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

(DS471)

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

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TABLE OF REPORTS

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EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr. 1, adopted 28 July 2011
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005
Mexico – Beef & Rice (AB)	Appellate Body Report, *Mexico — Definitive Anti-Dumping Measures on Beef and Rice — Complaint with Respect to Rice*, WT/DS295/AB/R, 2005, adopted 20 December 2005. DSR 2005
Thailand – Cigarettes (Philippines) (Panel)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – OCTG Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004

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US – Section 211 (AB)	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002
US – Softwood Lumber V (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

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USA-76	Australian Government, Anti-Dumping Commission, *Statement of Essential Facts No. 219: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* (18 September 2014)
USA-77	Australian Government, Anti-Dumping Commission, *Anti-Dumping Notice No. 2014/132: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* (10 December 2014)
USA-78	Council of the European Union, *Council Implementing Regulation No. 78/2013*, of 17 January 2013, *imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain tube and pipe fittings of iron or steel originating in Russia and Turkey*
USA-79	Black's Law Dictionary, norm.

Mr. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. The United States appreciates this opportunity to present its views on the issues in this dispute. As evidenced by the first written submissions of the parties and the third party written submissions, this dispute places before the Panel a number of important questions concerning the proper interpretation and application of the AD Agreement[1] and the GATT 1994.[2] Resolving this dispute will require the Panel to discern the meaning of various provisions of these agreements through the application of the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU.[3]

2. In its first written submission, China proposes interpretations of the AD Agreement and the GATT 1994 that are divorced from the customary rules, including the principle of effectiveness, which the Appellate Body has recognized as one of the corollaries to the "general rule of interpretation" in the *Vienna Convention on the Law of Treaties*.[4] China's troubling interpretations include, *inter alia*:

- an interpretation of the second sentence of Article 2.4.2 that denies that provision meaning by rendering it *inutile*;

- an interpretation of Article 6.10 that fails to recognize that that provision applies by its terms to "each known exporter or producer" rather than to every legally cognizable entity in the exporting country; and

- an interpretation of Annex II of the AD Agreement that omits the language in paragraph 7 of Annex II that explicitly provides that an interested party's failure to cooperate "could lead to a result which is less favourable to the party than if the party did cooperate."

3. As demonstrated in the U.S. first written submission, all of China's proposed interpretations, when subjected to scrutiny, simply are not supported by the ordinary meaning of the text of the covered agreements, in context, and in light of the object and purpose of the agreements. Accordingly, all of China's legal claims lack merit, and the Panel should reject them.

4. The U.S. first written submission responds in great detail to China's claims and arguments. We will not attempt to repeat in this statement all of the arguments presented in our first written submission. We would, however, like to highlight today some of the principal issues that we believe will be critical to the Panel's resolution of this dispute. We will begin by addressing the issues concerning China's claims regarding Commerce's[5] application of the second sentence of Article 2.4.2 of the AD Agreement in certain challenged antidumping proceedings, and then we will proceed to the claims concerning the alleged Single Rate

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] *General Agreement on Tariffs and Trade 1994*.
[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.
[4] *See Japan – Alcoholic Beverages II (AB)*, p. 12; *US – Gasoline (AB)*, p. 23.
[5] U.S. Department of Commerce.

Presumption (Articles 6.10, 9.2, and 9.4), and finally to the claims concerning Commerce's use of facts available (Articles 6.1, 6.8, 9.4 and Annex II).

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

A. "Zeroing" Is Necessary for the Alternative, Average-to-Transaction Comparison Methodology To Have Any Effect

5. The U.S. first written submission presents a thorough discussion of the questions of "when" and "how" an investigating authority may employ the exceptional average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[6] These are questions of first impression. The issue of "zeroing" has been considered in previous disputes in other contexts. However, neither the Appellate Body nor any panel has made findings in a dispute that actually involved a Member's application of the alternative comparison methodology set forth in the second sentence of Article 2.4.2. The Appellate Body has even explicitly stated that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2."[7] Accordingly, the questions presented here concerning the interpretation and application of the second sentence of Article 2.4.2 are new, and the Panel will need to resolve them by applying the customary rules of interpretation pursuant to Article 3.2 of the DSU.

6. The second sentence of Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[8] The Appellate Body has found that Members must offset positive and negative comparison results when using the "normal" comparison methodologies, and must calculate an aggregate margin of dumping for an exporter for the product as a whole. However, in a situation where a pattern of significantly different export prices is observed among different purchasers, regions, or time periods, such offsetting may "mask" what has been referred to as "targeted" dumping. Unmasking such dumping requires not offsetting the lower-priced export sales with the higher-priced export sales; that is, it requires zeroing.

7. Although the Appellate Body previously has made no findings with respect to the permissibility of zeroing under the alternative, average-to-transaction comparison methodology when the conditions of the second sentence of Article 2.4.2 are satisfied, a number of Appellate Body and panel reports include findings that bear on the interpretive questions before the Panel. As for any legal issue, the Panel should take into account relevant findings in adopted panel and Appellate Body reports where it finds the reasoning in those reports persuasive.[9] The U.S. first

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

[7] *US – Stainless Steel (Mexico) (AB)*, para. 127. *See also US – Zeroing (Japan) (AB)*, paras. 135-136; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.

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

[9] *See Japan – Alcoholic Beverages II (AB)*, p. 14.

written submission discusses many of the Appellate Body and panel findings related to zeroing and the interpretation of the second sentence of Article 2.4.2. As we have explained, the logical extension of those findings, when understood in the context in which they were made, is that zeroing is permissible – indeed, it is necessary – under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2.

