, para. 141; U.S. Second Written Submission, para. 278.

[141] Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, and Shrimp AR8 (Exhibits CHN-35, CHN-36, CHN-59, CHN-38,CHN-39). *See also* U.S. First Written Submission Section VII.D; United States' Response to Panel Questions, para. 141.

[142] With respect to the so-called third presumption, see China's First Written Submission, para. 491, the United States discusses in further detail in Question 120 that there is no such "presumption" because pulling-forward a previous rate does not equate to a finding of non-cooperation in any form (presumed, ongoing, implicit, etc.).

92. Despite China's lengthy exhibit and response to the Panel's question, China fails to demonstrate how its list of determinations establishes anything beyond a string of cases. In fact, China itself concedes that the cases alone do not demonstrate the general and prospective application of the norm and instead must be viewed "holistically" with the other evidence before the Panel.[143] But China does not explain why the deficiencies in evidence would become any less so simply because China has submitted other deficient evidence.

93. As the United States explained in response to Panel Question 115, the evidence before the Panel does not support the existence of China's alleged norm. In particular, the determinations do not demonstrate the general and prospective application of China's alleged norm by showing the norm's "invariable application," Nor do, as China alleges, the determinations show any reliance on its past decisions as a "justification and motivation" for its decision in a particular case. Nor do the determinations describe USDOC's actions in "normative terms." All three of China's arguments fail.[144]

94. First, China argues that this string of cases shows the "invariable application" of its alleged norm. But China fails to rebut that, as the United States has previously explained, the cases merely show that when a party fails to provide necessary information, USDOC may select from among the facts available, applying an adverse inference.[145] As the Appellate Body noted, and China highlighted, "what an agency '*does*' must confirm that the relevant conduct reflects a deliberate policy."[146] An examination of the "totality of the evidence", as China urges, demonstrates that USDOC's actions are wide-ranging and do not support its alleged norm.[147]

95. Second, China argues that USDOC relies on past decisions as a "justification and motivation" for its decision in a particular case. The evidence, however, does not support China's characterization of USDOC's decisions. USDOC's explanation of its practice provides background on what USDOC has done, when confronted with similar circumstances, *in the past*. USDOC's statements are not a justification or motivation for what will be done in the future. In fact, those statements may not even reflect USDOC's action in the challenged determination, as in the *Steel Cylinders OI*. As China pointed out in the Second Hearing, in *Steel Cylinders OI*, USDOC stated that: "It is the Department's practice to select, as AFA, the higher of the: (a) Highest margin alleged in the petition; or (b) the highest calculated rate of any respondent in the investigation."[148] And USDOC cited to previous determinations, which China claims USDOC

[143] *See* China's Response to Panel Question 117(a), para. 159.

[144] China's Response to Panel Question 117(a), para. 158.

[145] U.S. First Written Submission, para. 474.

[146] *See* China's Response to Panel Questions, para. 172 (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 85) (emphasis added).

[147] *See* China's Response to Second Set of Panel Questions, para. 189.

[148] *See* Steel Cylinders OI, 76 Fed. Reg. 77964, 77971 (Dec. 15, 2011) (Exhibit CHN-65).

uses as justification for its actions.[149] Yet, USDOC did not follow the statement cited by China and instead selected facts available based on transactional information from a cooperating respondent, demonstrating that China's selected statements from USDOC's determinations neither reflect a practice, nor an "invariable application."[150]

96. Third, China states, without any support, that USDOC's use of the word "practice" is "normative" and therefore supports the existence of a norm. China makes conclusory statements that "practice" is a normative word without further explanation of its meaning or significance. As the Panel found in *US – Steel Plate (India)*, "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."[151] In short, USDOC's statements reflect its past action and do not meet the high burden of proving the existence of a general and prospective norm.

Question 119: To China and the United States. Is there, under US anti-dumping law/practice, a way, other than through the alleged Single Rate Presumption challenged in these proceedings, to define an NME-wide or a similar entity in anti-dumping proceedings involving NME countries?

97. China's response to Question 119 is not responsive to the panel's query regarding the existence of mechanisms under U.S. law to treat certain affiliated producers and exporters as an NME wide entity.[152] Instead, China appears to be complaining about its status as a non-market economy under U.S. antidumping law, noting it "is concerned that, for as long as this view [that China is an NME for purposes of U.S. law] persists, the United States may seek to continue elements of its NME methodology and the Use of Adverse Facts Available norm, even if it withdraws the Single Rate Presumption."[153] That issue, however, has no relation to the issues and claims in this dispute, including the present one raised by the Panel.

98. Moreover, China appears to raise its same faulty arguments that the Panel should adopt wholesale the Appellate Body's findings in *EC – Fasteners*.[154] But as the United States has established, such an approach would be incorrect not only because that dispute involved a different Member's measure and therefore different facts, but also because of the differing legal and factual basis for USDOC's treatment of certain Chinese companies as part of a single China-government entity reflected in Section 15 of China's Accession Protocol and relevant paragraphs

[149] *See* Steel Cylinders OI, 76 Fed. Reg. 77964, n.68 (Dec. 15, 2011) (Exhibit CHN-65).

[150] *See* Steel Cylinders OI, 76 Fed. Reg. 77964, 77971 (Dec. 15, 2011) (Exhibit CHN-65).

[151] *See US – Steel Plate (India)*, para. 7.15; *see also* U.S. First Written Submission, paras. 343-354 and 407-409.

[152] We therefore refer the Panel to the U.S. Response to Panel Question 119, paras. 89-90.

[153] China's Response to Panel Question 119, para. 176.

[154] *See* China's Response to Panel Question 119, para. 175.

of the Working Party Report.[155] Additionally, as the United States has explained in its prior submissions, regardless of these distinctions, the Appellate Body's findings appear to result in certain irreconcilable inconsistencies that should call into question the persuasiveness of extending any analysis from that decision into the instant dispute.[156]

Question 120: The Panel notes that China has described the trigger of the alleged AFA Norm as a finding of non-cooperation by the NME-wide entity. The Panel also notes that the USDOC does not appear to have made a finding of non-cooperation in 13 of the determinations submitted by China as evidence of the existence of the alleged AFA Norm.[157] Could China please elaborate on its position that the alleged AFA Norm was nonetheless applied in these determinations?

99. In its response, China contends that by "pulling-forward" and reassigning the same rate as a previous proceeding which was based on facts available, USDOC "effectively applied" the same selection of adverse facts available in these 13 reviews. Thus, according to China, although there is no "express finding of non-cooperation" in these reviews – the trigger condition for the alleged AFA norm – these reviews nonetheless are subject to the alleged AFA norm because USDOC applied a "presumption of ongoing non-cooperation."[158]

100. As an initial matter, the United States notes that China's response indicates that China is no longer arguing that the alleged norm is triggered by a finding of non-cooperation alone. Rather, China now asserts that the alleged norm can be additionally triggered when USDOC does *not* make a finding of non-cooperation and reapplies the same rate from a prior proceeding which was based on facts available. This appears to be a new re-characterization of the trigger.

