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

(DS471)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

PUBLIC VERSION

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May 13, 2015

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I. INTRODUCTION

1. In this dispute, the People's Republic of China ("China") challenges a host of U.S. antidumping measures, claiming that they "do not accord with the requirements of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*" (the "AD Agreement").[1] China's claims are without merit. The United States agrees with China, though, that this dispute raises issues of "systemic importance."[2] At stake is whether Members have the ability to "unmask"[3] dumping concealed by a pattern of export prices which differ significantly, and whether Members have the ability to provide a remedy for dumping by exporters in nonmarket economy countries, such as China.

2. Ultimately, this dispute is like all others brought before World Trade Organization ("WTO") dispute settlement panels. It involves a good faith disagreement among Members about the proper interpretation and application of the provisions of the covered agreements. This dispute presents a number of novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel. Resolving this dispute will require the Panel to discern the meaning of various provisions of the AD Agreement through the application of the customary rules of interpretation of public international law.

3. In its first written submission, China proposes interpretations of the AD Agreement that are divorced from those rules. For example, contrary to the customary rules of interpretation, China would interpret Article 2.4.2 of the AD Agreement in a manner that reads the second sentence of that provision out of the agreement entirely. Such an interpretation cannot be accepted. Indeed, as demonstrated in this submission, the Panel should find that, when they are subjected to scrutiny, all of China's proposed interpretations of the AD Agreement simply are not supported by the ordinary meaning of text of the agreement, in context, and in light of the object and purpose of the agreement. Accordingly, all of China's legal claims lack merit, and should be rejected.

4. This submission is organized as follows: Section II contains a brief discussion of relevant procedural and factual background, and section III addresses relevant rules related to interpretation, standard of review, and burden of proof.

5. Section IV responds to China's various claims related to the application by the U.S. Department of Commerce ("USDOC") of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. In particular, section IV.B addresses China's "as applied" claims related to the USDOC's final determinations in certain antidumping investigations. China's claims concern both when and how an investigating authority may establish a margin of dumping utilizing the alternative,

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[1] First Written Submission of China (Confidential), para. 2 (March 6, 2015) ("China's First Written Submission").

[2] *See*, *e.g.*, China's First Written Submission, paras. 3-4.

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

average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement.

6. Section IV.B.2 discusses what is entailed in finding "a pattern of export prices which differ significantly among different purchasers, regions or time periods," and section IV.B.3 discusses what is entailed in providing an "explanation … as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."[4] We demonstrate that, in the challenged antidumping investigations, the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement in finding that the conditions of what we call the "pattern clause" and the "explanation clause" were met.

7. Then, sections IV.B.4 and IV.B.5 discuss how the alternative, average-to-transaction comparison methodology provided in Article 2.4.2 of the AD Agreement is to be applied. We demonstrate why the USDOC's application of the average-to-transaction comparison methodology to all sales in the challenged antidumping investigations, as well as the USDOC's use of zeroing in connection with its application of the alternative comparison methodology, is not inconsistent with Article 2.4.2 of the AD Agreement.

8. Section IV.C responds to China's "as applied" claims related to the USDOC's application of the alternative, average-to-transaction comparison methodology in an administrative review. We demonstrate that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in the challenged administrative review is not inconsistent with Article 9.3 of the AD Agreement or Article VI:2 of the GATT 1994.

9. In section V, the United States addresses China claims concerning the so-called Single Rate Presumption. The United States will explain that China has not demonstrated the existence of any such unwritten measure establishing a norm of general and prospective application. .The United States also demonstrates that Articles 6.10 and 9.2 of the AD Agreement permit an investigating authority to treat different legal entities as a single producer or exporter.

10. In section VI, the United States demonstrates that China has failed to establish a breach of Article 9.4 because it cannot show that the conditions in the second sentence of Article 6.10 are applicable. The plain text of Article 9.4 confirms it does not govern the rate assigned to those companies that have been included in the examination.

11. In section VII, the United States responds to China's claims concerning the use of Facts Available. The United States demonstrates that China's claims, both "as such" and "as applied" are without merit. In particular, many of China's arguments are directly refuted by the Appellate Body findings in *US – Hot-Rolled Carbon Steel (India)*, which was issued last December, well after China initiated this dispute. As demonstrated below, China has failed to demonstrate that USDOC's use of facts available in assigning a rate to the China-government entity is a rule or norm of general and prospective application that may be challenged on an "as such" basis. Further, China's arguments rely on an erroneous interpretation of the obligations contained in

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

Article 6.8 and Annex II. USDOC's determinations to apply facts available to the China-government entity and its use of adverse inferences, in response to failures to respond to requests for information, in selecting from the available facts on the record in a proceeding are fully consistent with Article 6.8 and Annex II.

12. Finally, in section VIII, the United States explains why China's claims with respect to Article 6.1 are misplaced. USDOC properly notified companies within the China-government entity of the information required, and provided opportunities for the companies within the China-government entity to provide relevant information.

II. PROCEDURAL AND FACTUAL BACKGROUND

13. On December 3, 2013, China requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 17 of the AD Agreement with regard to certain antidumping measures allegedly adopted by the USDOC.[5] The scope of this dispute is massive. China's request for consultations lists thirty-two separate antidumping determinations made by the USDOC.[6] China's request identifies dozens of aspects of those determinations that China claims are inconsistent with the provisions of the AD Agreement "as applied." In addition, China identifies dozens of measures that allegedly are inconsistent with various provisions of the AD Agreement.

14. The United States and China held consultations on January 23, 2014, but were unable to resolve the matter.

15. On February 13, 2014, China requested the establishment of a panel pursuant to Article 4 of the DSU, Article XXII of the GATT 1994, and Article 17 of the AD Agreement.[7] At a meeting held on March 26, 2014, the WTO Dispute Settlement Body ("DSB") established a panel with the following terms of reference:

> [t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS471/5 & Corr.1 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[8]

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[5] Request for Consultations by China, WT/DS471/1, circulated December 16, 2013 ("Consultations Request").

[6] Consultations Request, Annexes 1-5.

[7] Request for the Establishment of a Panel by China, WT/DS471/5, circulated February 14, 2014 ("Panel Request").

[8] Constitution of the Panel Established at the Request of China – Note by the Secretariat, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/6, para. 2 (August 29, 2014).

16. China's first written submission identifies and summarizes the 32 USDOC antidumping determinations that are at issue in this dispute.[9] Those determinations cover a wide range of different products: certain coated paper suitable for high-quality print graphics using sheet-fed presses (coated paper), certain oil country tubular goods (OCTG), high pressure steel cylinders (steel cylinders), polyethylene terephthalate film, sheet, and strip (PET film), aluminum extrusions, certain frozen and canned warmwater shrimp (shrimp), certain new pneumatic off–the-road tires (tires), crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), diamond sawblades and parts thereof (sawblades), multilayered wood flooring (flooring), narrow woven ribbons with woven selvedge (ribbons), polyethylene retail carrier bags (bags), and wooden bedroom furniture (furniture).

17. The United States will not summarize here the contents of each of these thirty-two different determinations. Rather, the relevant portions of specific determinations are discussed below, in the context of the U.S. response to China's specific legal claims.

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

18. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such customary rules.[10] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A corollary of this customary rule of interpretation is that an "interpretation must give meaning and effect to all the terms of the treaty."[11]

19. The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Article 11 of the DSU provides that:

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[9] *See* China's First Written Submission, paras. 35-36 and Annex 1.

[10] *US – Gasoline (AB)*, p. 17.

[11] *US – Gasoline (AB)*, p. 23.

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

20. Article 17.6 of the AD Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

21. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination."[12] It is well-established that the Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*."[13] Indeed, the Appellate Body has held that a panel breached Article 11 of the DSU where that panel went beyond its role as reviewer and instead substituted its own assessment of the evidence and judgment for that of the investigating authority.[14] At the same time, however, this does not mean

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[12] *China – Broiler Products*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103.).

[13] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187-188 (emphasis in original)

[14] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 188-190.

that the Panel "must simply *accept* the conclusions of the competent authorities."[15] Examination of the authority's conclusions must be "in-depth" and "critical and searching."[16]

22. Article 17.6 of the AD Agreement imposes "limiting obligations on a panel" in reviewing an investigating authority's establishment and evaluation of facts.[17] The aim of Article 17.6 is "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[18]

23. Finally, it is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[19] Accordingly, China, as the complaining party, bears the burden of demonstrating that the U.S. antidumping measures within the Panel's terms of reference are inconsistent with a provision or provisions of the AD Agreement or the GATT 1994. China must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of showing consistency with that provision.[20]

IV. CHINA'S CLAIMS RELATED TO THE USDOC'S APPLICATION OF THE ALTERNATIVE, AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY SET FORTH IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT ARE WITHOUT MERIT

A. Introduction

24. This dispute presents novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel. No prior WTO dispute has involved a Member's application of the alternative comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[21] Accordingly, neither the Appellate Body nor any panel has previously interpreted the terms of the second sentence of Article 2.4.2, or determined whether an antidumping measure adopted by a Member is consistent with the terms of that provision.

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[15] *US – Cotton Yarn (AB)*, para. 69, note 42 (emphasis in original) (*citing US – Lamb (AB)*, para. 106, note 41).

[16] *E.g., China – Broiler Products*, para. 7.5 (*quoting US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93).

[17] *Thailand – H-Beams (AB)*, para. 114.

[18] *Thailand – H-Beams (AB)*, para. 117.

[19] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also China – Autos (US) (Panel)*, para. 7.6.

[20] *EC – Hormones (AB)*, para. 109 (*citing US – Wool Shirts and Blouses (AB)*, pp. 14-16); *see also China – Broiler Products*, para. 7.6.

[21] In *US – Washing Machines* (DS464), Korea advances claims under the second sentence of Article 2.4.2 of the AD Agreement that are similar to the claims China advances in this dispute. As of the date of this submission, the panel in *US – Washing Machines* has not circulated its report.

25. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. Answering these questions will require the Panel to undertake an interpretive analysis of the terms of the second sentence of Article 2.4.2, which must be done in accordance with the customary rules of interpretation. This will, *inter alia*, involve consideration of what is entailed in finding a "pattern of export prices which differ significantly among different purchasers, regions or time periods" and what constitutes a sufficient "explanation" of "why such differences cannot be taken into account" by the average-to-average or transaction-to-transaction comparison methodologies.[22]

26. Of course, there is also the question of the permissibility (and in the U.S. view, the logical necessity) of using zeroing in connection with the application of the alternative comparison methodology provided for in the second sentence of Article 2.4.2. The Appellate Body has explained 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."[23] Hence, that is another interpretive question that the Panel will need to answer for itself in the first instance.

27. China asserts that the U.S. view that zeroing is permissible when applying the exceptional, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 is "erroneous."[24] Despite China's lengthy discussion of Appellate Body findings in prior disputes,[25] however, the present dispute is not about whether the United States has complied with any earlier findings of the Appellate Body or other panels. The United States has fully complied with all previous findings related to zeroing.[26] Nor is this dispute about re-

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

[23] *US – Stainless Steel (Mexico) (AB)*, para. 127. *See also US – Zeroing (Japan) (AB)*, paras. 135-136 (distinguishing the transaction-to-transaction and average-to-transaction comparison methodologies and declining to further address whether zeroing is permitted under the second sentence of Article 2.4.2 when applying the average-to-transaction comparison methodology: "We wish to emphasize, however, that our analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."); *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98 (Noting that "there is considerable uncertainty regarding how precisely the third methodology should be applied.").

[24] China's First Written Submission, para. 57.

[25] *See, e.g.,* China's First Written Submission, paras. 200-218.

[26] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006) (Exhibit CHN-71); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (February 14, 2012) (Exhibit CHN-25); *see also, e.g., Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 22 February 2012*, WT/DSB/M/312, paras. 31-48 (May 22, 2012) ("Despite the fundamental disagreement of the United States with the Appellate Body's findings on 'zeroing', the United States welcomed the agreement to end this difficult and long-standing dispute." *Id.*, para. 42. "The EU recognized that significant progress had been made and it hoped and expected that the satisfactory completion of all steps under the roadmap would effectively bring the zeroing disputes to an end." *Id.*, para. 43.). The panel in *US – Shrimp II (Viet Nam)* recently confirmed that the United States has implemented the "as such" findings against the use of zeroing in administrative reviews. *See US – Shrimp II (Viet Nam) (Panel)*, para. 7.51 ("To us, the fact that the USDOC has modified its calculation methodology and ceased to apply the zeroing methodology in administrative reviews is a significant element to take into consideration because it speaks directly to the question of the very existence of this methodology as a measure of general and prospective

litigating previous interpretations of the AD Agreement. In this dispute, the United States does not suggest, let alone argue, that the Panel depart from any prior interpretation of the AD Agreement by the Appellate Body or any other panel.

28. What this dispute is about, as it relates to the USDOC's application of the alternative, average-to-transaction comparison methodology in certain proceedings, is the correct interpretation of the second sentence of Article 2.4.2 of the AD Agreement. That sentence, 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."[27] Through its "as applied" challenges in this dispute, China seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance China's efforts in this regard.

29. Rather, the Panel should, consistent with Articles 11 and 3.2 of the DSU, make an objective assessment of the matter before it and apply the customary rules of interpretation of public international law to ascertain the meaning of the second sentence of Article 2.4.2 of the AD Agreement and assess whether the challenged U.S. measures are inconsistent with that and other provisions of the covered agreements, as China claims. As demonstrated below, China's claims are without merit, and the measures challenged by China are not inconsistent with Article 2.4.2 of the AD Agreement or any of the provisions of the covered agreements.

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

1. Overview of Article 2.4.2 of the AD Agreement

30. China claims that the USDOC's final determinations in the coated paper, OCTG, and steel cylinders antidumping investigations are inconsistent with Article 2.4.2 of the AD Agreement for a variety of reasons. In this section, the United States will address China's "as applied" claims related to Article 2.4.2.

31. An interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement must begin with the text of that provision. Article 2.4.2 of the AD Agreement, in its entirety, provides that:

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application. The Final Modification indicates that the USDOC decided to apply a modified methodology, except where it determines that application of a different comparison method is more appropriate.").

[27] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62 ("This provision [Art. 2.4.2, second sentence] allows Members, in structuring their anti-dumping investigations, to address three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.").