8. The Appellate Body has further observed that the third methodology is an "exception"[10] to the comparison methodologies that "normally" are to be used. As an exception, the third methodology, logically, *should* "lead to results that are *systematically* different"[11] from the two "normal" comparison methodologies when the conditions for its use have been met.

9. That is why, after presenting an analysis of the ordinary meaning of the text of the second sentence of Article 2.4.2, in its context, which is, of course, the foundation of any interpretive analysis under the customary rules of interpretation, the U.S. first written submission goes on at some length about what has been called the "mathematical equivalence" argument.[12] The concept of mathematical equivalence is critical to the resolution of the interpretive questions before the Panel because, if a proposed interpretation of a provision of the AD Agreement would lead to the alternative comparison methodology set forth in the second sentence of Article 2.4.2 systematically yielding results that are identical to the results of the average-to-average comparison methodology, then that proposed interpretation cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, which would be inconsistent with the customary rules of interpretation.

10. That is precisely what would happen under China's proposed interpretations. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all.

11. Certain third parties have addressed the mathematical equivalence argument, as has China this morning in its opening statement, and they suggest that the Appellate Body has already rejected the mathematical equivalence argument in the past. The U.S. first written submission discusses at some length the Appellate Body's consideration of the mathematical equivalence argument in previous disputes.[13] As we have demonstrated, the Appellate Body's prior consideration of the mathematical equivalence argument neither supports nor compels rejection of the mathematical equivalence argument in this dispute. The Appellate Body has never considered the mathematical equivalence argument in the context of an actual application of the average-to-transaction comparison methodology as an alternative to the "normal" average-to-average comparison methodology, nor with the benefit of record evidence underlying a challenged antidumping measure. The Appellate Body has never considered the argument in a

[10] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.
[11] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93 (emphasis added).
[12] *See* U.S. First Written Submission, paras. 237-307.
[13] *See* U.S. First Written Submission, paras. 276-307.

situation in which finding a prohibition on the use of zeroing in connection with the alternative methodology would, in fact, result in mathematical equivalence, as is the case here. And, finally, the Appellate Body has never considered the mathematical equivalence argument in the context of an interpretive analysis of the *second* sentence of Article 2.4.2.

12. Certain third parties and China also have suggested that the mathematical equivalence argument must fail because it rests on certain "assumptions." In particular, there are two assumptions on which the mathematical equivalence argument is premised: first, that the same export prices are used when applying both the normal and the alternative comparison methodologies, and second, that weighted average normal value is calculated in the same manner when applying both the normal and the alternative comparison methodologies. The mathematical equivalence argument is, indeed, premised on these two assumptions, as it should be. It is incorrect, however, to suggest that those assumptions may be changed to achieve a different mathematical result, with the consequence that the mathematical equivalence argument would fail.

13. The United States discusses both of these "assumptions" in the U.S. first written submission.[14] With respect to export prices, the transaction-specific export prices used in both comparison methodologies would, of course, be the same. We have explained, though, that limiting the application of the alternative, average-to-transaction methodology only to the so-called "targeted" export sales, an approach for which Japan appears to argue, raises at least two potential concerns. First, doing so in a way that would exclude entirely from the dumping calculation other "non-targeted" sales would be akin to what, in the U.S. first written submission, we have called "double zeroing."[15] In that case, the value of the export sale price is removed both from the numerator and from the denominator of the dumping margin calculation, which would result in the calculation of even higher dumping margins. The United States does not consider that excluding export prices from the dumping calculation in this way would accord with previous Appellate Body guidance about the proper interpretation of Article 2.4.2 of the AD Agreement, and this is not something that Commerce has ever done.

14. Second, another possibility that has been suggested would entail applying the alternative, average-to-transaction comparison methodology to the "targeted" sales while applying the "normal" average-to-average comparison methodology to the remaining sales, and then combining the results, with any negative results offsetting positive results, to determine the overall, aggregate, margin of dumping; so, zeroing will be prohibited. As demonstrated in the U.S. first written submission, however, this would also lead to a result that is mathematically equivalent to the application of the average-to-average comparison methodology to all export sales.[16] Thus, the identification of an assumption about export prices is no answer to the mathematical equivalence argument.

[14] *See* U.S. First Written Submission, paras. 220-222 (normal value assumption); 2826-306 (export price assumption).
[15] *See* U.S. First Written Submission, para. 290.
[16] *See* U.S. First Written Submission, paras. 291-306.

15. Likewise, identifying an assumption about the calculation of normal value does not mean that the mathematical equivalence argument would fail. Nothing in the text of Article 2.4.2 suggests that the "weighted average normal value" described in the first sentence of Article 2.4.2 is any different from the "normal value established on a weighted average basis" described in the second sentence of Article 2.4.2. To the contrary, these phrases are almost identical in form and their terms share the same ordinary meaning, suggesting that they should be understood to refer to the same concept. Accordingly, there is no reason why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2.

16. It has been suggested that different temporal bases may be used to calculate average normal value. Certain third parties, for example, argue that an investigating authority might address masked dumping by using a period-wide average normal value under one methodology and monthly average normal values under the other. The effect, it is argued, would be that the alternative, average-to-transaction comparison methodology would not necessarily yield a result that is mathematically equivalent to the result of the average-to-average comparison methodology. However, no explanation is offered for *why* such arbitrary manipulation or adjustment of the calculation of normal value, which is based on sales prices in the *home* market, would be appropriate to address a potential issue where there is a pattern of prices that differ significantly in the *export* market. The lower-price *export* sales are "masked" by other higher-price *export* sales. Calculating *normal value* differently would do nothing to help "unmask targeted dumping."