101. As the United States has explained, and as recognized by the panel in *US – Shrimp II (Viet Nam)*, applying a rate that has previously been determined in a prior proceeding does not equate to a determination that is subject to the disciplines of Article 6.8 and Annex II.[159] China has failed to explain why the *US – Shrimp II (Viet Nam)* panel's analysis is incorrect. Moreover, as a factual matter, there is a marked contrast between these 13 reviews in which USDOC made no finding of non-cooperation and pulled-forward a prior rate, and those prior proceedings in which USDOC sought information from the China-government entity, and the China-government entity failed to respond, which led to a finding of non-cooperation.

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[155] *See* U.S. Response to Panel Question 38, paras. 100-105; U.S. Second Written Submission, paras. 193-200; *see also* U.S. Response to Panel Question 113, paras. 60-70.

[156] *See* U.S. Response to Panel Question 40, paras. 106-110; U.S. Second Written Submission, paras. 197-198.

[157] *Diamond Sawblades* AR1; *Diamond Sawblades* AR2; *Diamond Sawblades* AR3; *Wood Flooring* AR1; *Wood Flooring* AR2; *Ribbons* AR1; *Bags* AR3; *Furniture* AR8; *Steel Nails* AR 2011-2012; *Warmwater Shrimp from Vietnam* AR 2009-2010; *Polyester Staple Fiber* AR 2008-2009; *Cased Pencils* AR 2006-2007; and *Cased Pencils* AR 2007-2008.

[158] China's Response to Panel Question 120, paras. 177-183.

[159] *See* U.S. Second Written Submission, paras. 258-263.

102. Finally, at its core, China's assertion that there was an "implicit" finding of non-cooperation in these 13 reviews rests on the flawed premise that USDOC selects facts available any time it does not issue questionnaire responses to every single company within the China-government entity to determine the rate for the entity. As the United States has previously established, China has not demonstrated, as a threshold matter, that this was required in these reviews, let alone that this request for information was required pursuant to Article 6.8 and Annex II. By its plain terms, Article 6.8 applies "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation[.]" In short, China not only has failed to explain that the alleged AFA norm was triggered in these 13 reviews – which should further call into question the existence of the norm – but has also failed to explain how the subset of seven (7) challenged reviews from among these 13 are inconsistent with Article 6.8 and Annex II.

Question 121: Please explain, in general, the characteristics a measure must possess in order to qualify as a norm that has general and prospective application for purposes of WTO dispute settlement.

103. China's response to this question is misplaced for two reasons. First, China addresses what may constitute a measure susceptible to challenge in dispute settlement generally rather than address the specifics of the challenge it is bringing here: against an alleged unwritten norm of general and prospective application. Second, China incorrectly states because a particular scenario might arise again or with respect to different actors, then China has established that the purported norm has general and prospective application. As discussed below, both of China's assumptions are erroneous.

104. With respect to the first point, China emphasizes that any act or omission that it is attributable to a Member can be subject to WTO dispute settlement and that the act or omission does not need to take the form of a written instrument.[160] The United States does not disagree. The issue though is that China is not simply seeking to bring an "as-applied" claim against a particular act or omission but is basing its challenge on the alleged existence of an unwritten norm of general and prospective application that it is challenging "as such." To prove the existence of such a norm, it is not sufficient to simply identify a particular act or even a string of acts. Rather China must demonstrate that there exists an unwritten measure with independent operational effect that is resulting in the particular acts or omissions. [161]

105. With respect to general application, China's position would allow this requirement to be satisfied by a complaining party simply showing uncertainty as to whether it will be applied to other actors or in the future. As the Appellate Body as recognized, however, general application

[160] China's Response to Panel Question 121, paras. 102-106.

[161] *US – Shrimp II (Viet Nam)*, para. 7.128 ("the very nature of a rule or norm of general and prospective application is that it applies independently of the specific factual circumstances of a particular case.")

is not about uncertainty but rather the opposite: the measure increases certainty that all actors will be subject to the measure at issue.[162]

106. Likewise, China encourages the panel to establish prospective application by simply looking at whether a string of prior acts exists. The Appellate Body and panels have rejected this type of analysis though.[163] Prospective application inherently is about future application and needs to be sustained on the basis of evidence that demonstrates as much. Past acts, standing alone, do not meet this requirement. As is intuitive, the only thing proven by consistent results is the fact of consistent results.

Question 122: To China. In paragraph 71 of its opening statement at the second substantive meeting of the Panel with the parties, China argues that each time the USDOC is faced with a proceeding in which it deems the NME-wide entity to be non-cooperating, the USDOC's "conduct is guided by the Use of Adverse Facts Available norm applied in previous determinations and affirmed by US courts". Please explain whether a norm of general and prospective application would be one that requires the USDOC to act in a particular way or, merely, one that would guide the USDOC in its determinations.

107. China responds, in short, that measures do not need to have legally binding force under a Member's domestic law in order to be susceptible to dispute settlement.[164] The United States does not disagree with this general proposition, nor is this an element of the U.S. response to China's facts available claims. Rather, the United States very much disagrees that China has shown the existence of any alleged AFA rule or norm of general and prospective application, or that any of USDOC's conduct within the scope of this dispute is inconsistent with U.S. obligations under the WTO Agreement.

108. Further, the United States does not agree with the reasoning used in China's response to this question. For example, China relies on the phrase "security and predictability" – presumably drawing on the statement in DSU Article 3.2 that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." But China's reliance on the phrase "security and predictability" is misplaced, and China's reasoning based on this language does not shed any light on what types of measures are subject to "as such" challenges in WTO dispute settlement. In particular, China asserts a general "objective of protecting the security and predictability needed to conduct future trade." But that phrase is not contained in the DSU, nor elsewhere in the WTO Agreement, and is not a basis for reaching any particular conclusions. China also states that conduct subject to norms may be "predictable."

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[162] *US – OCTG Sunset Reviews (AB)*, para. ("It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States.")

[163] *See e.g.*, *US – Zeroing (Japan) (AB)*, para. 84 ("Moreover, the Panel observed that the evidence before it "shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases."); *US – Steel Plate*, para. 7.23 India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree.")

[164] China's Response to Panel Question 122, paras. 118-120.

Although that may well be true in particular cases, repetition of the adjective "predictable" does not support any particular legal conclusion.

Question 123: To China. In paragraph 68 of its opening statement at the second substantive meeting of the Panel with the parties, China asserts that "general and prospective norms are often described using verbs in the simple present tense, because this tense can express a state that is always true or continues indefinitely". Could China please indicate, based on the record evidence, where the USDOC has laid down the alleged AFA Norm in the simple present tense?