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

32. On its face, Article 2.4.2 of the AD Agreement sets forth three comparison methodologies by which an investigating authority may determine the "existence of margins of dumping." Per the first sentence, "normally," an investigating authority "shall" do so "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." More succinctly, the two normal comparison methodologies available to an investigating authority are the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. The Appellate Body has observed that:

> The first sentence of Article 2.4.2 sets out the two methodologies that "shall normally" be used by investigating authorities to establish "margins of dumping". Although the transaction-to-transaction and weighted average-to-weighted average comparison methodologies are distinct, they fulfil the same function. They are also equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two. An investigating authority may choose between the two depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing "margins of dumping" and that there is no hierarchy between them, it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology.[28]

33. The second sentence of Article 2.4.2 describes a third, alternative comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences

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

cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

34. The Appellate Body has observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[29] As an exception to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should *not* "lead to results that are systematically different"[30] – the alternative, average-to-transaction comparison methodology, by logical extension, *should* "lead to results that are systematically different" when the conditions for its use have been met.

35. As noted above, when and how a Member may utilize the alternative comparison methodology described in the second sentence of Article 2.4.2 of the AD Agreement are two of the principle questions before the Panel. So, with this overview of the structure of Article 2.4.2 in mind, the United States will turn to a discussion of each of the conditions set out in the second sentence of Article 2.4.2 (*i.e.*, *when* a Member may utilize the alternative comparison methodology), as well as a discussion of the proper understanding of the application of the alternative comparison methodology (*i.e.*, *how* a Member may use it). In doing so, the United States also will demonstrate that the USDOC's application in the coated paper, OCTG, and steel cylinders antidumping investigations of what it called a "targeted dumping" analysis, as well as its use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology, were not inconsistent with the requirements of Article 2.4.2, or any other provision of the AD Agreement or the GATT 1994. Separately, in section IV.C, we address China's claims related to the USDOC's application of the alternative, average-to-transaction comparison methodology in the third administrative review of the antidumping order on PET film from China.

2. The First Condition for Resorting to the Alternative Comparison Methodology: The "Pattern Clause"

a. "A Pattern of Export Prices which Differ Significantly among Different Purchasers, Regions or Time Periods" Is a Regular and Intelligible Form or Sequence of Export Prices which Are Unlike in an Important Manner or to a Significant Extent

36. An interpretation of what we call the "pattern clause" in the second sentence of Article 2.4.2 of the AD Agreement, undertaken in accordance with the customary rules of interpretation of public international law, requires an analysis of the ordinary meaning of the terms of the "pattern clause" in their context and in light of the object and purpose of the AD Agreement.[31]

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

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

[31] *See* Vienna Convention, Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").

Such an analysis demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" means a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods.

37. While Article 2.1 of the AD Agreement suggests that the term "export price" should be understood "[f]or the purpose of [the AD] Agreement" as the "price of the product exported from one country to another,"[32] the remaining terms in the "pattern clause" of the second sentence of Article 2.4.2 are not defined in the AD Agreement.

38. The Appellate Body has explained that an ordinary meaning analysis "may start with the dictionary definitions of the terms to be interpreted," but the Appellate Body has cautioned that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words–be those meanings common or rare, universal or specialized."[33] Rather, as the panel explained in *US – Section 301 Trade Act*:

> For pragmatic reasons the normal usage … is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.[34]

39. The word "pattern," for example, has a wide variety of dictionary definitions, including noun and adjective forms, as well as numerous compound forms. Altogether, there are dozens of entries in the dictionary for the word "pattern," ranging, for example, from "a model, example, or copy" and "an example or model to be imitated," to "a quantity of material sufficient for making a garment," or "a regular or decorative arrangement," or "the distribution of shot fired from a gun."[35]

40. The most apt definition, though, as China appears to agree,[36] is "a regular and intelligible form or sequence discernible in certain actions or situations."[37] The *Oxford English Dictionary*, from which all of the above definitions are drawn, notes that this definition is used "[f]req[uently] with *of*, as *pattern of behaviour*." In the second sentence of Article 2.4.2, the word "pattern" appears together with "*of* export prices . . .," which is a contextual indication of the proper ordinary meaning of the word "pattern" as it is used there. Thus, it would appear that the term "pattern of export prices . . ." can be understood to mean a regular and intelligible form or sequence discernible in export prices.

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[32] In its first written submission, China does not suggest a different definition for the term "export price."

[33] *US – Gambling (AB)*, para. 164 (citations omitted; emphasis in original).

[34] *US – Section 301 Trade Act*, para. 7.22 (cited by the Appellate Body in *US – Gambling (AB)*, note 191).

[35] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit CHN-90).

[36] China's First Written Submission, para. 128.

[37] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 11 (Exhibit CHN-90).

41. The relevant pattern at issue in the second sentence of Article 2.4.2 is that of export prices "which differ significantly . . . ." The dictionary contains several definitions of the word "differ."[38] The most appropriate definition, in the sense in which the term is used in the second sentence of Article 2.4.2, appears to be "to have contrary or diverse bearings, tendencies, or qualities; to be not the same; to be unlike, distinct, or various, in nature, form, or qualities, or in some specified respect."[39] This is confirmed when the word "differ" is read together with the word "among."

42. The preposition "among" is defined, *inter alia*, as "of relation between object and objects"; "of the relation of a thing (or things) to the whole surrounding group or composite substance"; "of the relation of anything in a local group to the other members of the group, although these do not actually surround it; as of an individual to the other members of the same community"; "of the relation of a thing to others in the same nominal or logical group: In the number or class of"; and "*esp.* of things distinguished in kind from the rest of the group: Preeminent among, as distinguished from, in comparison with, above the others."[40] The preposition "among" thus references a relationship between one thing, for example, a purchaser, region, or time period, and other similar things of the same type, *e.g.*, other purchasers, regions, or time periods.

43. Thus, when the second sentence of Article 2.4.2 refers to "exports prices which differ significantly among different purchasers, regions, or time periods," this suggests the need for a comparison, for example, of export prices to one purchaser with export prices to another purchaser or purchasers to ascertain whether the export prices to the former are not the same, or are unlike, or are distinct from the export prices to the latter in some respect.[41]

44. The word "differ" in the second sentence of Article 2.4.2 is modified by the word "significantly." Thus, not only must there be a pattern of export prices that "differ" among purchasers, regions, or time periods, the export prices must differ "significantly." The word "significantly," when used as an adverb, as it is in the "pattern clause," is defined as "in a significant manner; *esp.* so as to convey a particular meaning; expressively, meaningfully";

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[38] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-1).

[39] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-1). The word "differ" is also defined as "to put apart or separate from each other in qualities." Along with being described as "now unusual" in the dictionary, the term is also a transitive verb, suggesting action, while the definition above is that of an intransitive verb. Thus, this definition seems less apt. Also, it is unlikely that a definition related to "heraldry" is appropriate; nor does a definition relating to holding different opinions or being in disagreement (in that same sense) appear suitable.

[40] *See* Definition of "among" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-2).

[41] We refer in this sentence only to an analysis of purchasers for the sake of clarity. There does not appear to be any disagreement between the parties that the appropriate comparison is between the export prices to one purchaser and the export prices to another purchaser or purchasers, or between the export prices to one region and the export prices to another region or regions, or between the export prices in one time period and the export prices in another time period or time periods. No party appears to suggest that the second sentence of Article 2.4.2 calls for a comparison, for example, of export prices to a purchaser with export prices to a region.

"importantly, notably"; or "to a significant degree or extent; so as to make a noticeable difference; substantially, considerably."[42]

45. China, in its first written submission, suggests that "[t]he term 'significant', from which the term 'significantly' is derived, is defined as 'having or conveying meaning.'"[43] However, another definition of "significant" is "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential."[44] This latter definition of the word "significant" is in accord with a definition of that term that has been accepted by the Appellate Body, which observed that "[t]he term 'significant' has been understood by the Appellate Body as 'something that can be characterized as important, notable, or consequential.'"[45]

46. Viewed together, the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement provide that, in order for an investigating authority to use the alternative, average-to-transaction comparison methodology in an investigation, the investigating authority first must find a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as between different purchasers, regions, or time periods.

47. Additionally, we note, as context, that the "pattern clause" appears in the second sentence of Article 2.4.2 of the AD Agreement and is a condition for resorting to the "exceptional"[46] average-to-transaction comparison methodology, which is an alternative to the comparison methodologies that investigating authorities "normally"[47] are to use. Logically, one would expect that the conditions for resorting to the "exceptional" alternative methodology "normally" would not be met. Accordingly, an investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically to ascertain whether a pattern of differences in export prices exists, and whether the export price differences among different purchasers, regions, or time periods are significant.

48. Finally, the United States observes that the interpretation of the "pattern clause" set forth above is consistent with and supports the object and purpose of the AD Agreement. While the AD Agreement "does not contain a preamble or an explicit indication of its object and purpose,"[48] guidance can be found in Article VI:1 of the GATT 1994, in which Members have recognized that injurious dumping "is to be condemned." Of course, the AD Agreement also

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[42] *See* Definition of "significantly" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit CHN-91).

[43] China's First Written Submission, para. 138.

[44] *See* Definition of "significant" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit CHN-92).

[45] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (*citing US – Upland Cotton (AB)*, para. 426).

[46] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

[47] AD Agreement, Art. 2.4.2, first sentence.

[48] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 118.

provides detailed rules governing the application of antidumping measures, including procedural safeguards for interested parties and substantive rules on the calculation of dumping margins. The AD Agreement thus appears to be aimed at providing a balanced set of rights and obligations regarding the use of antidumping measures.

49. The second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[49] in "exceptional"[50] situations. Interpreting the "pattern clause" as discussed above – *i.e.,* as requiring an investigating authority to undertake a rigorous, holistic examination of the data in order to find a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods – serves the aim of the second sentence of Article 2.4.2 and is consistent with the overall balance of rights and obligations struck in the AD Agreement.

50. As discussed below, in the coated paper, OCTG, and steel cylinders antidumping investigations, in which it applied what China terms a "targeted dumping" analysis, the USDOC has not acted inconsistently with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

b. China's Arguments about the Meaning of the "Pattern Clause" Are without Merit

51. Before turning to a discussion of the USDOC's application of the "pattern clause" in the coated paper, OCTG, and steel cylinders antidumping investigations, we first respond to certain arguments China raises in its first written submission concerning the interpretation of the terms of the "pattern clause." In its first written submission, China "acknowledges that an investigating authority is not bound by [the] *Anti-Dumping Agreement* to structure [its] enquiry into the existence of a relevant pricing pattern in any specific manner."[51] Despite this acknowledgement, though, China proposes a narrow interpretation of the "pattern clause" that would impose rigid, specific requirements on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. As explained below, however, such requirements are not supported by the text of the second sentence of Article 2.4.2 of the AD Agreement.

i. The "Pattern Clause" Does Not Require Investigating Authorities To Distinguish Observations that Are Part of the "Pattern" from Observations that Are Not Part of the "Pattern"

52. As noted above, China and the United States appear to agree on the most apt dictionary definition of the word "pattern," in the context of the "pattern clause" in the second sentence of

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

[50] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

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

Article 2.4.2.[52] Thus, the parties agree that a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations."[53] The United States does not agree, however, with China's further elaboration of this definition.

53. In particular, China suggests that one of the "key characteristics" of a pattern is that "the observations comprising the pattern may be discerned – that is, distinguished – from that which is *not* part of the pattern."[54] China further suggests that "[r]ead in the context of Article 2.4.2, second sentence, the relevant 'pattern' is constituted by a subset of an exporter's '*export prices*' for a particular product."[55] Later, China suggests that the wording "… which differ …" "by its plain terms, requires that a 'differ{ence}' must exist between the export prices making up the 'pattern' and those falling outside the 'pattern.'"[56] These are mere assertions for which China offers no explanation, and China's assertions lack any foundation in the text of the second sentence of Article 2.4.2 or in logic.

54. The second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to find "*a* pattern … *among* different purchasers, regions or time periods."[57] On its face, this text contemplates *a* pattern of export prices that would transcend multiple purchasers, regions, or time periods. China's suggestion that the "pattern" comprises the export prices to the "target," while the export prices to other purchasers, regions, or time periods are not part of the "pattern," is at odds with the plain meaning of the text.

55. Furthermore, the relevant "pattern" within the meaning of the second sentence of Article 2.4.2 is "a pattern of export prices *which differ significantly* among different purchasers, regions, or time periods."[58] Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. An export price cannot "differ significantly" on its own. Given that "difference" is a comparative or relative concept, for something to be different, it must differ from something else. Thus, lower export prices, which 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.

56. Logically, an investigating authority might examine all of an exporter's export sales in search of "a pattern," and likely may find that "a pattern" exists which consists of all of the exporter's export sales, including lower export prices to certain purchasers, regions, or time periods and higher export prices to other purchasers, regions, or time periods. This is one kind of "pattern" that an investigating authority might find, and it is entirely consistent with the terms and the logic of the second sentence of Article 2.4.2 of the AD Agreement. China's narrow

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[52] *See* China's First Written Submission, para. 128.

[53] China's First Written Submission, para. 128 (*citing* the dictionary entry provided in Exhibit CHN-90).

[54] China's First Written Submission, para. 128 (emphasis in original).

[55] China's First Written Submission, para. 129 (emphasis in original).

[56] China's First Written Submission, para. 136.

[57] Emphasis added.

[58] Emphasis added.

notion of a "pattern," on the other hand, is inconsistent with both the terms and the logic of that provision.

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

57. China argues that, "in order to identify a meaningful pattern, the investigating authority must assess such a pattern by observing the prices of individual export sales transactions."[59] China further contends that "[a]t least two textual elements reveal that the assessment of whether there is a pattern must focus on the export prices manifested in *individual* export transactions."[60] China is incorrect on several grounds.

58. Contrary to China's arguments, the text of the second sentence of Article 2.4.2 of the AD Agreement actually supports the opposite proposition. China emphasizes that the second sentence of Article 2.4.2 "contemplates that, if a relevant pricing pattern is identified, an average normal value may be compared with the 'prices of individual export transactions'."[61] Yet, later in the same sentence, the investigating authority is tasked with finding "a pattern of export prices," not a pattern of *individual* export prices. The presence of the term "individual" as a modifier of "export transactions" and the absence of the same term – or any modifier at all – in connection with "export prices" in the same sentence is a compelling basis to conclude that Article 2.4.2 does not require that the pattern be based on individual export prices. Nothing in the text of the second sentence of Article 2.4.2 prohibits the use of weighted averages in connection with an investigating authority's analysis of a "pattern" within the meaning of the "pattern clause."