17. Changing the basis for the normal value *might*, indeed, result in somewhat different outcomes. However, the actual outcome in any given situation would be unpredictable and dependent upon the mix of home market transactions that are used as the basis for the multiple normal values. But getting an unpredictably different mathematical result does nothing to address the concern about a pattern of export prices that differ significantly among different purchasers, regions, or time periods. Logically, using different normal values would not help "unmask targeted dumping" at all, and the identification of the normal value assumption is no response to the mathematical equivalence argument.

18. Furthermore, the suggestion that the temporal basis for the calculation of normal value might be changed simply is not germane to this dispute. In cases involving nonmarket economy countries, such as China, normal value is based on factors of production rather than home market sales, and, thus, normal value is determined on an annual basis, not on a monthly basis. This is the case both in investigations and in administrative reviews.

19. In sum, the objections to the mathematical equivalence argument offered by some third parties and China are not well founded, and no Member has provided an alternative understanding of the second sentence of Article 2.4.2 that gives meaning to that provision without using zeroing. We are aware of at least two Members – Australia[17] and the European

[17] *See* Australian Government, Anti-Dumping Commission, *Statement of Essential Facts No. 219: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea,*

Union[18] – that have come to the same conclusion as the United States on the question of mathematical equivalence and the use of zeroing in connection with addressing "targeted" dumping.

20. As a closing comment on zeroing, we would emphasize the caution exercised by the Appellate Body in previous disputes, and the carefully limited scope of the Appellate Body's zeroing findings. The interpretive approach China proposes to the Panel is not similarly cautious, and the Panel would be correct to regard it with skepticism.

B. If Application of the Alternative, Average-to-Transaction Comparison Methodology Is Limited Only to Lower-Priced Sales, then the Exceptional Methodology Would Have No Effect

21. Related to China's zeroing claims is China's claim that Commerce acted inconsistently with Article 2.4.2 of the AD Agreement in the challenged antidumping investigations by applying the alternative, average-to-transaction comparison methodology to all sales when, in China's view, "the exceptional [average-to-transaction] comparison methodology under Article 2.4.2 of the *Anti-Dumping Agreement* must be limited solely to sales comprising the relevant pricing pattern" and "may *not* be applied to all sales."[19] This claim is related to zeroing because, if zeroing is prohibited, then it does not matter whether the average-to-transaction comparison methodology is applied to all or just some export sales. If zeroing is prohibited, then, after the intermediate comparison results are aggregated, the mathematical result will be the same as it would be if the "normal" average-to-average comparison methodology had been used. We demonstrate this in the U.S. first written submission.[20]

22. Assuming that zeroing is permissible – and we have shown that it must be permitted because it is necessary to give effect to the exception in the second sentence of Article 2.4.2 – then it must also be permissible to apply the average-to-transaction comparison methodology not only to the export sales that are at significantly lower prices, but also to the higher-priced export sales that may "mask" the dumping evidenced by the lower-priced export sales.

23. "Masked" or "targeted" dumping involves both export sales priced below normal value, which are evidence of dumping, as well as export sales priced above normal value, which may mask such dumping. Such "targeted" dumping is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced export sales, and by ensuring that the higher-priced export sales do not offset dumping that properly should be evidenced by the lower-

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Taiwan, Thailand and the Socialist Republic of Vietnam (18 September 2014), p. 49 (Exhibit USA-76), *affirmed in Anti-Dumping Notice No. 2014/132: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* (10 December 2014) (Exhibit USA-77).

[18] Council of the European Union, *Council Implementing Regulation No. 78/2013*, of 17 January 2013, *imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain tube and pipe fittings of iron or steel originating in Russia and Turkey*, para. 31(Exhibit USA-78).

[19] First Written Submission of China (Confidential) (March 6, 2015) ("China's First Written Submission"), para. 290; *see also id.*, paras. 287-291 and 176-199.

[20] U.S. First Written Submission, paras. 291-306.

priced export sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

24. We recall that the "pattern" referred to in Article 2.4.2 of the AD Agreement is "a pattern of export prices which *differ significantly among* different purchasers, regions or time periods."[21] So, when analyzing export prices to purchasers, for example, any "pattern" that is "among different purchasers" necessarily must transcend at least two purchasers. Furthermore, any pattern of export prices which "differ significantly" necessarily must include both lower export prices and the higher export prices from which they "differ significantly." The "pattern" cannot be exclusively the lower-priced export sales to one particular purchaser that are observed, 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.

25. In *US – Zeroing (Japan)*, when the Appellate Body discussed the second sentence of Article 2.4.2 in connection with its review of the panel's contextual analysis of the first sentence of Article 2.4.2, the Appellate Body did not find that an investigating authority's application of the average-to-transaction comparison methodology must be limited only to those transactions found to have been priced significantly lower than other transactions.[22] Logically, the Appellate Body would not have made such a finding, because that would have been at odds with the text of the second sentence of Article 2.4.2 and with the Appellate Body's recognition that the alternative, average-to-transaction comparison methodology provides Members a means to "unmask targeted dumping."

26. China's proposed interpretation would once again deprive the second sentence of Article 2.4.2 of any effect, and must therefore be rejected.