109. China's response indicates that it has retreated from its contention that the alleged AFA Norm is laid down in the simple present tense. Instead, China argues that the sections of USDOC's determinations that refer to its practice have ongoing significance.[165] However, as the United States has explained, these statements summarize what happened in the past.[166] They do not provide that USDOC has adopted an unwritten norm governing what will happen generally and prospectively. At most, these statements may explain the selection of facts available in a particular or previous proceeding – as demonstrated by the fact that there are determinations where the prior practice was *not applied*.[167] China's discussion of verb tense and grammar is inaccurate and is simply a distraction from the key point: China has failed to provide the Panel with the necessary evidence to support its alleged norm.

Questions 124 & 125:

> **Q. 124: To China. In response to the Panel's advance question No. 11(a) before the second substantive meeting of the Panel with the parties, China stated, at the second substantive meeting of the Panel with the parties, that evidence of the general and prospective application of the alleged AFA Norm, i.e. court decisions and consistent application of the norm, shows more than "practice". Could China please show each category of evidence on the record in this regard, and explain how such categories of evidence show such general and prospective application of the alleged AFA norm?**
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> **Q. 125: To China. Is the Panel correct in understanding that the thrust of China's argument regarding the general and prospective application of the alleged AFA Norm is that the record evidence (Antidumping Manual, court decisions and USDOC determinations and statements) provides administrative guidance and creates expectations? If so, could China please explain how, based on the evidence**

[165] *See* China's Response to Panel Question 123, para. 186.

[166] *See* U.S. Response to Panel Question 117.

[167] *See* U.S. Response to Panel Question 64.

on the record, the alleged AFA Norm provides "'administrative guidance' and sets 'expectations' on a consistent and predictable basis"?

110. As China provided a joint response to Questions 124 and 125, the United States likewise will provide consolidated comments on China's response.

111. Although China agrees with the Panel's articulation of the "thrust" of China's argument, China appears to disagree that the question of whether a measure is a norm is separate and distinct from whether the measure has general and prospective application.[168] However, as discussed in response to China's response to Questions 121, 122, and 126, to prove a norm of general and prospective application, China must both demonstrate that the alleged unwritten measure at issue has normative value, as well as that the measure has general and prospective application. The United States first recalls that in determining whether a measure has normative value, the Appellate Body in *OCTG Sunset Reviews* found that one way of evaluating this issue is to examine whether the measure provides administrative guidance. As the United States has established, China has failed to demonstrate, through each piece of proffered evidence (Antidumping Manual, court decisions, and USDOC determinations and statements), that the alleged AFA norm provides administrative guidance. Of course, as discussed above in response to Question 115 and 120, an additional, over-arching issue with China's claims related to the AFA norm is that China has failed to put forth a coherent and consistent description of the precise content of both the trigger for the norm and the norm itself. Because the precise content of the alleged norm has not been established, this makes it extraordinary difficult – if not impossible – for China to meet its burden of proffering evidence that proves the normative character of the alleged unwritten measure.[169] And as the United States has explained, China has certainly not met its burden.

112. Second, the United States reiterates that a norm that is intended to have general and prospective application has systemic, continued application in the future until the underlying measure is modified or withdrawn. If an alleged measure does not apply to future events, this will preclude a finding in favor of the norm's existence.

113. Third, given that China has indicated that it may believe that "expectations" are relevant to the existence of a rule or norm, the United States would reemphasize a point that it made in its response to these questions: the concept of "expectations" is not useful for determining the existence of a normative quality. The Appellate Body noted in one report that a measure providing administrative guidance may create expectations. This may be true in certain situations, but it does not mean that expectations are an element of some sort of definitive legal test. First, expectations are inherently subjective – whose expectations would be involved?; would they need to be legitimate expectations?; and how would they be measured? Second, the mere existence of expectations cannot be sufficient to establish a norm – indeed, repeated action might create some expectations in the eyes of certain observers, but – as the Appellate Body has correctly found – mere repeated action does not establish the existence of an independent norm.

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[168] *See* China's Response to Panel Questions 124 and 125, paras. 188-189.

[169] *US – Zeroing (Japan) (AB)*, para 7.48 (requiring, *inter alia*, that in order to have normative value, a measure's "content must be clear.")

Third, the existence of expectations (at least in terms of the expectations of traders) cannot be a required element of a challenge to an unwritten measure. Indeed, a primary reason (and a circumstance not present in the current dispute) that a Member may bring a challenge against an unwritten measure is that the Member adopting a WTO-inconsistent measure has attempted to avoid its obligations by failing to put a measure in writing or by failing to abide by its publication obligations. In such a circumstance, that unwritten or unpublished, WTO-inconsistent measure may not create "expectations," but that would provide no rationale for excluding the measure from the scope of WTO dispute settlement.

114. Finally, we summarize below each piece of evidence proffered by China in support of the alleged AFA norm and explain how China has failed to show a measure with normative value, and a norm that is intended to have general and prospective application.

Antidumping Manual

115. The United States has made the following observations of the Antidumping Manual, and by extension, statements made within the Antidumping Manual, which count against finding the alleged AFA norm has normative value. Likewise, these points demonstrate China's failure to show the alleged norm is intended to have general and prospective application.

116. First, the Antidumping Manual, as the United States has previously explained,[170] contains an explicit disclaimer on the very first page that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish DOC practice."[171] Indeed, it is noteworthy that certain "practices" described in the Antidumping Manual are at odds with what Commerce has done in particular determinations.[172] Thus, given that the "practices" described in the Antidumping Manual are subject to – and do – change, it would be inappropriate to rely on the Antidumping Manual as evidence of a norm. Specifically, with respect to "administrative guidance", as the United States has established, the Antidumping Manual, placed in proper context, demonstrates that it is meant to provide education or internal training, not administrative guidance.[173]

[170] U.S. First Written Submission, para. 415; U.S. Second Written Submission, paras. 150-152.

[171] Antidumping Manual, p.1 (Exhibit USA-28).