59. China is also incorrect to suggest that the use of weighted averages would lead an investigating authority to "overlook the individual prices."[62] When the USDOC undertook analyses pursuant to the "pattern clause" in the coated paper, OCTG, and steel cylinders antidumping investigations, it took into account all of the export prices for U.S. sales reported by each exporter during the period of investigation. As explained in more detail below, the USDOC applied what we refer to as the *Nails* test in those investigations. The *Nails* test involves calculating a standard deviation of the weighted-average export prices to each purchaser, region, or time period during the period of investigation based on the variance between each of those weighted-average export prices.[63]

60. The standard deviation measures the extent of the differences within a set of numbers. Calculating the standard deviation enables the USDOC to determine what a "normal" range of weighted-average export prices is for the period of investigation, and whether certain weighted-average export prices are lower than that norm. As indicated above, the set of numbers (*i.e.*, the

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59 China's First Written Submission, para. 132.

60 China's First Written Submission, para. 130.

61 China's First Written Submission, para. 131.

62 China's First Written Submission, para. 133.

63 The sales are weighted by quantity.

weighted-average export prices) that the USDOC considered included all of the individual export prices for U.S. sales during the period of investigation. The USDOC calculated the weighted-average export prices and the standard deviation on a model-specific basis, *i.e.*, by "CONNUM." A CONNUM is based upon the product's physical characteristics.

61. China's argument that an investigating authority's analysis of a "pattern" "must" focus on individual export transactions,[64] 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,"[65] appear to 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." The next section discusses why China is incorrect.

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

62. In discussing the ordinary meaning of the term "significantly," China draws on dictionary definitions of the term "significant," including "with regard to the term's meaning in statistics."[66] Citing a dictionary entry for the word "significant," China proposes that the term means, among other things, "of an observed or calculated result: having a low probability of occurrence if the null hypothesis is true."[67] China appears to reason from this definition that, with respect to the "[q]uantitative dimension of 'significant' price difference," "[t]here must be a high level of confidence that the prices indeed differ in a significant way; or put differently, there must be a low probability that there is no distinct 'pattern' in the data."[68] On the basis of this proposed *ordinary meaning* of the term "significantly," China mounts an argument that the USDOC "failed properly to identify as 'significant', in a quantitative, *statistical* sense, the differences among export prices that it found to be a part of a relevant pricing pattern."[69]

63. We respond to China's statistical arguments more fully below in section IV.B.2.i.aa. However, we note, as a threshold matter, that the premise of China's arguments is flawed. The term "significantly" in the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to utilize the particular statistical techniques China that discusses when examining export prices to determine whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." China's suggestion that the meaning of the word "significant" in statistics informs the analysis of its ordinary meaning as it used in the second sentence of Article 2.4.2 is misguided.

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64 China's First Written Submission, para. 130.

65 China's First Written Submission, para. 134.

66 China's First Written Submission, para. 138.

67 China's First Written Submission, para. 138.

68 China's First Written Submission, para. 139.

69 China's First Written Submission, para. 219 *et seq.*

64. The Appellate Body has warned that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words–be those meanings common or rare, universal or specialized."[70] The definition of "significant" on which China relies would appear to be just such a "specialized" definition. Indeed, in contrast to entries presenting general definitions, the entry to which China draws the Panel's attention is preceded by the word "*Statistics*," which denotes the specialized nature of the definition that follows.[71] Additionally, the entry notes "More fully ***statistically significant***,"[72] suggesting that when the word "significant" is being used in a statistical sense, for clarity it should be modified by the word "statistically." The term "significantly" in the second sentence of Article 2.4.2 is not modified by the word "statistically," or at all, and thus should not be read as conveying this specialized statistical meaning of the word "significant."

65. Furthermore, while the term "statistically" is not used in the second sentence of Article 2.4.2, it is used elsewhere in the AD Agreement. Article 6.10 of the AD Agreement, for instance, provides that, where it would be impracticable to determine individual margins of dumping for all exporters or producers, the investigating authority may, *inter alia*, limit its examination "by using samples which are *statistically* valid."[73] In addition, footnote 13 of the AD Agreement provides that, when determining industry support in the case of a fragmented industry involving an exceptionally large number of producers, investigating authorities may use "*statistically* valid sampling techniques."[74] The presence of the term "statistically" in these other provisions of the AD Agreement and the absence of that or any similar term in the second sentence of Article 2.4.2 of the AD Agreement is strong contextual support for the conclusion that the term "significantly" in the "pattern clause" does not mean that an investigating authority is required utilize the kind of complex statistical methodology for which China argues.

66. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake the particular statistical analysis discussed by China, even if the investigating authority chooses to utilize certain statistical tools. China's arguments in this regard lack merit, among other reasons, because they are founded on a flawed understanding of the ordinary meaning of the term "significantly."

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

67. China argues that there is a "[q]ualitative dimension of 'significant' price differences" and that the definitions of the term "significantly" on which it relies "suggest that, in assessing

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[70] *US – Gambling (AB)*, para. 164 (citations omitted; emphasis in original).

[71] *See* Definition of "significant" from Oxford English Dictionary Online (http://www.oed.com), entry 5, p. 4 (Exhibit CHN-92).

[72] Emphasis in original.

[73] Emphasis added.

[74] Emphasis added.

whether export prices 'differ significantly' in a qualitative sense, it is appropriate to consider whether quantitative differences in prices *reflect factors unconnected with targeted dumping*, particularly where variations in price reflect normal or regular dynamics of the relevant product market."[75] China further contends that "quantitative differences that are clearly unconnected with targeted dumping are unlikely to be 'significant{}' in the sense of Article 2.4.2."[76] China's arguments are without merit.

68. The thrust of China's argument is that "export prices which differ significantly" under Article 2.4.2 can only exist for a particular reason. Indeed, China emphasizes that "[o]nly through understanding the 'why' could USDOC determine whether prices … 'differ{ed} significantly.'"[77] The United States disagrees, because there is no support in the text of the AD Agreement for this proposition.

69. The United States agrees with China, as the Appellate Body has suggested, that the term "significant" "*can* have both quantitative and qualitative dimensions."[78] China is incorrect, however, when it contends that "[t]he mere fact that there is a large *quantitative* difference between export prices does not, without consideration of the *qualitative* dimension, mean the difference is 'significant.'"[79] China's understanding, ironically, would read the quantitative dimension out of the term "significantly," necessitating an exclusive focus on China's understanding of the qualitative dimension. This would be inconsistent with the ordinary meaning of the term "significantly" in its context, and also with the Appellate Body's guidance regarding the meaning of the term "significant."[80]

70. In *US – Large Civil Aircraft (Second Complaint)*, the Appellate Body considered whether lost sales could be considered "significant" within the meaning of Article 6.3(c) of the SCM Agreement. It was there that the Appellate Body observed that the term "significant" can be understood as "something that can be characterized as important, notable or consequential."[81] The Appellate Body further observed that "an assessment of whether a lost sale is significant can have both quantitative and qualitative dimensions."[82] The Appellate Body found that:

> [A]s we have noted above, these campaigns were highly price-competitive, not only because of the direct consequence for LCA manufacturers in terms of revenue and production effects associated with the sale of multiple LCA, but also because of the strategic importance of securing a sale from a particular customer. For these

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[75] China's First Written Submission, para. 140 (emphasis added).

[76] China's First Written Submission, para. 148.

[77] China's First Written Submission, para. 255.

[78] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (emphasis added).

[79] China's First Written Submission, para. 140.

[80] *See US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.

[81] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (*citing US – Upland Cotton (AB)*, para. 426).

[82] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.

> reasons, we consider that these lost sales campaigns are significant within the meaning of Article 6.3(c) of the *SCM Agreement*.[83]

71. What the Appellate Body was suggesting in this passage from *US – Large Civil Aircraft (Second Complaint)* is that lost sales might be considered "significant" if there is a high number of lost sales, but equally might be considered "significant" where there is a lower number of lost sales, but the sales are of particular importance.

72. The same may be true when applying the "pattern clause" in the second sentence of Article 2.4.2 of the AD Agreement. If the difference between export prices to different purchasers, regions, or time periods is numerically large, that would justify finding that they are "significant" within the meaning of the second sentence of Article 2.4.2. Alternatively, if the difference between export prices is smaller, but price competition in the particular industry is such that even small price differences are important, that might also justify finding that the difference is "significant," in a qualitative sense. In this way, the term "significantly" in the "pattern clause" can have both quantitative and qualitative dimensions.

73. That, however, is not the way that China attempts to use the qualitative dimension of the term "significantly" in support of its position. China argues that, because of the qualitative nature of the term "significantly," an investigating authority is obligated to separately consider whether observed export price differences "could be explained by reasons other than targeted dumping."[84] China's proposed interpretation is at odds with the text and context of the "pattern clause." What must be identified is "a pattern of export prices which differ significantly." Thus, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other. That is, do the export prices differ in a way that qualitatively is notable or important, and thus is "significant"? Under China's notion of a qualitative analysis, the investigating authority would conduct a separate examination of *why* the export prices are different.

74. Indeed, China criticizes the USDOC for not considering whether there were commercial reasons or market explanations, such as "discounting," "seasonality," or "inflation," or other exogenous factors for the pattern of export prices identified.[85] Even though none of the challenged investigations involved "seasonality," such as might be encountered with an agricultural product, China, in asserting its "as applied" claims, contends that, in *any* analysis under Article 2.4.2, seasonality must be examined. According to China, the "pattern clause" is not meant to capture purely commercial conditions or market fluctuations.

75. Such questions, however, all go to *why* differences may exist between export prices. Answering them would not provide information about *how* the export prices are different, and whether the observed differences are "significant." Thus, such questions are not germane to an

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[83] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.

[84] China's First Written Submission, para. 248.

[85] *See* China's First Written Submission, paras. 140-143, 247-255.

application of the "pattern clause," which is a condition for using the alternative comparison methodology to "unmask targeted dumping."[86]

76. China emphasizes that:

> USDOC's application, in the three challenged determinations, of its Pattern and Price Gap Tests did not consider *any* qualitative factors in determining whether prices to the [alleged target] should be considered "low" relative to any other prices charged by the exporter under investigation. Instead of considering what price variations might be normal within an industry or over time, USDOC mechanically applied the one-standard-deviation threshold, its 33-percent threshold, the gap comparison test and its further 5-percent threshold. USDOC did not provide the slightest explanation as to why prices passing its various thresholds could not arise from market dynamics undistorted by "targeted dumping".[87]

77. China further argues that:

> In order properly to reach an affirmative finding, USDOC would need to show that observed price differences, although not statistically significant, must be attributed significance due to the fact that they could not be explained by normal market dynamics, but instead indicated pricing that was "targeted" by the exporter to particular customers, regions or time periods.[88]

78. China confuses the "pattern of export prices which differ significantly," which is described in the text of the "pattern clause" in the second sentence of Article 2.4.2, with the intention of an exporter to "target" its dumping and "mask" that dumping. As written, the "pattern clause" is passive and not active, such that the investigating authority is charged with finding whether a pattern of export prices exists, not with searching for the reason or intent behind an exporter's pricing behavior, or examining whether that exporter has intentionally patterned its export prices to "target" and "mask" dumping. Nothing in Article 2.4.2 or any other provision of the AD Agreement supports China's proposed notion that significant price differences – or dumping for that matter – must be found to be the result of some "guilty" intent or motivation. These concepts simply are foreign to the AD Agreement, and reading into the "pattern clause" an obligation that an investigating authority must examine an exporter's intent would be inconsistent with the customary rules of interpretation of public international law.

79. Additionally, China's reasoning is unsound. China asserts that "quantitative differences that are clearly unconnected with "targeted dumping" are unlikely to be 'significant{}' in the

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

[87] China's First Written Submission, para. 249.

[88] China's First Written Submission, para. 250.

sense of Article 2.4.2."[89] However, lower-priced export sales, if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. That dumping may still be injurious to the domestic industry, again, regardless of the intention or motivation behind the exporter's pricing behavior. The "reason" for the low export prices changes nothing.

80. Finally, China notes, correctly, that Article 2.4.2 of the AD Agreement is "subject to the provision governing fair comparison in Article 2.4" and that the comparison of normal value and export price "shall be made 'in respect of sales made at as nearly as possible the same time'."[90] China suggests that it "finds support" for its proposed interpretation in this language.[91] In this regard, China is incorrect.

81. Article 2.4 of the AD Agreement provides that "a fair comparison shall be made between the export price and the normal value." In other words, Article 2.4 establishes certain rules for making a comparison between *export price and normal value* under any of three comparison methodologies described in Article 2.4.2 – average-to-average, transaction-to-transaction, and average-to-transaction. However, Article 2.4 does address how an investigating authority is to determine the existence of a "pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2. Such a determination would not involve comparing export price to normal value. Rather, the inquiry under the second sentence of Article 2.4.2 involves examining only whether *export prices* differ significantly among different purchasers, regions, or time periods.

82. It is to be expected that an investigating authority may need to compare the export price paid during one time period with the export price paid during another time period, particularly if the investigating authority is assessing whether export prices differ significantly *among different time periods*, pursuant to the terms of the second sentence of Article 2.4.2 of the AD Agreement. Of course, once the investigating authority determines which of the three comparison methodologies provided in Article 2.4.2 it will use to determine the existence of margins of dumping, the comparison between the export price and normal value, regardless of the comparison methodology used, would "be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time," consistent with the requirements of Article 2.4 of the AD Agreement.[92]

83. For the reasons given above, China's arguments relating to the interpretation of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement are without merit.

[89] China's First Written Submission, para. 148.

[90] China's First Written Submission, para. 144.

[91] China's First Written Submission, para. 144.

[92] AD Agreement, Art. 2.4.

c. *The USDOC's Applications of the "Pattern Clause" in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Are Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement*

84. In each of the challenged investigations, the USDOC applied a two-part test to determine whether a pattern of export prices which differ significantly among different purchasers, regions, or time periods existed based on the domestic industry's allegation that certain purchasers, regions, or time periods had been "targeted." The test that the USDOC applied was developed in the context of antidumping duty investigations of steel nails from China and the United Arab Emirates,[93] and we refer to it as the *Nails* test.[94] In applying the *Nails* test, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by respondents. The USDOC described the analyses that it applied in its determinations and associated memoranda.[95]

i. Explanation of the *Nails* Test

85. At the time of the challenged antidumping investigations, the USDOC required an allegation of "targeted dumping"[96] by a member of the domestic industry before the USDOC would examine whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods. In the each of the challenged investigations, the

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[93] *See Antidumping Duty Investigations of Certain Steel Nails from the Peoples Republic of China (PRC) and the United Arab Emirate (UAE), Post-Preliminary Determinations on Targeted Dumping*, at 8 (April 21, 2008) (Exhibit CHN-67). *See also Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (June 16, 2008) (Exhibit CHN-74), and accompanying issues and decision memorandum (excerpted) (Exhibit CHN-78).