C. The "Pattern Clause"

27. Turning to what we are calling the "pattern clause" of the second sentence of Article 2.4.2, the U.S. first written submission presents an interpretive analysis that is in accordance with the customary rules of interpretation.[23] The conclusion that flows from such an analysis is that the "pattern clause" requires a finding of a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent among different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically. As we have demonstrated, that is precisely what Commerce did in the challenged antidumping investigations.[24]

28. China itself recognizes that "an investigating authority is not bound by [the] Anti-Dumping Agreement to structure [its] enquiry into the existence of a relevant pricing pattern in

[21] Emphasis added.
[22] *See US – Zeroing (Japan) (AB)*, para. 135 (emphasis added); *see also* U.S. First Written Submission, paras. 145-153.
[23] U.S. First Written Submission, paras. 36-83.
[24] U.S. First Written Submission, paras. 84-112.

any specific manner."[25] Yet, this recognition has not prevented China from elaborating rigid, specific requirements that it contends are imposed by Article 2.4.2 on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. The obligations China asks the Panel to find simply are not supported by the text of the second sentence of Article 2.4.2, and China's arguments are based on flawed premises and an apparent misunderstanding of Commerce's analysis.

29. Although Commerce did, in the challenged antidumping investigations, analyze certain data, or "statistics," *i.e.*, weighted-average export prices, the "pattern clause" of the second sentence of Article 2.4.2 does not require the use of any particular formal statistical techniques. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause." Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake any particular type of statistical analysis.

30. China contends that the *Nails* test applied by Commerce in the challenged antidumping investigations is not suitable to perform a particular type of statistical analysis.[26] However, that *Nails* test that Commerce applied does not involve the specific type of statistical analysis discussed by China. Accordingly, China's comments – which involve a discussion of a certain type of statistical probability analysis – are simply inapposite.

31. Furthermore, the standard deviation part of the *Nails* test is not aimed at measuring statistical probability or making statistical inferences, as one would expect when using a *sample* of data. Indeed, in the challenged investigations, Commerce calculated the standard deviation for a given exporter using *all* of the export price data reported by that exporter. Commerce used the standard deviation it calculated as a tool in its *Nails* test for determining, objectively and transparently, whether the average export price to the alleged target was sufficiently low in relation to the average export price for all of the exporter's transactions, such that it may be indicative of a "pattern" within the meaning of the "pattern clause."[27]

32. Critically, there is a fundamental distinction between Commerce's approach and China's probability-based approach. That is, Commerce's approach measures systematic pricing while China's approach attempts to identify a random, rare, abnormal occurrence. The standard deviation test used in connection with the *Nails* test simply is not aimed at finding statistical outliers or at making the particular kind of statistical inferences China discusses.

33. Accordingly, China's statistical arguments are misplaced.

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[25] China's First Written Submission, para. 154.

[26] *See* China's First Written Submission, paras. 230-237; *see also* Exhibit CHN-1.

[27] *See, e.g., Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the People's Republic of China*, at Comment 2 ("OCTG OI Final I&D Memo") (Exhibit CHN-77).

34. The U.S. first written submission also addresses China's arguments related to Commerce's use of weighted averages[28] and its treatment of so-called "qualitative significance."[29] We have shown that China's arguments lack merit, and we will not repeat here the arguments we have made already.

D. The "Explanation Clause"

35. As it does with the "pattern clause," the U.S. first written submission presents an interpretive analysis of the "explanation clause" of the second sentence of Article 2.4.2.[30] When interpreted in accordance with the customary rules of interpretation, the "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear the reason that it is not possible in the dumping calculation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2.

36. In the challenged antidumping investigations, Commerce considered whether observed price differences could be taken into account using the average-to-average comparison methodology. Commerce evaluated the difference between what the weighted-average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. Commerce concluded that the observed price differences could not be taken into account using the average-to-average method. Support for this conclusion is found in the fact that there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method.

37. Thus, consistent with the requirements of the "explanation clause," Commerce provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2.

38. China complains that Commerce did not explain why the transaction-to-transaction comparison methodology could not be used appropriately. However, since an investigating authority may choose between the average-to-average or the transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2. Additionally, we would note that, in investigations involving nonmarket economy countries, such as China, the transaction-to-transaction comparison methodology cannot be used, because normal value is not based on transaction-specific home market sale prices. So, it was

[28] *See* U.S. First Written Submission, paras. 146-155.
[29] *See* U.S. First Written Submission, paras. 141-145.
[30] U.S. First Written Submission, paras. 156-182.

self-evident in the challenged investigations that the pattern of export prices could not be taken into account appropriately by a comparison methodology that was impossible to use.

39. Accordingly, as we have shown, the explanations that Commerce provided in the challenged antidumping investigations are not inconsistent with Article 2.4.2 of the AD Agreement.

E. China's Claims Concerning the PET Film Third Administrative Review Are Consequential Claims, and They Lack Merit

40. We offer only a brief final comment on China's remaining claim under Article 2.4.2 of the AD Agreement, which relates to Commerce's use of zeroing in connection with its application of the alternative, average-to-transaction comparison methodology in the third administrative review of the antidumping order on PET film from China. China claims that Commerce's use of zeroing in the challenged administrative review is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. In reality, though, China's claims depend on the Panel finding that Commerce's use of zeroing in connection with its application of the alternative, average-to-transaction comparison methodology is inconsistent with the second sentence of Article 2.4.2. If the Panel agrees with the United States, as we urge you to do, that zeroing is permissible when applying the alternative, average-to-transaction comparison methodology – in a situation where the conditions for its use have been met – then the Panel must find that China's Article 9.3 and VI:2 claims lack any foundation.