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

[173] *See* U.S. Second Written Submission, paras. 150-152

117. Second, as the United States has explained, USDOC, nearly 10 years ago, had explicitly and publicly stated that the Antidumping Manual is not meant to be relied upon by the public:

> The Antidumping Manual was created as a tool for our analysts to use in order to further their understanding and application of the Uruguay Round Agreements Act. It was never intended to be a definitive guide for the staff, nor was it meant to be a "how-to" manual for the general public. We note that the manual in most respects continues to be accurate; however, we agree that it should be updated to reflect changes in IA practice.[174]

This memorandum was in response to a recommendation in a report that USDOC should update the manual in place at that particular time. As the memorandum makes clear, no member of the public should have any expectations regarding USDOC's conduct on the basis of the Antidumping Manual. Thus, as addressed in more detail in prior submissions, China has not demonstrated that the AD Manual can be cited as evidence of a norm.[175]

118. Third, China argues that the Antidumping Manual provides evidence of the general and prospective nature of the alleged norm. However, inspection of the Antidumping Manual demonstrates that it merely describes the non-binding nature of USDOC's practice and the fact-drive nature of USDOC's selection of facts available in situations where necessary information is not on the record. The Antidumping Manual lists examples of when USDOC "may" apply an adverse inference in selecting from amongst the facts available to determine a rate for the China-government entity. As noted in the United States' Second Written Submission, the Antidumping Manual's statements are phrased conditionally – "in many cases" or "occasionally" – and cannot reasonably be interpreted as evidence of invariable application or leading to certain conduct.[176]

U.S. Court Decisions

119. The United States has explained that the cases China relies upon to establish the alleged AFA norm fail to show any normative character of the alleged unwritten measure, *i.e.*, that there exists a purported norm that provides administrative guidance For instance, as the United States has explained, all these cases demonstrate is that when USDOC finds non-cooperation, and determines to apply a rate based on facts available, its selection of facts available is dependent on the facts and circumstances of each proceeding and is constrained by the requirement to corroborate selected secondary information to the extent practicable.[177] U.S. federal courts are limited to deciding the cases or controversies before them. China has not demonstrated that any of the court cases it has proffered purport to do otherwise and set forth some rule of general and

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

[175] *See* U.S. First Written Submission, paras. 337-346, 402-419; U.S. Second Written Submission, paras. 128-177.

[176] *See* U.S. Second Written Submission, paras. 176-177.

[177] *See* U.S. Response to Panel Question 68.c, paras. 160-164

prospective conduct for USDOC. Therefore, as the court rulings are limited to USDOC's past actions in particular determinations, they cannot be considered evidence that supports a finding that the norm that is intended to have general and prospective application.

USDOC Determinations and Statements

120. As an initial matter, although China has gone to great lengths, in its responses to Question 116 and 117.a, to try to show the alleged general and prospective nature of the AFA norm through USDOC's determinations, China has made no such effort with respect to establishing, through these determinations, that the alleged norm provides administrative guidance. Again, like the court decisions cited by China, all these determinations show is that when USDOC found non-cooperation, and determined to apply a rate based on facts available, its selection of facts available was dependent on the facts and circumstances of each proceeding and was constrained by the requirement to corroborate selected secondary information to the extent practicable.[178] While China argues that USDOC's actions are invariable and therefore demonstrate a consistent practice that has general and prospective application, that assertion is unsupported and conclusory. As the United States has explained above in addressing China's response to Questions 115, 116, and 117.a, USDOC's has discretion in whether to apply an adverse inference when selecting from amongst the facts available and, when applying an adverse inference, its selection has varied depending upon the specific circumstances before it.[179]

Question 126: To China and the United States. In US – Oil Country Tubular Goods Sunset Reviews, the Appellate Body found the SPB of the USDOC to be a measure of general and prospective application. In its reasoning, the Appellate Body found that:

> **[T]he SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance.**

Does the above statement by the Appellate Body suggest that the analysis of whether a measure "provides administrative guidance and creates expectations" is separate from the assessment of whether an alleged norm has general and prospective application?

121. China asserts in its response that:

> Although the factors identified by the Appellate Body in the quoted passage are discussed in several steps, China does not consider that the Appellate Body was suggesting that "general and prospective application" must be analyzed as

[178] *See* U.S. First Written Submission, para. 416; U.S. Response to Panel Question 71, paras. 168-171.

[179] *See* also U.S. First Written Submission, paras. 417-419.

> concepts that are distinct and separate from the concepts of "provid[ing] administrative guidance and creat[ing] expectations".[180]

China's assertion thus recognizes that the Appellate Body's analysis was structured in the form of specific steps, but simply suggests the Panel ignore it and minimize the elements that need to be found in order to sustain a finding that a norm of general and prospective application exists.

122. As the United States explained in its response to this Panel question, there are two distinct inquiries: (1) finding a norm and (2) finding that the norm has general and prospective application. While there is a degree of overlap in the inquiries, they are not coterminous – and the Appellate Body's analysis reflects as much. For example, an administrative ruling such as an importer's customs ruling arguably may constitute administrative guidance (at least with respect to that particular importer), but that does not mean it also has general and prospective application.[181] In short, China has failed to properly assess the application of the Appellate Body's analysis.

Question 127: To China. China characterizes both the alleged Single Rate Presumption and the alleged AFA norm as norms of general and prospective application. The Panel notes that the body of evidence and the nature/content of each piece of evidence that China submitted in order to show the general and prospective application of each of these two norms are different. In this light, could China present a comparative explanation of how each piece of evidence submitted in connection with each of these two norms serves to show their general and prospective application? Could China explain on what basis China considers both of these alleged norms to have general and prospective application despite the cited differences in the bodies of evidence submitted in respect of each of them?

123. Broadly, China's response demonstrates that China has not provided the requisite evidence to demonstrate the existence of its alleged norms.[182] The United States raises four main points with respect to China's response.

124. First, China's response still does not specifically explain how the content of each piece of purported evidence relates to a particular aspect of the alleged norms, including with respect to their general and prospective application. With respect to this point, the United States notes again that the content of the Single Rate Presumption norm in this dispute contains a second element that was not present in *US – Shrimp II*: the USDOC Separate Rate Test.[183] China has

[180] China's Response to Panel Question 126, para. 126.

[181] *Thailand – Cigarettes*, para. 7.127 ("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 prospective application.").

[182] The United States on this point also refers back to its arguments in Section IV of its Second Written Submission.

[183] U.S. Second Written Submission, para. 129, 163.

still not identified what evidence specifically supports this particular aspect of the alleged Single Rate Presumption norm.

125. Second, China attempts to suggest that the evidence it has put forward in this dispute with respect to its alleged norms is of the same quality and persuasive value as that put forward in the certain prior disputes. As explained in prior U.S. submissions, including Section IV of the U.S. Second Written Submission, that is not so. For example, the grand total of China's evidence for the precise content of the alleged Use of AFA norm is, per China's response to this question, as follows:

> This evidence includes the individual anti-dumping determinations on the record. As discussed in China's response to Panel Questions 115(a) and 115(b) the evidence also includes the Antidumping Manual and relevant court decisions.[184]

In short, China's argumentation consists only of unexplained citations to a string of cases, the Antidumping Manual, and various court decisions. Citations to various documents, without supporting explanations, do not begin to meet China's burden of showing the existence of alleged unwritten norms.

126. Third, China – without basis – asserts it is a concession that the United States has not provided contrary examples that would affirmatively refute the norms. In considering this point, the analysis of the Panel in *US – Shrimp (Ecuador)* is instructive.