[94] In its first written submission, China also refers to the test the USDOC applied as the *Nails* test. However, we note China's suggestion that it uses "different nomenclature" or "labels" to describe the elements of the *Nails* test, purportedly to enhance accuracy. *See* China's First Written Submission, at n. 109. China does not further elaborate, nor does it provide any concordance between the labels it uses and the language the USDOC actually used in its determinations and associated memoranda. The United States does not agree that using different (and in this case undefined and unexplained) nomenclature enhances accuracy. To the contrary, doing so likely will lead to confusion. In any event, the best evidence of the analyses undertaken by the USDOC are the determinations and associated memoranda that the USDOC issued in the challenged investigations.

[95] *See* Coated Paper OI Final I&D Memo, Comment 4 (Exhibit CHN-64); *Less-Than-Fair-Value Investigation on Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Targeted Dumping Analysis of Mandatory Respondents- Final Determination*, at 2-3 (September 20, 2010) ("Coated Paper OI Final Targeted Dumping Memo") (Exhibit CHN-3) (BCI); *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); *Less-Than-Fair-Value Investigation on Oil Country Tubular Goods from Peoples Republic of China: Targeted Dumping - Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Steel Tube Co., Ltd. (collectively, "Changbao") and Tianjin Pipe (Group) Co. ("TPCO")*, at 5-6 (March 2, 2010) ("OCTG OI Targeted Dumping Memo") (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 22-24 (Exhibit CHN-66).

[96] The phrase "targeted dumping" is a short-hand means of referring to the textual requirements of the second sentence of Article 2.4.2 of the AD Agreement. Of course, the terms of the AD Agreement itself establish the obligations to which Members have agreed, and those terms must be interpreted by applying the customary rules of interpretation of public international law.

domestic industry alleged that one or more respondents had "targeted" certain purchasers, regions, or time periods in the export market (*i.e.*, the U.S. market), and put forth evidence to support its claims.[97]

86. Applying the *Nails* test, the USDOC examined whether export prices to the allegedly "targeted" purchasers, regions, or time periods were at significantly different (*i.e.*, lower) levels than the export prices to other purchasers, regions, or time periods, based on the domestic industry's allegation of which purchasers, regions, or time periods had been "targeted." In other words, the USDOC applied the *Nails* test only to the purchasers, regions, or time periods that were specified in the allegation from the domestic industry, and did not test whether the export sales to other purchasers, regions, or time periods also may have been "targeted."[98]

87. The *Nails* test that the USDOC applied in the challenged antidumping investigations consisted of two distinct steps: the "standard deviation test" and the "gap test," both of which are described below.

88. We note that, in its first written submission, China recognizes the role of "intermediate" comparisons when calculating the margin of dumping for an exporter.[99] Similar to comparing export prices to normal value, when comparing export prices to determine whether they differ significantly among different purchasers, regions, or time periods, it may be necessary for an investigating authority to make "intermediate" comparisons of export prices on a "sub-product" level (*i.e.*, "CONNUM-specific" or "model-specific") to ensure that apparent price variations are not attributable to differences in physical characteristics among different product types. The USDOC relied on CONNUMs in its application of the *Nails* test in the challenged antidumping investigations.[100]

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[97] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 Fed. Reg. 248,92, 24,897 (May 6, 2010) ("Coated Paper OI Preliminary Determination") (Exhibit CHN-63); *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); *High Pressure Steel Cylinders From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 77,964, 77,968 (December 15, 2011) ("Steel Cylinders OI Preliminary Determination") (Exhibit CHN-65).

[98] *See* Coated Paper OI Final I&D Memo, at Comment 4 (p. 25 of the PDF version of Exhibit CHN-64); Coated Paper OI Final Targeted Dumping Memo, at 1 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, at 1 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66); Steel Cylinders OI Preliminary Determination, at 77,968 (Exhibit CHN-65).

[99] *See, e.g.,* China's First Written Submission, at paras. 209-210.

[100] *See* Coated Paper OI Final Targeted Dumping Memo, at 3 (Exhibit CHN-3); OCTG OI Final I&D Memo, Comment 2 (p. 8 of the PDF version of Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at 22 (Exhibit CHN-66) (discussing calculation of standard deviation on a product-specific basis (i.e., by CONNUM) using the POI-wide weighted-average sales prices for the allegedly targeted groups and the groups not alleged to have been targeted).

aa. The "Standard Deviation Test"

89. At the outset of its application of the *Nails* test, for purposes of the "standard deviation test," the USDOC calculated the weighted-average export price for each purchaser, region, or time period by CONNUM. The USDOC then determined the variance between each of the weighted-average export prices[101] to each purchaser, region, or time period during the period of investigation and calculated the standard deviation of the weighted-average export prices.[102] The standard deviation measures the extent of the differences within a set of numbers. Calculating the standard deviation enables the USDOC to determine what a "normal" range of weighted-average export prices is for the period of investigation, and whether certain weighted-average export prices are lower than that norm. The weighted-average export prices which the USDOC considered included all of the individual export sales reported by each exporter during the period of investigation. The USDOC calculated the weighted-average export prices and the standard deviation on a model-specific basis, *i.e.*, by "CONNUM." A CONNUM is based upon the product's physical characteristics.

90. It is important to note that the USDOC used weighted-average export prices to each purchaser, region, or time period in its application of both stages of the *Nails* test. The USDOC did not look to price variance at the transaction-specific level because the second sentence of Article 2.4.2 is concerned with export prices that "differ significantly *among* different purchasers, regions or time periods."[103] In other words, for this approach, the relevant price variance to be considered is the variance among purchasers, regions, or time periods, not among specific transactions.

91. We offer the following simple example to illustrate how the "standard deviation test" operates. A respondent makes export sales during the period of investigation to five purchasers in the export market. Assume for the sake of this example that all of the respondent's sales were of the same model and the respondent sold one unit of this model to each purchaser. The domestic industry alleges that an exporter's sales to Purchaser A are "targeted."

	Purchaser A	Purchaser B	Purchaser C	Purchaser D	Purchaser E
Weighted-Average Export Price	$6.00[104]	$9.50	$9.25	$8.00	$5.75

92. To calculate the variance and the standard deviation for the weighted-average export prices, the USDOC first calculates the weighted average of the weighted-average export prices to each purchaser. Because, in the example, the quantity sold to each purchaser is one, each of

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[101] The sales are weighted by quantity.

[102] *See* Coated Paper OI Final Targeted Dumping Memo, at 2-3 (Exhibit CHN-3); OCTG OI Final I&D Memo, Comment 2 (p. 8 of the PDF version of Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at 22-23 (Exhibit CHN-66).

[103] Emphasis added.

[104] Again, this is a weighted-average export sales price, not an individual, transaction-specific export price.

these weights is also one, and thus is not shown in the equation below. The total quantity sold (*i.e.*, 5) is in the denominator of the weighted average.

$$\frac{(6.00 + 9.50 + 9.25 + 8.00 + 5.75)}{5} = 7.70$$

93. Next, the USDOC calculates the difference between the weighted-average export prices to each purchaser and the weighted-average export price to all purchasers.

$$6.00 - 7.70 = -1.70$$
$$9.50 - 7.70 = 1.80$$
$$9.25 - 7.70 = 1.55$$
$$8.00 - 7.70 = 0.30$$
$$5.75 - 7.70 = -1.95$$

94. Then, the USDOC calculates the square of each of these differences.

$$(-1.70)^2 = 2.89$$
$$(1.80)^2 = 3.24$$
$$(1.55)^2 = 2.4025$$
$$(0.30)^2 = 0.90$$
$$(-1.95)^2 = 3.8025$$

95. Then, the USDOC calculates the weighted average of these results to determine the variance. Again, because the quantity sold to each purchaser is one, each of these weights is also one, and thus is not shown in the equation below. The total quantity sold (*i.e.*, 5) is once again in the denominator of the weighted average.

$$\frac{(2.89 + 3.24 + 2.4025 + 0.90 + 3.8025)}{5} = 2.485$$

96. Finally, the USDOC calculates the standard deviation as the square root of the variance.

$$\sqrt{2.485} = 1.58$$

97. Thus, in this example, the standard deviation is 1.58. The USDOC 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.,* 7.70).

$$7.70 - 1.58 = 6.12$$

98. Then, the USDOC would determine 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 USDOC will evaluate these sales, which have satisfied the standard deviation test, under the gap test.

99. In the example above, 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 6.00, which is more than one standard deviation (1.58) below the weighted-average export price to all purchasers (7.70).

100. In the challenged antidumping investigations, on a CONNUM-specific basis, the USDOC determined that there were export sales to the allegedly "targeted" groups (*i.e.*, purchasers, regions, or time periods) where the weighted-average export prices to those groups were more than one standard deviation below the weighted-average export price to all of the groups, and the volume of such sales to each allegedly "targeted" group exceeded 33 percent of the volume of export sales to each allegedly "targeted" group.[105]

bb. The "Gap Test"

101. The second stage of the *Nails* test is called the "gap test." In applying the gap test, the USDOC determined the total volume of sales for which the difference, or "gap," between the weighted-average sale price to the allegedly "targeted" group and the next higher weighted-average sale price for a non-targeted group exceeds the weighted-average gap among the non-targeted groups. The next higher price is the weighted-average sale price to a non-targeted group that is greater than the weighted-average sale price to the allegedly "targeted" group. The weighted-average gap is calculated as the average of the gaps between non-targeted groups weighted by the sum of the export sale quantities to the two non-targeted groups that define the gap. The gap test is only performed for the export sales which passed the standard deviation test. For purposes of the gap test, the USDOC omits weighted-average sale prices to non-targeted groups that are lower than the weighted-average sale price to the allegedly "targeted" group.[106]

102. Returning to the example above, the weighted-average export price to Purchaser A is $6.00 and the weighted-average export prices to the non-targeted purchasers are $9.50, $9.25, $8.00, and $5.75. Because the USDOC omits weighted-average export prices to non-targeted groups that are lower than the weighted-average export price to the allegedly "targeted" group, the export price to Purchaser E of $5.75 would be omitted from the gap test performed for Purchaser A. Commerce calculates the gap between $6.00 and $8.00 because $8.00 is the next higher weighted-average export price to a non-targeted purchaser above $6.00. Thus, the gap between Purchaser A and the purchaser with the next higher weighted average export price, Purchaser D, is $2.00. The gaps between the non-targeted purchasers that form the basis of the

[105] *See* Coated Paper OI Final Targeted Dumping Memo, at 2-3 (Exhibit CHN-3); OCTG OI Targeted Dumping Memo, at 6-9 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 22-24 (Exhibit CHN-66).

[106] *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).

weighted-average gap are $0.25 (Purchaser B and Purchaser C), and $1.25 (Purchaser C and Purchaser D). The weighted-average gap is thus $0.75.

103. 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 USDOC would determine that the sales which satisfy this five percent threshold pass the gap test.[107] In the example above, the volume of the sales that met this threshold is 100 percent, and thus exceeds five percent of the total volume of sales of subject merchandise to Purchaser A.

104. Where the USDOC found that sales to an alleged target passed both the standard deviation test and the gap test, it concluded that these sales passed the *Nails* test and were "targeted." The USDOC then examined the proportion, by volume, of the exporter's sales which passed the *Nails* test in relation to the exporter's total volume of export sales of subject merchandise during the period of investigation. If a sufficient volume of all export sales for the exporter and the product as a whole passed the *Nails* test, the USDOC found that the requirements of the "pattern clause" had been satisfied[108] and moved on to separately consider whether one of the two normal comparison methodologies could account for such differences (*i.e.*, the "explanation clause").

ii. Application of the *Nails* Test in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations

105. In the coated paper, OCTG, and steel cylinders antidumping investigations, the USDOC applied the analysis described above to each exporter's export sales data, based on the allegations of "targeted dumping" from the domestic industry, and determined for each exporter that there existed a sufficient volume of sales to the allegedly "targeted" groups which passed the *Nails* test.[109]

106. Specifically, in the coated paper antidumping investigation, with respect to APP China, the USDOC determined that a pattern of export prices which differed significantly existed for customer [[* * *]].[110] In the OCTG antidumping investigation, with respect to TPCO, the USDOC determined that a pattern export prices which differed significantly existed for the

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[107] *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).

[108] *See, e.g.,* Coated Paper OI Final Targeted Dumping Memo, at 1 (Exhibit CHN-3) ("Overall, targeted sales value represent [[* * *]] percent of the APP-China's sales to the United States during the POI."); *Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from the People's Republic of China*, dated December 3, 2012, at 18 (Exhibit CHN-104) ("If the Department's two-step analysis confirmed the allegation of targeting and sufficient sales were found to have been targeted (i.e., to have passed the two-step Nails test), then the Department considered whether the average-to-average method could take into account the observed price differences.").

[109] *See* Coated Paper OI Final I&D Memo, at Comment 4 (Exhibit CHN-64); Coated Paper OI Final Targeted Dumping Memo, at 3-3 (Exhibit CHN-3); OCTG OI Final I&D Memo, at Comment 2 (p. 10 of the PDF version of Exhibit CHN-77); OCTG OI Targeted Dumping Memo, at 6 (Exhibit CHN-80); Steel Cylinders OI Final I&D Memo, at 23 (Exhibit CHN-66).

[110] Coated Paper OI Final Targeted Dumping Memo, at 4 (Exhibit CHN-3) (BCI).

month of [[* * *]].[111] In the steel cylinders antidumping investigation, with respect to BTIC, the USDOC determined that a pattern of export prices which differed significantly existed for the month of [[* * *]].[112] Again, these findings were based on employing the *Nails* test to export sales data provided by each respondent, and based on the "targeted dumping" allegations made by the domestic industry.