II. CHINA'S CLAIMS UNDER ARTICLES 6.10, 9.2, AND 9.4 OF THE AD AGREEMENT ARE WITHOUT MERIT

41. We now turn to some of the salient issues concerning China's claim that the United States has breached Articles 6.10, 9.2, and 9.4 of the AD Agreement on account of a so-called Single Rate Presumption. As we will explain, China's claims under these provisions, both "as such" and "as applied" rest on erroneous characterizations of the relevant facts and law and must accordingly fail.

A. China Has Failed to Establish The Existence of a Norm That Can Be Challenged "As Such"

42. With respect to China's "as such" claim, it begins – and in our view ends – with the analysis of whether China has properly established the existence of a "norm of general and prospective application." Specifically, China mischaracterizes the evidence it proffers to support the existence of such a norm. When this purported evidence is critically and fairly considered, it is clear that China has not satisfied the high evidentiary burden it must in order to establish the existence of a norm.[31]

43. But before we proceed to discuss this evidence, we think it appropriate to engage in a brief threshold exercise that China eschews, which is to consider precisely what is a norm of

[31] *US – Zeroing (EC) (AB)*, para. 197.

general and prospective application. A norm in the legal sense is simply a "rule," a word that it is often used interchangeably with norm or alongside it.[32] Not surprisingly, panels thus considering the issue of whether a complaining party has established the existence of a norm have framed their inquiries in terms of whether an authoritative requirement exists.[33] Thus, to have a norm of general and prospective application means to have a rule with application in (1) *all* scenarios that (2) *arise after* its issuance.[34] Put more succinctly, the rule will be invariably applied in the future. Under this standard, a cursory review of the evidence put forward by China does not sustain a finding that the so-called Single Rate Presumption is established as a norm of general and prospective application.

44. First, China cites Policy Bulletin 05.1 describing it as a "statement of policy"[35] as well as a document that has "normative" character meaning that it can be challenged in and of itself.[36] But China does not, at least in its submission, claim to be challenging the document itself – and for good reason. The document has multiple, clearly identifiable sections. The portion of that document referenced by China is not from the section of that document titled "Statement of Policy" that contains the policies actually being announced. That section clearly states the policies in the bulletin concerns the application for separate antidumping rates and the use of combination rates. What China cites from is in another section called background. This section clearly does not purport to set policy or guidance in any respect. Accordingly, we fail to see how a background discussion could be viewed by any reasonable party as an authoritative pronouncement that could create legitimate expectations as to future conduct.

45. Second, China puts forward Commerce's Antidumping Manual ("Manual"), which by its plain language is a training manual.[37] It explicitly disclaims to set forth any suggestion that it is authoritative or otherwise controlling with respect to Commerce's policy, by noting that it:

> is for the internal training and guidance of . . . personnel only, and the practices set out herein are subject to change without notice. This manual cannot be cited to establish [Commerce] practice.[38]

The notion of relying on any training module to establish a legal norm is problematic in and of itself. For example, by that logic, would that mean that any training materials used by a WTO Member, such as a training module prepared by the WTO Secretariat, has incorporated

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[32] Black's Law Dictionary (Definition 2: "A set of standard rules and laws laid down by the legal system …") (Exhibit USA-79).

[33] *EC – IT Products*, para. 7.157 ("The issue before it is whether CNEN set forth rules or norms that are intended to have general and prospective application, and whether CNEN have normative value in providing administrative guidance, and create expectations among the public and among private actors. Stated another way, the issue is whether CNEN are "authoritative" such that "per se" requirements set out in the CNEN could validly form the basis of an "as such" claim…"

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

[35] China's First Written Submission, para. 325.

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

[37] China's First Written Submission, para. 327.

[38] Department of Commerce 2009 Antidumping Manual, p. 1 (Exhibit USA-28).

statements in those materials as norms of general and prospective application that can be challenged in dispute settlement? The notion China seeks to advance is outright untenable where, as here, Commerce through a clear disclaimer has explicitly circumscribed the relevance of its AD Manual and has alerted the world that the Manual cannot serve as a basis to argue that Commerce has adopted an approach that must be followed for any particular, future proceeding. For these reasons, the Manual cannot be considered as having general or prospective application.

46. Third, China points to the fact that Commerce has purportedly utilized such a presumption in previous cases.[39] Even if we accept China's characterization, what outcome has happened *arguendo* in discrete cases – even a large number of cases – does not establish either why it happened in those specific cases, or more critically, what Commerce will determine if the situation occurs in the future. But, that is precisely the burden that China carries though.[40] Put plainly, establishing consistent behavior does not indicate whether there is some separate instrument – a measure – that accounts for the consistent behavior. Absent some separate instrument or measure, the only thing proven by consistent results is the fact of consistent results.

47. Moreover, it is critical to note that the referenced statements are taking place in the context of specific investigations rather than any document that purports to reflect a general practice of Commerce. In this respect, we think the panel's analysis in *Thailand – Cigarettes (Philippines)* to be instructive. Specifically, looking at the analysis of other panels, it noted that

> 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.[41]

In that particular dispute, the panel went on to note that government documents provided by the complainant were insufficient to establish a norm because the Panel could not locate in those documents a government rule or policy directing government officials to "systematically" act in a prescribed manner in the future.[42] Likewise, none of the determinations from particular investigations cited by China claim to purport they are announcing or vindicating a prospective rule to be applied by Commerce in the future.