> the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a prima facie case. We take note in this regard that the Appellate Body has cautioned panels against ruling on a claim before the party bearing the burden of proof has made a prima facie case.[185]

China cannot simply argue that its bare allegation establishes its case. Moreover, here, the United States has fully and completely contested China's claim with arguments that have not been rebutted.[186] The United States does not have to affirmatively prove a negative or what might happen under hypothetical circumstances; China must prove its *prima facie* case – and it has not done so here.

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[184] Para. 213.

[185] *US – Shrimp (Ecuador)*, para. 7.11.

[186] For example, Section IV of the U.S. Second Written Submission highlights deficiencies with each piece of evidence. China has not contested many of the points made by the United States such as that there exists an explicit disclaimer and public pronouncement that the Antidumping Manual does not reflect a basis for any of USDOC's actions.

127. Finally, the United States notes that China continues to conflate the notion of invariable application with consistent application.[187] The United States explained in response to Question 117(d) that prior practice of USDOC does not compel it to apply that practice generally and prospectively – and that rules that do have such features are subject to a special rule-making process.

3.2 Alleged violations of Articles 6.1 and 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II to the AD Agreement

Question 128: To China. The Panel notes that in its response to the Panel's question No. 61(a) following the first substantive meeting of the Panel with the parties, China argues that the "the manner in which USDOC determines the PRC-wide entity rate is WTO-inconsistent irrespective of whether it is analysed from the perspective of the fictional single entity, or from the perspective of each of the individual respondents included within the PRC-wide entity." The Panel also notes that China, on a number of occasions , puts forth arguments with respect to specific individual exporters within the PRC-wide entity or specific groups of exporters within the PRC-wide entity.

a. Is the Panel correct in understanding that the thrust of China's "as applied" claims under Articles 6.1 and 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II to the AD Agreement is the manner in which the USDOC calculated dumping margins and duty rates for the PRC-wide entity in the 30 determinations challenged under these claims?

b. Is the Panel correct in understanding that the references, in China's written submissions and responses to the Panel's questions, to the individual exporters or groups thereof within the PRC-wide entity do not change the thrust of these claims?

The United States' comments address both China's response to Question 128, parts (a) and (b).

128. First, China asserts – incorrectly and without any textual support in the AD Agreement – that "as a matter of WTO law" all companies within the China-government entity must be treated as "distinct producers/exporters and 'interested parties' in their own right."[188] But as the United States has explained in prior submissions, not every legal entity is necessarily required to be treated as a distinct exporter or producer under the AD Agreement.[189] This holds especially true for the companies included in the China-government entity – *i.e.*, those that did not rebut the presumption of government control over their export activities, the legal and factual basis for

[187] China's Response to Panel Question 127, Para. 214.

[188] China's Response to Panel Question 128, para. 215.

[189] *See* U.S. First Written Submission Section V.D; U.S. Responses to Panel Questions, paras. 88-96, 101; U.S. Second Written Submission, paras. 182-185.

which is supported by Section 15 of China's Accession Protocol and certain paragraphs of the Working Party Report.[190]

129. Second, China continues to argue that "in order to determine an individual rate, either for each of these individual respondents or for a single exporter comprised of all of them, USDOC required information regarding the export prices and normal values from each of the respondents that was included within the PRC-wide entity in the relevant determinations."[191] China has not explained why that is the case though. Critically, China has failed to substantiate why USDOC was legally required to demand such information under each of the various circumstances presented in of the challenged determinations. The United States has already demonstrated that neither Article 6.1, Article 6.8 nor Annex II speak to the substance of information which an investigating authority must seek in order to establish a dumping margin for a single entity.[192] Nor do these provisions require that, where a single entity has failed to respond to a request for information, *i.e.*, demonstrated its unwillingness to cooperate, the investigating authority is required to continue to seek information time and time again which would help it establish a dumping margin for the entity.[193]

130. Third, the Panel must review of USDOC's determinations and consider whether USDOC's treatment of the entity, as a whole, is consistent with Articles 6.1, 6.8 and Annex II, and Article 9.4 (first sentence).[194]

131. Finally, China raises certain arguments related to its response to Question 132, which we address below in further detail in our discussion of Question 132. However, it is telling that China states that "[a] finding that USDOC acted inconsistently with Article 6.10, 9.2 and 9.4 (second sentence) by imposing a condition for access to individual rates which has no basis in the *Agreement* does not clarify the basis upon which rates, if any should be determined for individual respondents during implementation[]."[195] Such a statement confirms that China is not asking the Panel to evaluate whether the manner in which the rate determined for the China-government entity, and the resulting rate, as the challenged determinations currently stand are consistent with USDOC's obligations under Articles 6.1, 6.8, Annex II, and Article 9.4. Rather, China is asking the Panel essentially to provide guidance to USDOC and "clarify the basis upon which rates, if any should be determined for individual respondents during implementation" should the Panel find inconsistencies with Articles 6.10, 9.2 and 9.4 (second sentence). Not only should the Panel decline such an invitation, but this further exhibits that China has not

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[190] *See* U.S. First Written Submission, paras. 361-373; U.S. Responses to Panel Question 40, paras. 106-110; U.S. Second Written Submission, paras. 193-200; and U.S. Response to Panel Question 113, paras. 60-70.

[191] China's Response to Panel Question 128(b), para. 221.

[192] *See* U.S. Second Written Submission, paras. 237-257, 271-278.

[193] *See US – OCTG Sunset Reviews (AB)*, paras. 241-242 (discussing that Article 6.1 does 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.") *See also* U.S. Second Written Submission, paras. 237-257, 271-278.

[194] *See* U.S. Second Written Submission, Section VI and VII.

[195] *See* China's Response to Panel Question 128(b), para. 218.

demonstrated how findings under Articles 6.1, 6.8, and Annex II and Article 9.4 would contribute to positive resolution of the dispute if the China-government entity itself were found to be inconsistent with U.S. WTO obligations.

Questions 129, 130, & 131:

> **Q. 129: The Panel notes that, in its response to the Panel's question No. 61(a) following the first substantive meeting of the Panel with the parties, China states that "[t]he concept [of a PRC-wide entity] is intimately related to the Single Rate Presumption and interacts importantly with the Use of Adverse Facts Available norm." Could China please clarify the manner in which the alleged Single Rate Presumption interacts with China's various claims under Articles 6.1 and 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II to the AD Agreement?**
>
> **Q. 130: The Panel understands the term "presumed non-cooperation", as it is used by China, to refer to a finding, by the USDOC, that an NME-wide entity, identified through the application of the alleged Single Rate Presumption, has failed to cooperate because of the non-cooperation of one or more individual exporters included within the entity.**
>
> **a. Can China confirm this understanding?**
>
> **b. Can China distinguish the term "presumed non-cooperation" from the term "genuine non-cooperation" as it is used by China (e.g. in paragraph 100 of China's opening statement at the second substantive meeting of the Panel with the parties)?**
>
> **c. Can China confirm the Panel's understanding that China's "as such" and "as applied" claims under Articles 6.1 and 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II to the AD Agreement relate to the manner in which the USDOC calculated dumping margins and duty rates based on what China calls "presumed non-cooperation" rather than "genuine non-cooperation"?**
>
> **Q: 131: To China. Is the Panel correct in understanding that China's claim regarding the alleged AFA Norm "as such" challenges the USDOC's use of facts available in determining anti-dumping duty rates for NME-wide entities as identified through the application of the alleged Single Rate Presumption?**