107. The USDOC then considered, after finding for each exporter that there existed a pattern of export prices that differed significantly among different purchasers, regions, or time periods, whether the average-to-average comparison methodology, which the USDOC normally would use to calculate an exporter's margin of dumping, could appropriately take into account such differences, or whether it was necessary to utilize the alternative, average-to-transaction comparison methodology to "unmask" any "targeted dumping."[113] Upon identifying a meaningful difference in the weighted-average margins of dumping calculated for each exporter when using the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology, the USDOC concluded that the average-to-average comparison methodology could not take into account such differences appropriately.[114]

108. As reflected in the description above and in the discussion in the final determinations and explanatory memoranda issued in connection with the challenged investigations, the USDOC undertook a rigorous, holistic examination of each exporter's export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods, consistent with the requirements of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

109. In addition to explaining its analytical approach in the final determinations and explanatory memoranda for these investigations, the USDOC addressed numerous arguments raised by interested parties concerning the analysis applied in the examination of the existence of a pattern of export prices which differed significantly among different purchasers, regions, or time periods. For example, the USDOC responded to arguments concerning the use of weighted average sales prices in its analysis,[115] the use of a one-standard-deviation threshold versus a two-

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[111] *See 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).

[112] *See Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd. ("BTIC")*, dated April 30, 2012, at Attachment 4, pp. 138 and 158 (pp. 341 and 361 of the PDF version of Exhibit USA-23) (BCI).

[113] *See* Coated Paper OI Final Targeted Dumping Memo, at 4-5 (Exhibit CHN-3); OCTG OI Final I&D Memo, at Comment 2 (p. 11 of the PDF version of Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at 23-24 (Exhibit CHN-66).

[114] *See* Coated Paper OI Final Targeted Dumping Memo, at 4-5 (Exhibit CHN-3); OCTG OI Final I&D Memo, at Comment 2 (p. 11 of the PDF version of Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at 23-24 (Exhibit CHN-66).

[115] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); Coated Paper OI Final I&D Memo at Comment 3 (Exhibit CHN-64).

standard-deviation threshold,[116] whether other statistical tests should be applied,[117] and whether a *de minimis* threshold should apply.[118] In many cases, the USDOC had previously considered these arguments, and thus the final issues and decision memoranda make reference to prior USDOC determinations that also discuss the USDOC's positions.

110. The United States recalls the Appellate Body's elaboration of the standard of review to be applied by panels when reviewing an investigating authority's antidumping determination:

> [T]he task of a panel [is] to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."[119]

The United States observes that China appears to agree that this is a correct articulation of the standard of review to be applied by WTO panels.[120]

111. As discussed above, and as demonstrated in the final determinations and explanatory memoranda in the challenged antidumping investigations, the USDOC's conclusion that there existed for each exporter a pattern of export prices which differed significantly among different purchasers, regions, or time periods is reasoned and adequate in light of the evidence on the record. The USDOC's reasoning is coherent and internally consistent. The explanations disclose how the USDOC treated the record evidence and whether positive evidence supported each inference that the USDOC made and each conclusion that the USDOC reached. The explanations demonstrate that the USDOC took proper account of the relevance of all factual evidence before it. And the USDOC explained why it rejected or discounted alternative explanations and interpretations of that evidence.

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[116] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66).

[117] OCTG OI Final I&D Memo, at Comment 2. (Exhibit CHN-77); Coated Paper OI Final I&D Memo at Comment 3 (Exhibit CHN-64).

[118] Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66).

[119] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

[120] *See* China's First Written Submission, para. 583-584.

112. Accordingly, the Panel should find that, in the coated paper, OCTG, and steel cylinders antidumping investigations, the USDOC did not act inconsistently with the requirements of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, as that clause is properly interpreted.

iii. China's Arguments that the USDOC Acted Inconsistently with the "Pattern Clause" of the Second Sentence of Article 2.4.2 Are without Merit

113. In its first written submission, China advances three arguments in support of its request that the Panel find that the USDOC's determinations in the challenged antidumping investigations that there existed a pattern of export prices which differed significantly among different purchasers, regions, or time periods are inconsistent with the second sentence of Article 2.4.2 of the AD Agreement.[121] China's arguments are without merit. In the following sections, we address each of China's arguments in turn.

aa. China's Statistical Arguments Are Flawed

114. China first argues that the *Nails* test applied by the USDOC in the challenged investigations "did not properly qualify differences between the averages of prices that it considered as 'significant' in a *quantitative*, statistical sense."[122] China's arguments are flawed.

115. Before turning to the substance of China's statistical arguments, we offer three initial observations. First, we note that China presents a substantial portion of its statistical argumentation in Exhibit CHN-1. China characterizes Exhibit CHN-1 as an "expert" statement.[123] Whatever credentials the author of that document may have, he is not an impartial observer in this dispute. The arguments in Exhibit CHN-1 were prepared for the Government of China, just as the first written submission was prepared for the Government of China. Accordingly, Exhibit CHN-1 cannot be viewed as "evidence" from an impartial or independent source. Rather, it is part of China's legal argumentation, just the same as any other argumentation presented by China in its written submissions, oral statements, and responses to the Panel's questions in this dispute. In other words, Exhibit CHN-1 simply is China's argument presented in a different form.

116. Second, the premises of China's statistical arguments are flawed. As explained above in section IV.B.2.b.iii, nothing in the text of the "pattern clause" of Article 2.4.2 of the AD Agreement requires an investigating authority to identify a pattern of export prices which differ significantly among different purchasers, regions, or time periods using any particular statistical analysis, even if it chooses to utilize certain statistical tools. Indeed, China itself acknowledges that "an investigating authority is not bound by [the] Anti-Dumping Agreement to structure [its] enquiry into the existence of a relevant pricing pattern in any specific manner."[124] Following

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[121] *See* China's First Written Submission, paras. 219-272.

[122] China's First Written Submission, para. 226; *see also id.*, paras. 225-246.

[123] China's First Written Submission, note 114.

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

China's own reasoning, an investigating authority is not obligated under the AD Agreement to employ any particular statistical analysis, let alone the specific type of statistical probability analysis for which China advocates. Accordingly, when China contends that "the USDOC used a statistically inappropriate methodology when it determined the existence of a pattern of export prices,"[125] the basic legal premise of its argument is flawed.

117. The basic logical premise of China's argument is equally flawed. China contends that the *Nails* test applied by the USDOC in the challenged antidumping investigations is not suitable to perform a particular kind of statistical probability analysis.[126] However, the *Nails* test does not involve the type of statistical analysis discussed by China. The USDOC explained that it "is not using the standard deviation measure to make statistical inferences."[127] That is, the USDOC did not utilize statistical probability analysis.

118. Furthermore, in the challenged investigations, the USDOC's approach to examining a "pattern" within the meaning of the "pattern clause" took into account all export sales by each exporter during the period of investigation. Because the USDOC based its analysis on all export prices and not a sample of export prices, statistical inferences of the type discussed by China are not relevant to the issues in dispute. China is discussing a particular type of statistical issue, which is involved when calculations are based on sample data selected from a larger population of data. In that situation, the calculations based on that sample (*e.g.*, of the mean) are estimates of the actual values for the population as a whole. Associated with each estimate is a measure of the statistical significance (*i.e.*, reliability) of that estimate with respect to the actual, uncalculated value based on the entire population of data. This statistical significance represents the potential sampling error, or noise, which is present whenever a value (*e.g.*, mean) of a population of data is estimated based on a sample of that data. However, such statistical issues are not involved in the specific type of analysis used by USDOC in the *Nails* test. In particular, the USDOC includes all export prices in its analysis, and thus there is no sampling error present in the USDOC's analysis, nor related issues of statistical significance. China's statistical criticism of the *Nails* test simply is inapposite.

119. Third, we note that China contends that the *Nails* test is "inherently biased in favor of finding a relevant pricing pattern."[128] This contention is baseless, and rather ironic. Indeed, immediately following the USDOC's first application of the *Nails* test, the *domestic industry* in the United States challenged the test, arguing before the U.S. Court of International Trade ("USCIT") that the USDOC used "statistically invalid methodology" and that the test

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[125] China's First Written Submission, para. 224.

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

[127] 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").

[128] China's First Written Submission, subheading III.D (preceding para. 219).

"overlook[s] obvious targeting."[129] In sustaining the USDOC's application of the *Nails* test, the USCIT explained that, although the test "may create a standard that *is more difficult to satisfy than domestic industry would have preferred*, the nails test does not violate any statute and is not otherwise arbitrary and capricious."[130] Additionally, despite China's claim of bias, in a number of instances in which the USDOC applied the *Nails* test based on an allegation from domestic parties, the USDOC did not find a pattern of export prices which differed significantly, and thus did not consider applying the alternative comparison methodology.[131]

120. Turning to China's substantive statistical arguments, China's first written submission sets forth three criticisms of the USDOC's application of the *Nails* test in the challenged antidumping investigations. China's criticisms are without merit. We address each below.

121. China's first criticism of the *Nails* test relates to the gap test,[132] which, as described above, is the second stage of the *Nails* test that the USDOC applied in the challenged investigations. China contends that the gap test "is inherently an inappropriate tool to assess significant differences."[133] China is wrong and its argument rests on a faulty premise.

122. China asserts that the USDOC makes "the implicit *assumption*" that there is a normal probability distribution, *i.e.*, the universe of all sale transactions is normally distributed.[134] China argues that "<u>[i]n light of this assumption of the existence of a normal distribution</u>, the pairwise price comparisons undertaken by USDOC in the three challenged determinations as part of the Price Gap Test (stage 2 of the Nails Test) are incapable, by design, of revealing anything about the statistical *significance* of such price gaps."[135]

123. China's argument fails, however, because it rests upon a false premise. The USDOC makes *no* assumptions (whether implicit or explicit) concerning the probability distribution, let alone assume the existence of a particular type of probability distribution.[136] Probability

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[129] *Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (Ct. Int'l Trade 2010) (Exhibit USA-3).

[130] *Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (Ct. Int'l Trade 2010) (emphasis added) (Exhibit USA-3).

[131] *See, e.g., Notice of Final Determination of Sales at Less than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 Fed. Reg. 17,422, 17,422 (March 26, 2012) (explaining that the USDOC applied average-to-average comparisons to Electrolux because it did not find pattern of prices that differ significantly among the purchasers, regions or time periods) (Exhibit USA-4); *Certain Stilbenic Brighteners from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 17,027, 17,028 (March 23, 2012) (explaining that the USDOC applied average-to-average comparison methodology because the portion of sales that passed both pattern and gap test was insufficient to establish a pattern of export prices that differ significantly among purchasers, regions or time periods) (Exhibit USA-5).

[132] *See* China's First Written Submission, paras. 230-237.

[133] China's First Written Submission, para. 231.

[134] China's First Written Submission, para. 230 (emphasis in original).

[135] China's First Written Submission, para. 231 (underlining added; italics in original).

[136] To the extent that China assumes that the standard deviation can only be used with the normal statistical probability distribution, China is mistaken. The standard deviation can be used effectively with various types of

distributions are irrelevant because, as discussed above, the USDOC makes *no* statistical inferences when undertaking examinations pursuant to either the pattern or explanation clauses. Indeed, it would be inappropriate to make the kind of statistical inferences implied by China since sampling, sampling error, and probability are not a part of the USDOC's analysis. In the challenged investigations, the USDOC made no assumptions about the distribution of export prices because the distributions of the export prices are irrelevant to the analysis that the USDOC employed. As noted above, the USDOC expressly stated that it is not using standard deviation "to make statistical inferences."[137]

124. China's second criticism of the *Nails* test also relates to the gap test.[138] China argues that the USDOC improperly removed from the gap test analysis the non-targeted prices that were situated in the distribution below the weighted-average price to the allegedly "targeted" group, which in China's view, may have reduced the average size of the weighted-average gap to non-targeted groups with the potential to increase the likelihood that the gap test would be passed.[139]

125. Once again, China's argument rests upon statistical assumptions for particular statistical probability distribution models. However, the USDOC did not employ statistical probability analysis of the type propose by China, and the AD Agreement does not require investigating authorities to employ this type of statistical analysis when determining the existence of a pattern of export prices which differ significantly by purchaser, region, or time period.

126. Additionally, it was logical for the USDOC to consider only the gap between weighted-average export prices which are greater than the weighted-average export price to the allegedly "targeted" group, because that weighted-average export price to the allegedly "targeted" group had been found to be significantly lower than the overall weighted-average export price in the standard deviation test, and therefore was of concern. Accordingly, the USDOC compared the difference in the weighted-average export price to the allegedly "targeted" group and the next highest weighted-average export price to a non-targeted group with the weighted-average gap among different groups whose weighted-average export prices were also greater than the weighted-average export price to the allegedly "targeted" group.

127. In the challenged determinations, the gap between the weighted-average export price paid by the allegedly "targeted" purchaser (or during the allegedly targeted time period) at issue and the next higher weighed average price of export sales to a non-targeted purchaser (or during a non-targeted time period) exceeded the weighted-average price gap for the non-targeted groups.

128. The USDOC actually addressed the criticism China advances in the context of one of the challenged antidumping investigations. In the steel cylinders investigation, the USDOC considered and rejected the argument that the gap test may only be done in one particular methodological way. The USDOC explained that, "[w]e also do not agree with BTIC's

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statistical probability distributions, including the normal probability distribution. However, as we have explained, the *Nails* test is neither concerned with nor intended to analyze statistical probability.

137 China's First Written Submission, para. 69.

138 *See* China's First Written Submission, paras. 238-241.

139 *See* China's First Written Submission, para. 239.

argument that our gap test is arbitrary because it does not consider the weighted-average prices of non-targeted groups that are below the weighted-average price of the targeted group. BTIC does not demonstrate why the significant difference requirement can only be met by the use of gaps that both 'look up' and 'look down.'"[140]

129. China similarly has made no such demonstration in this dispute. Instead, China engages in a misguided attempt to demonstrate that the gap test is not an appropriate tool for conducting a particular type of statistical probability analysis, which was never the purpose for which the USDOC used the gap test. China has failed to demonstrate that the USDOC's approach is inconsistent with the text of the "pattern clause" of the second sentence of Article 2.4.2, which, as we explain above, requires investigating authorities to employ rigorous analytical methodologies and view the data holistically to ascertain whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

130. China's third criticism of the *Nails* test relates to the standard deviation test, which is the first step of the *Nails* test applied by the USDOC in the challenged investigations.[141] China argues that "USDOC's threshold of one standard deviation below the mean, as applied by USDOC in the three challenged determinations as part of the Pattern Test, is not an appropriate measure of whether certain prices are significantly different from other prices, in a statistical sense."[142] In China's view, the USDOC should have used a threshold of 1.96 times the standard deviation in the first stage of the *Nails* test. China asserts that this would have been "consistent with the established statistical conventions."[143]

131. Once again, and for the same reasons given above, China's argument fails because it rests on the flawed premises that the USDOC was required by Article 2.4.2 of the AD Agreement to apply a particular type of statistical probability analysis and that the USDOC was, in fact, attempting to do so. Neither premise is correct.