48. Finally, China cites certain decisions from U.S. domestic courts.[43] As an initial matter, the quoted language does not assert what Commerce will necessarily do in the future, but speaks to it being "within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy…", which is far short of the burden China must meet.[44] More

[39] China's First Written Submission, paras. 328-329.
[40] *See US – Zeroing (EC) (AB)*, para. 204 (In sustaining the finding of a norm, the Appellate Body noted the "evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract.").
[41] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.127.
[42] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.130.
[43] China's First Written Submission, paras. 332-333.
[44] China's First Written Submission, para. 333, quoting *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997) (Exhibit CHN-131).

fundamentally, these decisions – like those at issue in *Thailand – Cigarettes (Philippines)* – are necessarily decisions evaluating complaints made by particular parties rather than authoritative statements of future policy. The principal difference between the types of determinations at issue in *Thailand – Cigarettes (Philippines)* and those presented by China here are that the latter are one step further removed because they are not even issued by the relevant agency, which is Commerce. Instead, they are issued by U.S. courts that are adjudicating concerns raised by particular private parties in specific determinations – not what Commerce will do in the future.

49. In short, China, at best, is trying to take selected excerpts from various documents and claim that they necessarily carry sufficient legal import to establish a norm of general and prospective application because a government authority issued the documents. That is of course untenable. Governments issue documents for a variety of purposes with the likely majority of them not intended to carry any authoritative weight, let alone establish general and prospective application.

50. Notably, China fails to discuss in its submission the one instrument – which it cites to in its Panel Request – that is in fact authoritative under the U.S. legal system: 19 CFR § 351.107(d), a federal regulation issued by Commerce. Indeed, the very existence of this written authoritative rule undermines China's ability to assert that the norm should be established by looking to incidents of prior application since the rule itself can be examined.[45] Such an examination confirms why it is not surprising that China chooses not to discuss that instrument – at all. Because the Commerce regulation is clear on its face that China cannot sustain its claim that the so-called Single Rate Presumption will *invariably* be applied to antidumping investigations involving China. To the contrary, the regulation simply notes that "[i]n an antidumping proceeding involving imports from a nonmarket economy country, 'rates' *may* consist of a single dumping margin applicable to all exporters and producers."[46] In other words, there is nothing binding, authoritative, compulsory, or otherwise indicative in that instrument that should create expectations that a Single Rate Presumption will be applied generally in the future. To the contrary, it implies discretion, which the Panel should not assume will automatically be applied in any particular manner.[47]

51. We close on our discussion of the "as such" claim with one final observation. China, as the Panel's Advance Questions touch upon, is asserting that it has put forward the same evidence that was before the panel in *US – Shrimp II* and points to the ultimate finding reached by that panel that the evidence is sufficient to establish a norm of general and prospective application.[48] What China generally avoids though is any discussion of that panel's analysis and engagement with the particular evidence at issue in that dispute. And, as discussed, when one does engage in

[45] *Compare US – Zeroing (EC) (AB)*, para. 190 (the Appellate Body stated "the zeroing methodology . . . is not expressed in writing" (citing to the Panel Report, para 7.104) There was no statutory provision at issue in the dispute. The challenge in that case pertained to the continued application of zeroing, making evidence of systematic application arguably relevant to determining the existence of a norm.).
[46] Exhibit CHN–108 (emphasis added).
[47] *US – Section 211 (AB)*, para. 259 ("where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the WTO Agreement in good faith.")
[48] Panel Question 19; China's First Written Submission, n. 348 & para. 330.

the specific evidence and arguments, it is clear that China has not presented a viable claim regarding the so-called single rate presumption.

B. China's As-Applied Claims Regarding the Single Rate Presumption Must Also Fail

52. With respect to China's as-applied claims, they suffer from a fatal deficiency at the outset. Specifically, in each of the investigations challenged by China, Commerce evaluated all the facts and found that certain entities in China should be treated as a single "exporter or producer" for purposes of 6.10. In particular, Commerce, through its Separate Rate Application, engages in a comprehensive and particularized review of a particular company's relationship with the Chinese government. These findings to treat certain entities as a single exporter or producer were accordingly supported by the record evidence, and fully consistent with the obligations under Article 6.10. China does not – because it cannot – show otherwise.

53. In addition, we submit three other points. First, China's arguments distort the text of the provisions it invokes by asserting they compel investigating authorities to provide separate margins of dumping for every nominally distinct legal entity. In actuality, the provisions concern the individual treatment of known *producers* and *exporters*. For example, China begins by correctly quoting Article 6.10 of the AD Agreement, including the language that provides "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known *exporter or producer* …[49] Thereafter though, China's submission conveniently substitutes different terms that would apply to a broader array of entities. For example, China incorrectly interposes respondents[50] and companies[51] in place of exporter or producer. In using terminology that differs from that used in Article 6.10, China obscures a point that significantly undermines its argument: investigating authorities are perfectly entitled to consider whether entities should be treated as a single producer or exporter – and do so even in investigations involving market economies.[52]

54. This bring us to our second point: this dispute is factually different that *EC – Fasteners* and *US – Shrimp II*. China may prefer to couch this dispute as *EC – Fasteners* redux, but that does not make it so. There are critical factual differences between those disputes and the present one that China's first written submission sidesteps, including that Commerce actually collects and evaluates information that goes directly to whether Chinese respondents should be afforded individual treatment or not.[53] *EC – Fasteners* did