132. The United States provides the following observations of China's responses to Questions 129, 130, and 131. First, as discussed above in its discussion of Question 116, the United States rejects China's repeated and incorrect suggestion that USDOC's resort to facts available in determining a rate for the China-government entity in certain challenged proceedings was a result of *presumptions*, and not *facts and circumstances of the given proceeding*. For instance, in

5 investigations[196] and 1 review,[197] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information. In 7 investigations,[198] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information and to respond to the dumping questionnaire. In one investigation[199] and 5 reviews,[200] USDOC's recourse to facts available was based on the failure of certain companies within the China-government entity to respond to the dumping questionnaire. In short, USDOC's resort to facts available was driven, in each case, by the facts and circumstances before it. China's characterizations otherwise that these determinations are based on presumptions are flatly contradicted by this record evidence, and must be disregarded by the Panel. Put plainly, this is simply not an accurate characterization of USDOC's determinations.

133. Second, with respect to its response to Question 129, China has failed to clarify "the manner in which the alleged Single Rate Presumption interacts with China's various claims under Articles 6.1 and 6.8, the first sentence of Article 9.4 and paragraphs 1 and 7 of Annex II to the AD Agreement." As an initial matter, we note that throughout this proceeding China has been very clear that its claims with respect to the way in which the rate is determined for the

[196] Shrimp OI, Solar OI, Steel Cylinders OI, Tires OI, and Wood Flooring OI (Exhibits CHN-37, CHN-14, CHN-41, CHN-49). *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 141; U.S. Second Written Submission, paras. 273-276. In Shrimp OI, USDOC's recourse to facts available was also based in part on the failure of the Chinese government to respond to a request for information. *See* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 149.

[197] Ribbons AR3 (Exhibit CHN-52). *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 141; U.S. Second Written Submission, paras. 273-276. As discussed in paragraphs 142 and 143 of the U.S. Response to First Panel Questions, the failure of a mandatory respondent to cooperate was an additional ground for USDOC's finding of noncooperation of the China-government entity in Ribbons AR3. In Solar AR1, one of the new challenged determinations, USDOC found the China-government entity non-cooperative because of the failure of certain companies within the entity to respond to a request for quantity and value information. *See* Solar AR1 Preliminary Decision Memo at 2, 17-18 (Exhibit CHN-488), unchanged in Solar AR1 Final Determination, 80 FR at 40999 (Exhibit CHN-489). Assuming *arguendo* that the Panel finds this determination within its terms of reference, China's claims with respect to this determination are without merit.

[198] Aluminum OI, Coated Paper OI, Diamond Sawblades OI, Furniture OI, OCTG OI, Retail Bags OI, and Ribbons OI (Exhibits CHN-32, CHN-12, CHN-45, CHN-58, CHN-13, CHN-53, CHN-33). *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 141; U.S. Second Written Submission, para. 277. In Diamond Sawblades OI and Furniture OI, the recourse to facts available was also based in part on the failure of the Chinese government to respond to requests for information. *See* U.S. First Written Submission, Section VII.D.1; U.S. Response to First Panel Questions, para. 149.

[199] PET Film OI (Exhibit CHN-56). *See also* U.S. First Written Submission, Section VII.D.1; U.S. Response to Panel Question 54, para. 141; U.S. Second Written Submission, para. 278.

[200] Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, and Shrimp AR8 (Exhibits CHN-35, CHN-36, CHN-59, CHN-38,CHN39). *See also* U.S. First Written Submission, Section VII.D; United States' Response to Panel Questions, para. 141.

China-government entity is entirely dependent on, in the first instance, the Panel resolving its claims with respect to the alleged Single Rate Presumption:

- Having presumed, in each of the 13 challenged investigations, the existence of a PRC-wide entity, USDOC proceeded to determine a single dumping rate for the PRC-wide entity, including all of the producers/exporters included within it.[201]

- [A]ssuming *arguendo* that USDOC was entitled to treat the PRC-wide entity as a single entity, in order to determine a margin of dumping for the single entity, USDOC was required to seek all of the information that would have allowed it to determine normal value, export price and any due allowances for the entity as a whole.[202]

- China recalls that, in each of the relevant challenged determinations, USDOC presumed the existence of a fictional PRC-wide entity, without positive evidence of the existence of any relevant links between the different respondents included in that entity. Accordingly, USDOC had no basis under the *Agreement* to assign a single rate to all of the respondents that USDOC included within the fictional PRC-wide entity. Yet, USDOC decided to assign a single rate to all of those respondents.[203]

134. China's submissions therefore make clear that its claims related to USDOC's request for information, resort to facts available, and selection of available facts are in fact contingent on USDOC's treatment of certain exporters and producers as part of the China-government entity in the first instance.[204] Possibly because showing that one alleged norm underlies the other would likely undermine China's argument in response to Question 132 that the Panel should look at all claims, even if it finds that the alleged Single Rate Presumption is WTO-inconsistent, in stark contrast to its prior statements, China now insists that the existence of the alleged Single Rate Presumption "is not a material or essential fact for resolution of any of these claims."[205] However, as demonstrated above, China's statements and arguments related to these claims clearly convey otherwise. As discussed in further detail in our discussion of Question 132 below, China has not demonstrated how findings under Articles 6.1, 6.8, and Annex II would contribute to positive resolution of the dispute if the China-government entity itself is found to be inconsistent with WTO obligations.

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[201] China's First Written Submission, para. 389.

[202] China's Response to Panel Question 61(c), para. 305.

[203] China's Response to Panel Question 80, para. 740.

[204] *See* U.S. Response to Second Panel Questions, paras. 99-105.

[205] China's Response to Panel Question 129, para. 227

135. Moreover, China's assertion that "[o]ne WTO violation cannot excuse another WTO violation[]"[206] misstates the U.S. position. USDOC's treatment of certain Chinese companies as part of a single China-government entity provides important context for USDOC's determination that the entity was non-cooperative in certain challenged proceedings – a determination which was based on the facts and circumstances of the given proceeding. China's assertion that USDOC relies on such treatment as an "excuse" or "justification" for not sending a dumping questionnaire to each and every member of the entity[207] is merely a distraction from China's own failure to establish its *prima facie* case that such action was required in the challenged determinations. As the United States has shown, neither Article 6.1, Article 6.8 nor Annex II speak to the substance of information which an investigating authority must seek in order to establish a dumping margin for a single entity.[208] Nor do these provisions require that, where a single entity has failed to respond to a request for information, *i.e.*, demonstrated its unwillingness to cooperate, the investigating authority is required to continue to seek information time and time again which would help it establish a dumping margin for the entity.[209] China has not demonstrated otherwise, and thus, its claims under Article 6.1, 6.8 and Annex II must fail.