132. We observe that China appears to assume, incorrectly, that all export prices are *random* variables.[144] However, export prices are not random and the prices are not set by chance. An exporter establishes a pricing behavior based on the company's goals. By applying this pricing behavior, an exporter sets its own prices to achieve such corporate goals and may "target" lower prices to a specific purchaser, region, or time period.

133. China argues that "significantly different" in a certain statistical sense must mean a difference of approximately two standard deviations at a 95 percent confidence level.[145] This would mean that the export price to the alleged target would be viewed as statistically different from the average or mean price, for a given model, only when the export price to the alleged target is at least 1.96 times the standard deviation below the mean price. However, the export

[140] Steel Cylinders OI Final I&D Memo, at Comment IV (Exhibit CHN-66).

[141] *See* China's First Written Submission, paras. 242-246.

[142] China's First Written Submission, para. 242.

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

[144] China's First Written Submission, paras. 243-244.

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

price that is two or more standard deviations below the mean price is also highly unlikely to be observed; it is an "outlier." This is a direct consequence of the fact that, with normal probability distributions, which China assumes but the USDOC does not, the probability of observing the export price to the alleged target in the tail of the normal distribution that is two or more standard deviations below the mean is just 2.5 percent. China's interpretation of the "pattern clause" limits it to identifying random and aberrational outliers, and such an interpretation finds no support in the text of the "pattern clause" of the second sentence of Article 2.4.2.

134. In other words, China defines the requisite pattern of export prices as an extremely low-probability event; one which occurs by chance. However, nothing in the text of the AD Agreement suggests such a definition. Moreover, China's statistical approach, which is designed to test the occurrence of random and extremely low-probability events, is inconsistent with the basic notion of an exporter "targeting" a specific purchaser, region, or time period, which may not be random or abnormal in nature.

135. The *Nails* test is not a statistical test. It does not involve *random* variables, *probability* distributions, *sample* data, or testing for high and low *probability* events. As we explain above, and as China itself acknowledges, the USDOC expressly stated that it "is not using standard deviation measure to make statistical inferences."[146]

136. The standard deviation and mean[147] are two "statistical" measures used in connection with the *Nails* test that the USDOC applied in the challenged investigations.[148] However, the USDOC did not use those concepts as part of the type of probability-based statistical test discussed by China. Rather, the USDOC used weighted averages and standard deviations as a transparent, predictable, and objective metric to characterize an exporter's pricing behavior in the U.S. market to determine whether there existed a pattern of export prices which differed significantly among different purchasers, regions or time periods. As the USDOC explained:

> The Department considers the price threshold of one standard deviation below the average market price as a reasonable indication of the price difference that may be indicative of targeted dumping, because (1) it is a distinguishing measure relative to the spread or dispersion of prices in the market in question; and (2) it strikes the balance between two extremes, the first being where any price

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[146] China's First Written Submission, para. 69 (quoting 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").

[147] "Mean" is a concept that is used in a variety of applications such as mathematics, statistics, etc. China does not challenge the use of mean in the USDOC's analysis.

[148] In this context, "statistical" is another term for data, just as the number of people who live in a city (*i.e.*, its population) is a "statistic," or a data point, or a piece of information which characterizes that city. The *Nails* test, and indeed the entire dumping analysis, involves many statistics, including export prices, comparison market prices, production costs, as well as weighted-average normal values and weighted-average export prices. None of these "statistical" measures involve probability or an analysis of statistical significance.

> below the average price is sufficient to distinguish the alleged target from others, and the second being where only prices at the very bottom of price distribution are sufficient to distinguish the alleged target from others. In contrast, the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted sales within the observed price data. Therefore, the Department believes that one standard deviation, rather than two standard deviations, is a better measurement to distinguish potentially targeted prices using this test.[149]

137. China seeks to replace the USDOC's balanced approach with one of the extremes noted above by the USDOC, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is China's insistence on the use of a particular type of statistical probability analysis, which the AD Agreement does not require.

138. More importantly, the fundamental distinction between the USDOC's approach and China's probability-based approach is that the USDOC's approach measures systematic pricing while China's approach attempts to identify a rare, abnormal occurrence. The standard deviation test used in connection with the *Nails* test is not aimed at finding statistical outliers with respect to particular sales to a single customer, to a single region, or in a single time period, or at making the particular kind of statistical inferences China discusses. Rather, the USDOC used the standard deviation to determine whether the weighted-average export price to the allegedly "targeted" group (be it customer, region, or time period) is sufficiently low in relation to the weighted-average export price of all export sales that it may be indicative of a pattern of export prices which differ significantly.

139. Finally, in connection with its statistical arguments, China asserts that certain alleged "programming errors" affected the USDOC's application of the gap test in the coated paper and OCTG antidumping investigations.[150] China contends that "[t]his compounded the legal error" that China identified in its first written submission.[151] As explained above, China's legal arguments are without merit, and thus there is no legal error to compound. China further suggests that the programming errors reflect "a clear failure to provide the reasoned and adequate explanation showing compliance of this erroneous methodology with the requirements of the *Anti-Dumping Agreement*."[152] China does not elaborate its argument, and it is not at all clear why a ministerial error in the programming code used by the USDOC should give rise to a

[149] OCTG OI Final I&D Memo, at Comment 2 (Exhibit CHN-77).

[150] China's First Written Submission, para. 237.

[151] China's First Written Submission, para. 237.

[152] China's First Written Submission, para. 237.

finding that the United States has breached the second sentence of Article 2.4.2 of the AD Agreement due to a failure by the USDOC to provide a reasoned and adequate explanation.

140. In any event, we note that, with respect to the coated paper investigation, similar errors were identified in the context of litigation before the USCIT. The USDOC requested a voluntary remand to correct the errors and did so.[153] While the litigation concerning the coated paper antidumping investigation is still ongoing, the USDOC's voluntary correction of these programming errors was uncontested before the court and, thus, is not subject to any subsequent appeal. To the extent that China alleges that similar ministerial errors were committed in the OCTG antidumping investigation, we note that the USDOC has a process through which it discloses its calculations to the interested parties and provides interested parties an opportunity to request correction of ministerial errors.[154] No interested party identified the alleged errors in the programming code to which China refers in that process in the OCTG antidumping investigation.

bb. The USDOC Was Not Required to Consider *Why* Export Prices Differed Significantly

141. China next argues that the "USDOC's application of the Nails Test in the three challenged determinations failed to identify – and exclude – those results that pass the purely quantitative and mechanical tests under the Nails Test but which are *not* prices that 'differ significantly' in the sense of Article 2.4.2 of the *Anti-Dumping Agreement*."[155] China contends that the USDOC's analysis was inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement because the "USDOC failed to consider whether variations within the groups of export prices in the three challenged determinations had *qualitative* significance, or rather whether they could be explained by reasons other than targeted dumping."[156] China's arguments lack merit.

142. As explained above, China's proposed interpretation of the "pattern clause," and specifically the term "significantly," is not supported by the text of the second sentence of Article 2.4.2, read in its context. The USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement by not doing so.

143. Furthermore, while China complains that the USDOC did not "explore … explanations for variations in pricing other than 'targeted' dumping,"[157] we note that China points to nothing in the records of the coated paper and OCTG antidumping investigations that would indicate that any interested party presented such "explanations" to the USDOC in those investigations.

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[153] *See Gold East Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317, 1328-29 (Ct. Int'l Trade 2013) (Exhibit USA-6).

[154] 19 C.F.R. § 351.224 (Exhibit USA-7).

[155] China's First Written Submission, para. 249 (emphasis in original).

[156] China's First Written Submission, para. 248.

[157] China's First Written Submission, para. 251.

144. With respect to the steel cylinders antidumping investigation, China contends that one of the respondents made an argument concerning variations in steel prices and that the USDOC "simply failed to address this issue."[158] China is incorrect. The USDOC directly addressed the respondent's contention concerning increasing steel prices, including by explaining that "BTIC's argument about increases in the price of steel during the POI influencing the targeted dumping analysis is merely an unsupported assumption without the support of record evidence."[159]

145. China emphasizes that it was "essential" for the USDOC to determine "why" prices to the allegedly "targeted" group were lower. As we have demonstrated, though, China is wrong as a matter of law. Accordingly, the USDOC's decision not to consider why export prices differed is not a basis for finding that the USDOC's examination of patterns of export prices in the challenged investigations was inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

cc. The USDOC's Use of Weighted-Average Export Prices Is Not Inconsistent with the Second Sentence of Article 2.4.2

146. China's final argument against the *Nails* test applied by the USDOC in the challenged investigations relates to the USDOC's use of weighted-average export prices in its analysis.[160] Specifically, China argues that the USDOC's use of weighted-average export prices is inconsistent with the requirement in Article 2.4.2 to "focus on individual export prices" and also that the USDOC's use of weighted-average export prices "created a systematic downward bias in the standard deviation used in the Pattern Test. . . ."[161] Both of China's arguments lack merit.

147. As explained above in section IV.B.2.b.ii., China's first argument fails because the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to focus on individual export prices when determining whether a "pattern" exists within the meaning of the "pattern clause." The text of the second sentence of Article 2.4.2 simply does not support China's proposed interpretation, and actually supports the opposite conclusion, because it requires the investigating authority to find "a pattern of export prices which differ significantly *among different* purchasers, regions or time periods."[162] Accordingly, the proper focus is not on individual export prices *per se*, or on differences between export prices to a given purchaser, region, or time period, but on differences in export prices *among different* purchasers, regions, or time periods.

148. China's second argument also fails because it is premised on China's first flawed argument. The USDOC was not required to calculate the standard deviation using a variance

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[158] China's First Written Submission, para. 254.

[159] Steel Cylinders OI Final I&D Memo, at 32 (Exhibit CHN-66).

[160] *See* China's First Written Submission, paras. 256-268.

[161] China's First Written Submission, para. 257.

[162] Emphasis added.

calculated based on individual export prices rather than weighted-average export prices, and the USDOC did not calculate the standard deviation incorrectly in the challenged investigations.

149. A simple example illustrates why China's proposed interpretation is untenable. Suppose the domestic industry had alleged that a specific purchaser has been "targeted." In response to this allegation, the investigating authority might examine whether prices to the alleged "target" (Purchaser A) differ significantly from prices to a "non-targeted" purchaser (Purchaser B) or purchasers (Purchaser C, Purchaser D, etc.). In the simplest case, there is one sales transaction to each purchaser and there is a single export price for each purchaser. Simply comparing the export prices will reveal the extent to which they differ among purchasers.

150. However, suppose Purchaser A had three export sale transactions, and paid $100 in each transaction, while Purchaser B had three export transactions and paid $95, $100, and $105 for identical merchandise in its three transactions. There is no relevant difference in pricing between the two purchasers. Both paid the same total of $300 for identical merchandise, and both paid the same weighted-average price of $100. There are numerous combinations of the three prices that could produce a weighted-average price of $100. However, distinguishing between the individual prices each paid is unnecessary. As long as both purchasers paid the same weighted-average price of $100, or $300 in total, for the three sales, no purchaser is being targeted and there is no pattern of prices that differ significantly among different purchasers. Using purchaser-specific weighted averages allows the investigating authority to disregard price variation *within* the sales to each purchaser and focus on meaningful price variation *among* (*i.e.,* across) the purchasers.

151. In a typical case, there likely will be multiple individual transactions with various prices for each purchaser, region, or time period. The investigating authority must decide how to compare these multiple sets of individual transaction prices. Article 2.4.2 provides no specific guidance in this regard. Transaction-to-transaction comparisons of export prices would be difficult in practice because it may be unclear which transaction pairs should be compared, and there may be cases involving thousands or hundreds of thousands of transactions. This exponentially increasing difficulty is why the transaction-to-transaction comparison methodology is appropriate only in very limited, specific circumstances which involve a very small number of sales or unique products. Because of the practical difficulties involved, and in order actually to assess the differences in export prices "among different" purchasers, regions, or time periods, the USDOC based the *Nails* analysis applied in the challenged investigations on weighted-average export prices to purchasers, regions, or time periods.

152. China's proposed transaction-based variance calculation, on the other hand, would not only be difficult to administer in most cases (if not impossible), but, as we have explained, it also is at odds with the text of the second sentence of Article 2.4.2, which requires an investigating authority to find "a pattern of export prices which differ significantly *among different* purchasers, regions or time periods."[163]

153. China asserts that "what USDOC effectively did with the Pattern Test was to analyze certain *groups* of export sales, these groups being comprised of the *aggregate* of sales to an

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[163] Emphasis added.

allegedly targeted customer, region or time period *of each type or model* of the product under investigation."[164] China is correct. That is precisely what the USDOC did, and the USDOC was correct to do it. China further asserts that "USDOC ignored the respective *within-customer* and *within-time period* variability in prices."[165] Again, China is correct, and, as explained above, so was the USDOC's analysis.

154. China argues that the USDOC's analysis is "fundamentally flawed."[166] On the contrary, as we have demonstrated, it is China's proposed interpretation of the "pattern clause" of the second sentence of Article 2.4.2 that is fundamentally flawed.

155. Accordingly, for the reasons given above, the Panel should find that, in the three challenged antidumping investigations, the USDOC did not act inconsistently with the requirements of the "pattern clause" in the second sentence of Article 2.4.2 of the AD Agreement.

3. The Second Condition for Resorting to the Alternative Comparison Methodology: The "Explanation Clause"

a. The "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Requires a Reasoned and Adequate Statement by the Investigating Authority that Makes Clear or Intelligible or Gives Details of the Reason that It Is Not Possible in the Dumping Calculation or Computation To Deal or Reckon with Export Prices which Differ Significantly in a Manner that Is Proper, Fitting, or Suitable Using One of the Normal Comparison Methodologies Set Forth in the First Sentence of Article 2.4.2

156. The second condition set forth in the second sentence of Article 2.4.2 of the AD Agreement is that an investigating authority may utilize the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

157. As we did with the "pattern clause" above, we will examine the meaning of what we call the "explanation clause" by considering the ordinary meaning of the terms of the "explanation clause" in their context. As explained below, applying the customary rules of interpretation of public international law leads to the conclusion that the "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2.

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[164] China's First Written Submission, para. 260 (emphasis in original).

[165] China's First Written Submission, para. 262 (emphasis in original).

[166] China's First Written Submission, para. 265.

158. It appears clear, and it seems as though it should be uncontroversial that, while written in the passive voice, the "explanation" to be "provided" pursuant to the "explanation clause" must be provided by the same "authorities" required earlier in the second sentence of Article 2.4.2 to "find a pattern," those being the investigating authorities undertaking the antidumping investigation.