[49] Emphasis added. China's First Written Submission, para. 350.
[50] China's First Written Submission, para. 354 (emphasis added).
[51] China's First Written Submission, para. 371, 381.
[52] *Korea – Certain Paper*, para. 7.161 ("While Article 6.10 does not by its terms require that each separate legal entity be treated as a single "exporter" or "producer", neither does it allow a Member to treat distinct legal entities as a single exporter or producer without justification. Whether or not the circumstances of a given investigation justify such treatment must be determined on the basis of the record of that investigation. In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment.")
[53] U.S. First Written Submission, paras. 382-385.

not preclude such an examination, but rather noted the examination in that dispute, the IT Test, was flawed because the relevant criteria in that test led to the denial of individual treatment of producers and exporters with "little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State."[54]

55. Here, China makes no similar claim against Commerce's Separate Rate Test, but rather takes issue that any such test is required at all.[55] As our submission demonstrates, the criteria in the U.S. Separate Rate Test are consistent with what the Appellate Body found to be appropriate in *EC – Fasteners*.[56]

56. The second factual distinction, not addressed by China in its submission, is that Commerce has engaged in a determination that China is a non-market economy.[57] China has not contested that determination either in proceedings before Commerce or before this Panel, although it was certainly aware of it as it was the party that supported the request that triggered it. To be sure, as our submission makes clear, the United States disagrees with the Appellate Body's reasoning in *EC – Fasteners* that the European Union was not entitled to rely on China's Protocol of Accession as a basis to find China a non-market economy. And we will further discuss in our responses to the Panel's questions why we think that is so – and why the misplaced reasoning should not be extended any further if not repudiated altogether. That said, to the extent China invokes the reasoning in *EC – Fasteners* and *US – Shrimp II* to argue that Commerce erred by designating China a non-market economy solely on the basis of the Protocol, that proposition cannot be sustained because that is simply not the case here.

57. The final point we note is regarding the inadequacy of the evidence China puts forward for its as-applied claims. Principally, China relies on Table SRP,[58] which appears to be a compilation of quotes from various antidumping proceedings. This table, despite its length, proves nothing, precisely because it simply provides extracted generalized quotes rather than any evidence of concrete treatment by Commerce with respect to any of the particular participants in any of the respective proceedings. For example, nowhere in Table SRP does China present evidence to indicate whether the China government entity was under examination for purposes of Article 6.10. Likewise, China's table fails to demonstrate as-applied breaches of Articles 6.10 and 9.2 because it is does not demonstrate that any actual exporter or producer failed to receive an individual margin or confirm whether circumstances that triggered such a denial were

[54] *EC – Fasteners (AB)*, para. 380.
[55] *See e.g.*, China's First Written Submission, para. 394 ("It does so because it imposes an *additional condition* for access to individual duties; namely, that the relevant producer/exporter must first satisfy the Separate Rate Test.") (emphasis original); *compare* EU Third Party Submission, para. 66 ("Were the Panel in the present case to discuss the criteria themselves, the European Union would agree with the United States that Members are entitled to make Single Entity determinations based on the type of criteria referred to by the United States.").
[56] U.S. First Written Submission, paras. 382-383.
[57] U.S. First Written Submission, para. 381.
[58] *See e.g.*, China's First Written Submission, paras. 344, 378, 380.

inconsistent with the obligations in the AD Agreement.[59] In short, China cannot circumvent the fact-intensive analysis that is required to prove that an exporter or producer was denied its proper rate because that is precisely the burden China must carry.

III. CHINA'S CLAIMS UNDER ARTICLES 6.1, 6.8, ANNEX II, AND 9.4 OF THE AD AGREEMENT ARE WITHOUT MERIT

58. The final set of issues we address in our statement concerns China's various claims against what China dubs "Use of Adverse Facts Available norm." At the outset, we note that the alleged measure China proffers in its first written submission bears little resemblance to the alleged measures it put forth in its Panel Request. Although China in its Panel Request asserted that the measures at issue included the U.S. legal instruments, 19 U.S.C. § 1677e and 19 C.F.R. § 351.308,[60] China's submission does not appear to take any issue with them. Instead, the challenge appears limited to the purported norm alone, an alleged unwritten measure which China struggles to define with the requisite clarity. We do not find that surprising. The U.S. legal instruments clearly provide Commerce significant discretion and require Commerce to corroborate where practicable the use of any secondary information.[61] Indeed, the Appellate Body just last year in *US – Carbon Steel (India)* found these instruments to be consistent with the analogous provision that governs the use of facts available under the SCM Agreement.[62] With that focus – that China's claim rests solely on the existence and operation of a purported norm – we briefly consider some of the key issues concerning the "as such" and "as applied" challenges made with respect to it.

A. China Has Failed to Establish The Existence of a Norm That Can Be Challenged "As Such"

59. With respect to China's "as such" claims regarding the "Use of Facts Available norm," we note two fundamental deficiencies. First, China does not – because it cannot – articulate the alleged norm's precise content with the requisite clarity. Specifically, China appears to allege that the content of this norm is that Commerce selects "adverse facts" when Commerce finds non-cooperation by the China government entity.[63] Yet China also makes several inconsistent statements throughout its first written submission with respect to whether a finding of non-cooperation – what China refers to as the "trigger condition" for the norm – is also part of this alleged norm. China also fails to explain though what qualifies a fact as adverse. Indeed, the reason the investigating authority must select from available facts is because a non-cooperative party has withheld certain facts. In other words, the investigating authority does not know whether the information it has selected is indeed adverse or potentially favorable since the ideal information is missing.