136. Third, and finally, in response to Question 131, China raises Tires AR5 and Containers OI as examples which "are relevant because they demonstrate why the Use of Adverse Facts Available norm is not necessarily limited to an NME-wide entity identified through the application of the Single Rate Presumption."[210] However, by China's own description of the "trigger condition" for the AFA norm, Tires AR5 and Containers OI would not be subject to the norm, because in both cases USDOC made no finding of noncooperation (nor does China argue, as discussed above in response to Question 120, that there is an "implicit" finding of noncooperation, which apparently China now argues also could lead to the application of the alleged norm). China overlooks this salient detail in its attempts to convince the Panel that it must still reach China's claims related to the alleged AFA norm regardless of the outcome of China's claims related to the alleged Single Rate Presumption. As noted below in the Question 132 discussion, these arguments remain unconvincing.

[206] China's Response to Panel Question 129, para. 231.

[207] China's Response to Panel Question 129, paras. 229-231.

[208] *See* U.S. Second Written Submission, paras. 237-257, 271-278.

[209] *See US – OCTG Sunset Reviews (AB)*, paras. 241-242 (discussing that Article 6.1 does 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.") *See also* U.S. Second Written Submission, paras. 237-257, 271-278.

[210] China's Response to Panel Question 131, paras. 251-253.

Question 132: To China and the United States. If China's "as such" and "as applied" claims under the alleged Single Rate Presumption stand, in what sense, if at all, would findings on China's "as such" and "as applied" claims presented under the heading "VI. China's Claims under Article 6.1, Article 6.8, Annex II and Article 9.4 Regarding the NME-Wide Methodology and the Use of Adverse Facts Available Norm Through Which USDOC Assigns a Rate to NME-Wide Entities" in China's first written submission contribute to the positive resolution of the dispute?

137. At the outset, China's response to this question ignores the central reason why it would not contribute to a positive resolution of this dispute for the Panel to rule on the claims relating to the purported Use of AFA norm if the Panel finds that the Single Rate Presumption norm is inconsistent with US WTO obligations: China has premised its claims regarding the alleged Use of the AFA norm on the existence of the Single Rate Presumption. Thus, if the Panel invalidates the treatment, based on the alleged Single Rate Presumption, of distinct entities as part of a China-government entity, then the Panel need not, and indeed should not, consider actions taken stemming from, or depending upon, such treatment. Indeed, consider how China frames the relationship between the Single Rate Presumption and the NME wide methodology in its panel request:

> Applying the Single Rate Presumption, the USDOC calculates a single margin of dumping, or a single anti-dumping duty rate, for the NME-wide entity. In doing so, the USDOC applies a number of other practices, to which China refers, collectively, as the "NME-wide methodology". Features of the NME-wide methodology include the following practices:
>
> - The systematic failure to request the information required to determine a margin of dumping for all the producers and exporters comprising the NME-wide entity, or for the NME-wide entity as a whole. China refers to the application of this practice, for ease of reference, as the "failure to request information".
>
> - The systematic failure to allow all producers and exporters comprising the NME-wide entity, or the NME-wide entity as a whole, an appropriate opportunity to make submissions, oral or written, that would allow the USDOC to establish their margin of dumping without resorting to information from a secondary source. China refers to the application of this practice, for ease of reference, as the "failure to provide rights of defense".
>
> - The systematic determination of the margin of dumping for all producers and exporters comprising the NME-wide entity on the basis of facts available, when one or more producers or exporters comprising the NME-wide entity fails to provide information requested of it. China refers to the

> application of this practice, for ease of reference, as the "recourse to facts available".[211]

Thus, the condition precedent for China's claims under Article 6.1, 6.8 and Annex II, and Article 9.4 by the terms of China's own Panel Request is the application of the Single Rate Presumption. If that condition though has changed, then it is no longer clear why the findings of the Panel with respect to the Use of AFA norm would have any relevance. The reasons offered by China to ignore this point are unavailing.

138. First, China posits that judicial economy would be inappropriate because there are distinct measures.[212] The supposed distinctness of the measures though is simply a creation of how China framed its complaint. China does not – because it cannot – cite any analysis from any panel suggesting that judicial economy is prohibited simply because there are distinct measures. The notion of judicial economy draws – as the Panel's question recognizes – from the notion of a positive resolution of the dispute. Here, the Use of AFA norm is premised upon the existence of the Single Rate Presumption norm. If the Panel finds that the Single Rate Presumption norm invalid, then the assertions made by China regarding the application and operation of the Use of AFA Norm will no longer hold.

139. The analysis of a prior GATT report on this point is instructive. Specifically, in *EEC – Regulation on Imports of Parts and Components*, Japan separately challenged various facets of an anti-circumvention measure. As that panel recognized, once a fundamental defect was found with a basic aspect of that measure, then there was no need to examine the consequential aspects of the measures such as whether its administration was separately inconsistent.

> The Panel considered the argument of Japan that, in the administration of the anti-circumvention provision, the EEC violated its obligations under Article X:1 and X:3 of the General Agreement, in particular in respect of the criteria for the acceptance of undertakings and the methodology for determining the origin of imported parts and components. Given that the Panel found the anti-circumvention duties and the acceptance of parts undertakings to be inconsistent with Article III:2 and 4, and not justifiable under Article XX(d), and that any further imposition of such duties or acceptance of related undertakings would therefore be inconsistent with the General Agreement, the issue of whether the administration of the anti-circumvention provision is consistent with Article X is no longer relevant.[213]

140. Second, China argues the Panel would breach Article 11 of the DSU if it refused to rule on the Use of AFA norm. China offers no convincing reason why though it would amount to an exercise in false judicial economy. As China asserts, the very trigger for the application of the

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[211] China's Panel Request, para. 18.

[212] China's Response to Panel Question 132, para. 256.

[213] Para. 5.27.

Use of AFA norm is a finding of non-cooperation by the China-government entity – which exists *per China* on account of the Single Rate Presumption.[214] Effectively, China's complaint is that it has presented various arguments but that they have not been decided. As the Appellate Body has explained previously, this is not a breach of DSU Article 11.

> as the Appellate Body has found, a panel has the discretion "to address only those arguments it deems necessary to resolve a particular claim" and "the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU".[215]

If the Panel finds against the Single Rate Presumption, then the relevant fact pattern for the Use of the AFA norm is implicated. Nothing in DSU Article 11 requires the Panel to provide a speculative ruling.