159. It also appears clear that the term "such differences" in the "explanation clause" refers to the differences in "export prices," which have been found to "differ significantly" pursuant to the operation of the "pattern clause," as set forth earlier in the second sentence of Article 2.4.2.

160. The word "explanation" is linked contextually with the word "why," such that it is an "explanation why" that is required by the "explanation clause." The ordinary meaning of the word "why" includes "for what reason."[167]

161. The ordinary meaning of the word "cannot" includes that something is not possible. Though, as noted below, the word "cannot" is linked contextually with the word "appropriately," and this must be considered in the interpretive analysis. Per the terms of the "explanation clause," the investigating authority must explain the reason that it is not possible for the significant differences in export prices to "be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

162. The most relevant definition of the verb "take" is "to proceed to deal with mentally; to consider; to reckon,"[168] and the most relevant definition of "account" is "counting, reckoning, enumeration; computation, calculation; (also) a style or mode of reckoning; an amount established by counting."[169] The dictionary also defines "to take account of" as "to include (something) in an account or reckoning" and "to take into consideration, esp. as a contributory factor; to notice."[170] For something to be "taken into account," then, it must be "deal[t]" or "reckon[ed]" with in a "computation" or "calculation," or it must be "notice[d]." In the context of the "explanation clause," the investigating authority must explain why it is not possible to "deal" or "reckon with" the significantly differing export prices "appropriately" in the dumping "computation" or "calculation" using one of the two "normal[]" comparison methodologies, or, alternatively, why one of the two normal comparison methodologies would not "appropriately" "notice" such significantly differing export prices.

163. The term "appropriately" is not defined in the AD Agreement, but the Appellate Body has considered the meaning of the word "appropriate" in the context of an interpretive analysis of Article 19.3 of the SCM Agreement:

> [W]e note that the relevant dictionary definitions of the term "appropriate" include "proper", "fitting" and "specially suitable

[167] *See* Definition of "why" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-8).

[168] *See* Definition of "take" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-9).

[169] *See* Definition of "account" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit CHN-97).

[170] *See* Definition of "account" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit CHN-97).

> (*for*, *to*)". These definitions suggest that what is "appropriate" is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else. They suggest some core norm – "proper", "fitting", "suitable" – and at the same time adaptation to particular circumstances.[171]

164. As already noted, the word "appropriately" also is linked contextually with the word "cannot." Thus, it is not the case that the investigating authority must explain why it is not possible *at all* to take into account significantly differing export prices using one of the two normal comparison methodologies. Rather, the investigating authority must explain why the significant differences in export prices cannot be taken into account in a manner that is "proper," "fitting", or "suitable" using one of the normal comparison methodologies, given, *inter alia*, the particular circumstance of the "pattern clause" condition having been met.

165. The dictionary defines the word "explanation" as "[t]he action or process of explaining"; "[t]hat which explains, makes clear, or accounts for; a method of explaining or accounting for; a statement that makes things intelligible."[172]

166. Taking all of the above textual and contextual considerations together, what is required of the "explanation" described in the "explanation clause" of the second sentence of Article 2.4.2 is a "statement" by the investigating authority that "makes clear" or "intelligible" the "reason" that it is not possible in the dumping "calculation" or "computation" to "deal" or "reckon" with export prices which differ significantly in a manner that is "proper," "fitting," or "suitable" using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2.

167. This is the meaning that results from a proper application of the customary rules of interpretation of public international law. Where an investigating authority provides such an "explanation," and that "explanation" is "reasoned and adequate," as that standard of review has been elaborated by the Appellate Body,[173] the investigating authority's "explanation" should not be found to be inconsistent with the requirements of the second sentence of Article 2.4.2 of the AD Agreement.

b. The United States Largely Agrees with China's Views Regarding the "Explanation" Required by the Second Sentence of Article 2.4.2 of the AD Agreement

168. The United States and China appear to be in general agreement, to a large extent, on the proper interpretation of the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement, with one important exception discussed in the next section. China and the

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[171] *See US – Anti-Dumping and Countervailing Measures (China)*, para. 552 (quoting *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106).

[172] *See* Definition of "explanation" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-10).

[173] *See, e.g., US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186.

United States rely on the same or similar dictionary definitions for the terms of the "explanation clause," and both cite the same Appellate Body finding as well.[174]

169. The United States agrees with China, for example, that "there may be scenarios where the first condition is met but where the relevant pricing pattern can nevertheless be taken into account appropriately by using the [average-to-average] or [transaction-to-transaction] comparison methodologies."[175] It may often be the case that the exceptional average-to-transaction comparison methodology and the average-to-average comparison methodology, which the USDOC "normally" uses, yield margins of dumping that are not meaningfully different. One explanation for this, for example, is that while there is a pattern of export prices which differ significantly, all of the export prices may be above normal value, so both comparison methodologies indicate that there is no dumping. Alternatively, perhaps all of the export prices are below normal value, such that both the average-to-transaction and the average-to-average comparison methodologies result in a calculation of the same margin of dumping. In some cases, though, where higher-priced export sales are at prices above normal value and the lower-priced export sales, from which they differ significantly, are below normal value, the investigating authority may find that the average-to-average comparison methodology cannot take that pattern of export prices which differ significantly into account appropriately.

170. The United States also agrees with China that "[a]n explanation will not meet the requirements of the second sentence of Article 2.4.2 if it is illogical, incomplete, or incorrect."[176] This is self-evident. The United States further agrees that "an investigating authority must provide a reasoned and sufficiently detailed explanation on a case-by-case basis."[177] That being said, though, the United States emphasizes that the "explanation" required by the "explanation clause" must be *sufficiently* detailed. As the Appellate Body has explained of an investigating authority's explanation generally, "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case."[178]

171. A relatively brief and not particularly detailed explanation may suffice when, for example, it is readily apparent from a comparison of the results of the application of one of the normal comparison methodologies and the results of the application of the alternative comparison methodology that using one of the normal comparison methodologies would lead to the "masking" of dumping to a material or meaningful degree. In such a situation, it is clear that the significantly differing export prices cannot be "deal[t]" or "reckon[ed]" with in the dumping "computation" or "calculation" using one of the normal methodologies, because those differences would not be "notice[d]" using one of the normal methodologies.

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[174] *See, e.g.,* China's First Written Submission, paras. 163-164.

[175] China's First Written Submission, para. 157.

[176] China's First Written Submission, para. 170.

[177] China's First Written Submission, para. 172.

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

c. China Is Incorrect when It Contends that the "Explanation" Required by the Second Sentence of Article 2.4.2 of the AD Agreement Must Include a Discussion of Both the Average-to-Average and Transaction-to-Transaction Comparison Methodologies

172. The United States does not agree with China that the "[explanation clause] requires an explanation why both of the symmetrical comparison methodologies are unsuitable"[179] and "an explanation that fails properly to explain why the relevant pricing pattern cannot be taken into account appropriately by *both* [average-to-average] and [transaction-to-transaction] comparisons fails to satisfy" the requirements of the "explanation clause."[180] In this, China is incorrect.

173. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."[181] The Appellate Body has further explained that it would be illogical if these two comparison methodologies were to yield "results that are systematically different."[182]

174. Logically, if the average-to-average and transaction-to-transaction comparison methodologies yield systematically similar results, then there would be no purpose in requiring an investigating authority to explain why a pattern of export prices that differ significantly cannot be taken into account appropriately by the transaction-to-transaction comparison methodology, when the investigating authority already has explained why the pattern of export prices that differ significantly cannot be taken into account appropriately by the average-to-average comparison methodology.

175. The Appellate Body also has acknowledged that "[a]n investigating authority may choose between the two [comparison methodologies in the first sentence of Article 2.4.2] depending on which is most suitable for the particular investigation."[183] A transaction-to-transaction comparison methodology may be particularly unsuitable, and could be quite burdensome, when there is a large number of sales transactions in both the home market and the export market. Moreover, as a practical matter, 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 comparison market sale prices. In any event, nothing in the first sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to apply both of the "normal" comparison methodologies in the course of a single antidumping investigation. This is confirmed by the use of the disjunctive term "or" between the descriptions of the two comparison methodologies in the first sentence of Article 2.4.2.

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

[180] China's First Written Submission, para. 169.

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

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

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

176. China point to the use of the word "or" in the second sentence of Article 2.4.2 and argues that "[i]t is not possible, in this context, to read the disjunctive 'or' as suggesting that only one of the symmetrical comparison methodologies must be considered."[184] China is wrong. China is also wrong when it contends that its proposed interpretation "has been explicitly confirmed by the Appellate Body in *US – Zeroing (Japan)*."[185] In the passage China quotes, the Appellate Body merely summarizes the "explanation clause" as part of a summary of the "two conditions" for using the alternative, average-to-transaction comparison methodology.[186] The Appellate Body does not engage in an interpretative analysis of the "explanation clause" at all.

177. The United States observes that the word "or" in the second sentence could not be replaced with the word "and" because that would make no sense. The result of doing so would be that an investigating authority would be required to provide an explanation of "why such differences cannot be taken into account appropriately by the use of an average-to-average *and* transaction-to-transaction comparison." However, it is difficult to imagine why an investigating authority would ever have a practical need to use both an average-to-average comparison methodology and a transaction-to-transaction comparison methodology together in the same proceeding to calculate a single margin of dumping for a given exporter. Furthermore, the first sentence of Article 2.4.2 does not contemplate such a mixed application of the "normal" methodologies, as it affords investigating authorities the option of using the average-to-average comparison methodology "or" the transaction-to-transaction comparison methodology. Accordingly, the proper term to be used in the second sentence of Article 2.4.2 necessarily is "or."

178. An example may help illustrate this point. Imagine a senior partner at a law firm provides a junior attorney with a blue pen and a black pen and instructs the junior attorney to write a legal brief with either one of those pens, but the partner indicates that the junior attorney also could use a pencil if it is not possible to use either of the pens appropriately. The junior attorney explains that she cannot use the black pen because she might make mistakes that would need to be corrected, so the pencil, with the possibility of erasing, would be a better tool. There is no reason for the partner to press the junior attorney to explain why the blue pen also would be an inappropriate tool. While they are not identical, the black and blue pens would yield systematically similar results.

179. Thus it is with the average-to-average and transaction-to-transaction comparison methodologies. They are similar, but not identical tools, which the Appellate Body has found should not yield "systematically different" results.[187] The investigating authority may choose which of the "normal" tools to use and the first sentence of Article 2.4.2 does not require the investigating authority to use one comparison methodology over the other.

180. This interpretation is further supported by reading the two sentences of Article 2.4.2 as describing a logical progression, in which the investigating authority first selects whether to use

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[184] China's First Written Submission, para. 168.

[185] China's First Written Submission, para. 168.

[186] *US – Zeroing (Japan) (AB)*, para. 131.

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

the average-to-average comparison methodology or the transaction-to-transaction comparison methodology as a "normal" methodology under the first sentences. Then, the investigating authority examines whether there is a "pattern of export prices which differ significantly" and, if so, whether the "normal" methodology that the investigating authority has chosen cannot take such differences into account appropriately.

181. Reading the "or" in the second sentence this way gives meaning to the "or" in the first sentence and is consistent with the Appellate Body's observation that the average-to-average and transaction-to-transaction comparison methodologies should be interpreted as yielding results that are not "systematically different," with the investigating authority having the option of choosing between the two "normal" comparison methodologies.[188]

182. For these reasons, when the "explanation clause" is read in the context of Article 2.4.2 as a whole, an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the "explanation clause" of the second sentence of Article 2.4.2.

d. The USDOC's "Explanations" in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Are Not Inconsistent with the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

183. In the challenged determinations, after finding that there was a pattern of export prices that differed significantly among different purchasers, regions, or time periods, the USDOC considered whether the observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the margin of dumping would have been as calculated using the average-to-average comparison methodology and what the margin of dumping would have been as calculated using the average-to-transaction comparison methodology.[189]

184. In the coated paper antidumping investigation, the USDOC found that, for the Chinese respondent APP China, the margin of dumping calculated using the average-to-average comparison methodology was [[* * *]] percent, *i.e.*, below the *de minimis* threshold, while the margin of dumping calculated using the average-to-transaction comparison methodology was 7.62 percent.[190]

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

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

[190] *See* Coated Paper OI Program Output for APP China (program run on April 10, 2015), pp. 144-145 (pp. 239-240 of the PDF version of Exhibit USA-18). Exhibit USA-18 is SAS log and output derived from USDOC's rerunning the original SAS program with additional programming steps to determine and print subtotals to demonstrate mathematical equivalence. No calculations were changed and the modified SAS program uses the same data that was used when the SAS program was run for the purpose of the amended final determination. We also are providing to the Panel a document entitled *Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China: Allegation of Ministerial Errors*, dated October 27, 2010, which presents the details of USDOC's calculations for the amended final determination and includes the original SAS log and output from

185. In the OCTG antidumping investigation, the USDOC found that, for the Chinese respondent TPCO, the margin of dumping calculated using the average-to-average comparison methodology was [[* * *]] percent, while the margin of dumping calculated using the average-to-transaction comparison methodology was 32.07 percent.[191]

186. In the steel cylinders antidumping investigation, the USDOC found that, for the Chinese respondent BTIC, the margin of dumping calculated using the average-to-average comparison methodology was [[* * *]] percent, while the margin of dumping calculated using the average-to-transaction comparison methodology was 6.62 percent.[192] In fact, [[* * *]].[193]

187. The USDOC concluded that these differences in the calculated margins of dumping were evidence that the average-to-average comparison methodology "conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group."[194] In other words, the USDOC found that the "application of the standard average-to-average comparison methodology would

that amended final determination. *See* Exhibit USA-19. *See also* Coated Paper OI Final I&D Memo, pp. 23-24 (Exhibit CHN-64).

[191] *See* OCTG OI Program Output for TPCO (program run on April 10, 2015), pp. 63-64 (pp. 139-140 of the PDF version of Exhibit USA-20). Exhibit USA-20 is SAS log and output derived from USDOC's rerunning the original SAS program with additional programming steps to determine and print subtotals to demonstrate mathematical equivalence. No calculations were changed and the modified SAS program uses the same data that was used when the SAS program was run for the purpose of the amended final determination. We also are providing to the Panel a document entitled *Amended Final Determination Analysis Memorandum for Tianjin Pipe (Group) Corporation and Tianjun Pipe International Economic and Trading Corporation (collectively "TPCO")*, dated May 19, 2010, which presents the details of the USDOC's calculations for the amended final determination and includes the original SAS log and output from that amended final determination. *See* Exhibit USA-21. *See also* OCTG OI Final I&D Memo, Comment 2 (p. 10 of the PDF) (Exhibit CHN-77).