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[59] *EC – Fasteners* (AB), para. 376 ("Whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations.").
[60] China Panel Request, paras. 23-24.
[61] Exhibits CHN-152 & CHN-153.
[62] *US – Carbon Steel (India) (AB)*, Section 4.6.3.
[63] China's First Written Submission, para. 436.

60. Thus, put plainly, facts are simply facts – no fact is inherently adverse or non-adverse. The pertinent question is what inferences an investigating authority may draw in selecting from available facts where a non-cooperative party has withheld some of the relevant facts. To the extent China is taking issue with the ability of an investigating authority to utilize such inferences, such a claim must of course fail.

61. There is no text that proscribes an investigating authority from drawing an inference adverse to the interests of a non-cooperative party in selecting from the available facts. To the contrary, paragraph 7 of Annex II explicitly contemplates that non-cooperative parties may face a result "which is less favourable to the party than if the party did cooperate." The Appellate Body, considering the analogue to the facts available provision in the SCM Agreement, has also noted in that context that nothing prohibits an investigating authority from using an inference that is "'adverse to the interests' of a non-cooperating party" if the other requisite requirements concerning the facts available provision are satisfied.[64]

62. Second, China's principal evidence in support of the existence of this norm is the purported practice of Commerce. As a threshold matter, we have already explained why trying to infer a norm generally on the basis of a practice is problematic.[65] The infeasibility of adopting such an approach is compounded here though because China's proffered evidence provides no indicia regarding the existence and nature of any alleged practice. China simply provides various tables indicating the China government entity was subject to significant dumping margins. But such figures prove nothing. The Appellate Body's findings in *US – Carbon Steel (India)* are instructive on this issue:

> even if the "practice" in respect of its application were relevant to ascertaining its meaning in this case, it does not conclusively support the proposition [that the measure requires the USDOC to draw the worst possible inference in all cases of non-cooperation].[66]

Because China simply points to outcomes rather than any analysis and conditions that dictated such outcomes, its "as such" claims must fail.

B. China's As-Applied Claims Regarding the Use of Adverse Facts Available Norm Must Also Fail

63. China's submission presents a variety of arguments regarding its as-applied claims. However, these various arguments are essentially a variant of two basic complaints:

(1) China believes the AD Agreement requires Commerce to seek information from each and every member of the China-government entity with respect to

[64] *US – Carbon Steel (India) (AB)*, para. 4.469.
[65] *See e.g.*, U.S. First Written Submission, para. 343.
[66] *US – Carbon Steel (India) (AB)*, para. 4.481.

the calculation of a dumping margin, regardless of any non-cooperation on the part of one or more members of the entity; and

(2) China contends that the AD Agreement requires Commerce to compare "all secondary source information to all other secondary source information to determine which source rose to the top as the 'best' available information" and failed to do so.[67]

64. China's claim fails though because, as we set forth in our first written submission, Commerce evaluated all available information on the record and appropriately considered the non-cooperation of the entity when selecting from among the available facts. What China forgets is that the nature of the evaluation depended on the particular facts in each case. Thus, in cases where the record had little information due to non-cooperation, Commerce's evaluation was necessarily limited. In other cases though, there was more information. In such instances, Commerce examined the record, including information from cooperating parties, to determine whether the information in the application had probative value. If Commerce's evaluation, using the available information, indicated the particular dumping rate or rates in the application did not have probative value, Commerce rejects their use as "facts available."

C. China Cannot Establish that Commerce Acted Inconsistently With Article 6.1

65. We briefly note one observation regarding China's claim under Article 6.1. Specifically, China in its submission did not attempt to address the threshold issue of the applicability of this article. Article 6.1 by its plain terms does not govern the substantive issue of what specific types of information an investigating authority must solicit from interested parties for a given determination. It only speaks to the procedural issue requiring notice to be given if an investigating authority actually requires information. Accordingly, China fails to explain why a decision not to issue questionnaires to each legal entity that comprised the China government entity would implicate Article 6.1.

IV. CONCLUSION

66. This bring us nearly to the end of our statement. Mr. Chairman, Members of the Panel, we appreciate that you have been inundated with information. China has provided a submission of over 260 pages, with nearly 500 exhibits, and 340 pages of charts in Annexes. Yet, in those volumes of pages are critical gaps:

- China fails to propose an interpretation of the second sentence of Article 2.4.2 that would give that provision any meaning;

[67] China's First Written Submission, para. 687.

- China cannot overcome that none of the evidence it relies on to claim a Single Rate Presumption norm would create any expectations with respect to Commerce's general and prospective behavior;

- China does not address Commerce's individualized review of particular companies in determining their relationship with the Chinese government in order to determine whether it should be treated as part of a single "exporter or producer;"

- China does not address why Commerce is precluded from utilizing an adverse inference under the terms of Article 6.8 and Annex II; and

- China cannot rewrite Article 6.1 to compel an investigating authority to require certain types of information.

In short, the extensive length of China's submissions cannot overcome what are China's very clear shortcomings when it comes to the necessary interpretive analysis of the relevant provisions of the AD Agreement and the fact-specific evaluation of the record evidence.

67. This concludes our opening statement. We would be pleased to respond to your questions.