141. Third, China asserts that a finding against the Single Rate Presumption would not prevent the United States from using a different presumption based mechanism to create a new China government entity.[216]. The Panel though has asked China in Question 119 whether such a mechanism exists and China did not point to one. Moreover, China's suggestion highlights why judicial economy is appropriate. China wants an *ex ante* ruling to restrict how USDOC might proceed with respect to any potential compliance measure. China notes that – assuming the Panel accepts China's arguments – that there may be scenarios where the United States could group exporters as a single entity.[217] This makes clear that China is essentially acknowledging that it is seeking dicta even the potential facts and scenarios are unknown. China has not explained how this would contribute to a positive resolution of this dispute.

142. Indeed, consider a threshold issue in the Use of AFA norm. China has argued consistently that it is not appropriate for the United States to, purportedly, infer non-cooperation for the China government entity writ large simply because a constituent component attached on account of a presumption is uncooperative. But that fact may potentially be different if the Single Rate Presumption is found inconsistent.

143. Fourth, China argues that the failure to request information claims and failure to provide rights for defence claim are unique because paragraph 151 of the Working Party Report provided specific assurances to China. But China has not brought a claim under this provision. Nor could China since this paragraph was not incorporated into China's Accession Protocol. Specifically, in *EU – Footwear*, a panel found that China cannot sue WTO members on the basis

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

[215] *EC – Fasteners (AB)*, para. 511 quoting *EC – Poultry (AB)*, para. 135.

[216] China's Response to Panel Question 132, para. 258.

[217] China's Response to Panel Question 132, para. 262.

of paragraph 151 of the Working Party Report.[218] Thus, if the Panel finds that the Single Rate Presumption is a breach of U.S. obligations, there is no reason that also resolving China's claims with respect to the alleged Use of the AFA norm would result in a positive resolution of this dispute.

144. The United States notes one final point that militates in favour of a finding of judicial economy and that relates to achieving a positive resolution of this dispute. At present, significant concerns have been raised regarding WTO resources and delays in the resolution of disputes. While the conversation to address these concerns is ongoing, clearly one long standing mechanism can be part of the solution: judicial economy. Using judicial economy where appropriate – as it is here – promotes parties to have greater focus in considering the claims and ensures limited resources are effectively allocated.

Question 134: The Panel notes that China, in its second written submission, states that "China set forth a *claim* in relation to [the AFA Norm] [in China's Panel Request]; specifically that [the AFA Norm] is 'inconsistent with the obligation of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement'." How does China respond to the United States' argument that the cited paragraph of China's Panel Request "is so lacking in specificity that – if this is indeed the only relevant phrase – then <u>all of</u> China's claims under Article 6.8 and Annex II would fail to comply with the requirement of Article 6.2 of the DSU 'to provide a brief summary of the complaint sufficient to present the problem clearly.'"?

145. China's response confirms that its claims relating to the alleged Use of the AFA norm are inconsistent with DSU Article 6.2 and should be dismissed. Most of China's response is a grievance with how the United States has raised point. While the United States disagrees with China's characterization, it is beside the point, which is that China's most recent claim is deficient.[219]

146. China does not dispute that its claim defined as the AFA norm is "inconsistent with the obligation of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement'." Thus, China appears to acknowledge that it claims only reference Article 6.8 and Annex II, not the particular paragraphs in Annex II and commitments there within. The Appellate Body has explained why China cannot simply invoke a *section* of a covered agreement:

> Identification of the treaty provisions claimed to have been violated by the respondent is *always necessary* both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be

[218] Para. 7.183.

[219] Notably, although China describes the U.S. complaint as belated, it does not appear to dispute the propriety of the challenge. The Appellate Body has previously found that jurisdiction can be raised at any stage of the proceeding. *EC and certain member States — Large Civil Aircraft*, para. 791.

> enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. *This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations*. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.[220]

Here, China's response maintains that it is acceptable for its claim not to specifically invoke the specific provisions in Annex II. Annex II contains 7 paragraphs, most of which contain multiple obligations.[221] China appears to suggest its omission to cite the specific paragraphs is acceptable because it previewed its arguments.[222] The United States agrees that China does not need to preview its arguments, but it is obliged to identify the legal claims and a preview of arguments is simply insufficient.

147. Moreover, in merely listing part of the title of Annex II – entitled "Best Information Available in Terms of Paragraph 8 of Article 6", and certain phrases from paragraph 7, China still did not provide an adequate summary of the complaint sufficient to present the problem clearly. Such statement do not confirm the scope of the claim or necessarily the problem that China for which seeks redress. Moreover, as indicated in our discussion of China's responses to Question 115, China's current description of the precise content of the alleged AFA norm bears little resemblance to the description provided in its Panel Request. Thus, as we have clearly seen, China's claim has developed to an almost unrecognizable state from this first statement in its panel request.

Question 135: To China. The Panel notes the United States' objection that China's second and third arguments regarding the WTO-consistency of the alleged AFA Norm relate to the USDOC's finding of non-cooperation and decision to resort to facts available, and not to the USDOC's selection of facts available, and therefore fall outside the Panel's terms of reference. The Panel also notes the United States' objection that a number of the factors listed by China as factors the USDOC should have taken into account when selecting facts available in the 30 challenged determinations are "circular" as they relate to the issue of whether the USDOC was justified in resorting to facts available and not the USDOC's selection of facts available. How does China respond to these two objections raised by the United States?

148. Despite China's attempts to further clarify its prior statements, China has not adequately addressed these two objections. The United States recalls that China's claim is that if USDOC

[220] *Korea – Dairy (AB)*, para. 124 (emphasis added).

[221] *See EC – Biotech*, preliminary ruling, para. 79.

[222] China's Response to Panel Question 134, para. 276.

had properly considered certain "factors" – such as, that USDOC was not entitled to treat Chinese companies as part of a single China-government entity in the first instance[223] – in its selection of facts available, it would reach the conclusion that it was not justified in resorting to facts available in the first place.[224] This is evident by the fact that China continues to refuse to engage with the facts of each proceeding to demonstrate actual errors in USDOC's selection of facts. Thus, China does not argue that USDOC should have selected any alternative fact as a reasonable replacement for the China-government entity's rate. Instead, China attempts to take a short-cut to establish its claim by insisting that USDOC should have not resorted to facts available in the first place. Notwithstanding that China continues to insist that it in fact does not challenge USDOC's resort to facts available,[225] throughout its responses to the Panel's second set of questions, in the context of its claims against the norm, China seems to raise objections that USDOC's resort to facts available is based on presumptions not fact.[226] While China might argue that the alleged presumed non-cooperation is somehow relevant to its claims against the norm, this just further demonstrates a lack of clarity in what China is arguing with respect to the norm.

[223] *See* China's Response to Panel Question 80, paras. 702-703, 740-745.

[224] *See* U.S. Second Written Submission, paras. 282-284.

[225] *See* China's Response to Panel Question 135, para. 278.

[226] *See, e.g.*, China's Response to Panel Question 116, para. 146.