[192] *See* Steel Cylinders OI Program Output for BTIC (program run on April 10, 2015), pp. 55-56 (pp. 124-125 of the PDF version of Exhibit USA-22). Exhibit USA-22 is SAS log and output derived from USDOC's rerunning the original SAS program with additional programming steps to determine and print subtotals to demonstrate mathematical equivalence. No calculations were changed and the modified SAS program uses the same data that was used when the SAS program was run for the purpose of the final determination. We also are providing to the Panel a document entitled *Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd. ("BTIC")*, dated April 30, 2012, which presents the details of the USDOC's calculations for the final determination and includes the original SAS program log and output from the original investigation. *See* Exhibit USA-23. *See also* Steel Cylinders OI Final I&D Memo, p. 24 (Exhibit CHN-66).

[193] *See* Steel Cylinders OI Program Output for BTIC (program run on April 10, 2015), p. 55 (p. 124 of the PDF version of Exhibit USA-22) (BCI). This can be derived by dividing the "Total Comparison Results (US$)," [[* * *]], by the "Total Export Value (US$)," [[* * *]]. We note, of course, that this percentage is not a margin of dumping. The AD Agreement does not contemplate the existence of negative margins of dumping. We note the percentage simply to highlight the substantial change in the result when the alternative, average-to-transaction comparison methodology is used.

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

result in the masking of dumping that would be unmasked by application of the alternative average-to-transaction comparison method."[195]

188. Specifically, in the coated paper investigation, the dumping determination for APP China using the normal, average-to-average comparison methodology was negative while the average-to-transaction methodology resulted in an affirmative finding of a dumping at a rate of 7.62 percent.[196] Likewise, in the OCTG investigation, TPCO's margin of dumping increased by approximately [[* * *]] percent when the average-to-transaction comparison methodology was used.[197] Finally, in the steel cylinders investigation, BTIC's weighted average dumping margin was [[* * *]] percentage points higher using the average-to-transaction comparison methodology, and the result changed from a finding of no dumping using the average-to-average comparison methodology to an affirmative finding of dumping at a rate of 6.62 percent using the alternative, average-to-transaction comparison methodology.[198]

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

190. China complains that the USDOC's explanations are "brief,"[199] they "provide[] no analysis,"[200] and they contain "little explanatory content, let alone explanatory value."[201] China's assertions are unfounded. The evidence supporting the USDOC's conclusion in each of the challenged determinations – *i.e.*, that export prices which differ significantly cannot be taken into account by the use of the average-to-average comparison methodology – was, as explained above, the observed differences in the margins of dumping under that methodology when compared to the margins of dumping as calculated under the alternative, average-to-transaction comparison methodology. Behind each of these values lies the complexities of calculating a margin of dumping. The differences demonstrate that the exporter engaged in a significant, not *de minimis* level of dumping that was concealed by a meaningful amount of higher-priced export sales such that the normal average-to-average comparison methodology could not account for such differences in prices. These differences justified the application of the alternative

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195 Coated Paper OI Final I&D Memo, p. 24 (Exhibit CHN-64); *see also* OCTG OI Final I&D Memo, Comment 2 (p. 10 of the PDF) (Exhibit CHN-77).

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

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

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

199 China's First Written Submission, paras. 275, 279-281.

200 China's First Written Submission, paras. 275, 280.

201 China's First Written Submission, para. 281.

comparison methodology because they were meaningful and, in the case of APP China and BTIC, the difference resulted in a change from a determination of no dumping to an affirmative determination of dumping.

191. China also criticizes the USDOC for not mentioning the transaction-to-transaction comparison methodology in connection with its explanation.[202] China's criticism is misplaced. As explained above in section IV.B.3.c., the USDOC was not obligated by the terms of the second sentence of Article 2.4.2 to include in its explanation a discussion of both the average-to-average and transaction-to-transaction comparison methodologies.

192. Finally, China contends that the USDOC's explanation is "premised on the untenable assumption that, in contrast to [average-to-average] comparisons, an investigating authority is somehow permitted to use *zeroing* when applying [average-to-transaction] comparisons."[203] China is correct that the USDOC's explanation is premised on such an understanding. However, that understanding, far from being "untenable," flows from a proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement, as explained below in section IV.B.5.

193. When there is a pattern of export prices that differ significantly, and the export prices that are lower are below normal value while the export prices that are higher are above normal value, that is a situation where, as the Appellate Body has recognized, "targeted dumping" may be "masked."[204] In that case, the fact that the average-to-average comparison methodology would result in a lower margin of dumping – because dumping is being concealed or masked – itself provides the required "explanation" as to why that methodology cannot take into account the pattern of export prices found to exist. It is unclear what other than this would provide the requisite explanation.

194. The United States recognizes that, even in a situation where a "pattern" within the meaning of the "pattern clause" has been found, there may nevertheless be circumstances where the average-to-average comparison methodology could still "take into account appropriately" the observed pattern of export prices which differ significantly. As discussed above, if all export prices are above normal value or all export prices are below normal value, there is no concern that any dumping would be concealed or masked.

195. Additionally, there may be situations where the differences in export prices can be "taken into account appropriately" through the kinds of adjustments contemplated under Article 2.4 of the AD Agreement. It may be the case, for example, that differences in levels of trade in the export market, when export prices are examined together, reflect a pattern of export prices which differ significantly among different purchasers, regions, or time periods. However, in order to make a "fair comparison" with normal value, as required by Article 2.4 of the AD Agreement, different levels of trade are taken into account when comparing export prices with normal values. The result may be that the outcome of the calculation using the average-to-average comparison methodology can account for such differences, which were the result of differences in levels of

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[202] *See* China's First Written Submission, para. 282.

[203] China's First Written Submission, para. 283.

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

trade. That is, the margin of dumping calculated using the alternative, average-to-transaction comparison methodology may not be meaningfully different from the margin of dumping calculated using the normal average-to-average comparison methodology. Making such "due allowances" under Article 2.4 would appear to be a way in which a pattern of export prices which differ significantly could be "taken into account appropriately" using one of the normal comparison methodologies.

196. Of course, zeroing cannot be used "appropriately" under the average-to-average and transaction-to-transaction comparison methodologies to take into account a pattern of export prices which differ significantly, as zeroing has been found to be impermissible under those comparison methodologies. However, as the United States demonstrates in section IV.B.5. of this submission, if "targeted dumping" is to be "unmasked" through the use of the alternative, average-to-transaction comparison methodology, then zeroing (*i.e.,* not offsetting positive comparison results with negative comparison results) can, and indeed must be used in the application of that alternative comparison methodology.

197. In light of the above, contrary to China's suggestion, the USDOC articulated a basis for concluding that the average-to-average comparison methodology cannot take into account appropriately the observed pattern of export prices which differed significantly. The reason, to be absolutely clear, is that zeroing is not permissible under the normal, average-to-average comparison methodology, and thus cannot be used "appropriately" under that methodology to "unmask targeted dumping."[205]

198. For these reasons, the "explanations" that the USDOC provided in the coated paper, OCTG, and steel cylinders antidumping investigation as to why significant differences in export prices cannot be taken into account appropriately by the use of the average-to-average or transaction-to-transaction comparison methodologies are not inconsistent with the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.

4. The USDOC's Application of the Alternative, Average-to-Transaction Comparison Methodology to All Sales in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Is Not Inconsistent with Article 2.4.2 of the AD Agreement

199. Having addressed China's "as applied" claims relating to *when* the alternative comparison methodology may be applied, we now turn to China's "as applied" claims relating to *how* the alternative comparison methodology is to be applied. China claims that the USDOC acted inconsistently with Article 2.4.2 of the AD Agreement in the coated paper, OCTG, and steel cylinders 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."[206] China's claims are without merit.

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

[206] China's First Written Submission, para. 290; *see also id.*, paras. 287-291 and 176-199.

200. The text of Article 2.4.2 of the AD Agreement supports the conclusion that the second sentence of that provision sets forth an alternative comparison methodology that is an "exception" to the comparison methodologies described in the first sentence, which are to be used "normally." The Appellate Body previously has signalled its agreement with this understanding of Article 2.4.2.[207] When the conditions for the use of the exceptional comparison methodology are met, however, 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."

201. In *US – Zeroing (Japan)*, the Appellate Body discussed the text of the second sentence of Article 2.4.2 of the AD Agreement in connection with its review of the panel's contextual analysis of the first sentence of Article 2.4.2. The Appellate Body observed that:

> The emphasis in the second sentence of Article 2.4.2 is on a "pattern," namely a "pattern of export prices which differs [sic] significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern.[208]

The Appellate Body went on to suggest that "in order to unmask targeted dumping, an investigating authority *may* limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[209] We emphasize in the preceding quotation that the Appellate Body used the word "may." The Appellate Body did not find definitively in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.[210]

202. Logically, the Appellate Body would have made no such declaration. As discussed above in section IV.B.2.b.i., China appears to harbor a fundamental misconception about the meaning of the phrase "pattern of export prices which differ significantly among different purchasers, regions or time periods" in the second sentence of Article 2.4.2. Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. An export price cannot "differ significantly" on its own. Given that "difference" is a

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[207] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

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

[209] *See US – Zeroing (Japan) (AB)*, para. 135 (emphasis added).

[210] We note that the Appellate Body emphasized that its "analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision." *US – Zeroing (Japan) (AB)*, para. 136.

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.

203. In the context of the USDOC's application of the *Nails* test in the coated paper, OCTG, and steel cylinders antidumping investigations, the export prices of those sales that passed the *Nails* test and those of other sales were significantly different from one another. Taken together, and only taken together, all of the export prices examined constituted the "pattern of export prices which differ significantly among different purchasers, regions or time periods."[211] As the "pattern" the USDOC identified was revealed by, and therefore comprised, all export sales, the USDOC's application of the alternative, average-to-transaction comparison methodology to all export sales is not at odds with the Appellate Body's suggestion that "an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[212]

204. China's proposed interpretation of Article 2.4.2, on the other hand, is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping."[213] "Masked" or "targeted dumping" involves both sales below normal value, which are evidence of dumping, as well as sales above normal value, which may mask such evidence of dumping. The "targeted" sales identified through the *Nails* test, *i.e.*, lower-priced sales, are identified as sales that may be below normal value and that may be "masked" by sales that are not specifically identified by the *Nails* test, which are higher-priced export sales. Accordingly, "targeted dumping" – which is evidenced by lower-priced sales that "differ significantly" from higher-priced sales – is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced sales, and by ensuring that the higher-priced sales do not offset dumping that properly should be evidenced by the lower-priced sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

205. China argues that "the alternative methodology may be applied to sales forming part of a relevant pricing pattern" and "[f]or sales that are *not* part of the relevant pricing pattern, Article 2.4.2, second sentence, does not provide authority to depart from the standard rule that mandates use of the symmetrical comparison methodologies."[214] China puts forward several arguments in support of its position, but they all are premised on China's misunderstanding of the term "pattern" in the second sentence of Article 2.4.2.[215] As we have shown, that premise is flawed.

206. China also advances arguments that are at odds with prior findings of the Appellate Body. For example, China argues that "application of the [average-to-transaction] comparison methodology is authorized by the second sentence of Article 2.4.2 for the purpose of

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[211] AD Agreement, Article 2.4.2, second sentence.

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

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

[214] China's First Written Submission, para. 177.

[215] *See, e.g.,* China's First Written Submission, paras. 179, 193, 197-199.

'unmask{ing} targeted dumping', but the application of that comparison methodology is limited to 'the prices of export transactions falling within the relevant pattern' – *i.e.*, *those transactions for which 'targeted dumping' has been found.*"[216] However, the Appellate Body has found that "'dumping' and 'margin of dumping' are exporter-specific concepts; 'dumping' is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped"[217] and "the results of … transaction-specific comparisons are not, in themselves, 'margins of dumping'."[218] Given that dumping is an exporter-specific concept and the margin of dumping must be determined for the product under investigation as a whole, China has no basis to suggest that an investigating authority would ever be in a situation in which it had "found" "targeted dumping" for certain "transactions."[219] It would be an untenable interpretation of Article 2.4.2 to require an investigating authority to limit its application of the average-to-transaction comparison methodology to transactions "for which 'targeted dumping' has been found."[220]

207. China appears to recognize this when it argues, in the same paragraph of its first written submission, that an investigating authority that "use[s] these two different comparison methodologies to obtain the intermediate comparison results for the different segments of the exporter's export sales database … would then need to aggregate the results of all comparisons (whether W-T, T-T or W-T) in order to determine a margin of dumping for the product as a whole."[221] There is, though, a logical and legal disconnect between this statement and the statement discussed in the preceding paragraph, and that disconnect undermines the premise of China's argument.

208. China also departs from prior Appellate Body findings when it suggests that, "if the authority examines whether the conditions in the second sentence are satisfied on a model-specific basis, the [average-to-transaction] comparison methodology should not be extended to models (in the case of US practice, "CONNUMs") other than those in which a relevant pricing pattern is found to exist."[222] Applying the alternative, average-to-transaction comparison methodology on such a model-specific basis would appear to be directly contrary what the Appellate Body said about the so-called "targeted dumping" provision in *EC – Bed Linen*. There, the Appellate Body explained that the second sentence of Article 2.4.2 of the AD Agreement:

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[216] China's First Written Submission, para. 181 (emphasis added).

[217] *US – Stainless Steel (Mexico) (AB)*, para. 94.

[218] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87 (citations omitted).

[219] China's First Written Submission, para. 181.

[220] China's First Written Submission, para. 181.

[221] China's First Written Submission, para. 181.

[222] China's First Written Submission, para. 188.

> allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the Anti-Dumping Agreement refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the Anti-Dumping Agreement intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation.[223]

The Appellate Body has already addressed China's contention and rejected it.

209. Finally, China suggests that the United States purportedly previously shared China's understanding of the operation of the second sentence of Article 2.4.2 of the AD Agreement, as evidenced by an obsolete regulation promulgated by the USDOC.[224] The United States does not see how this is at all relevant to an interpretive analysis of Article 2.4.2 undertaken in accordance with the customary rules of interpretation of public international law. A limitation on the application of the alternative comparison methodology that the U.S. investigating authority, for a time, imposed on itself provides no guidance as to the correct interpretation of the terms of Article 2.4.2. Additionally, in withdrawing its regulation, the USDOC acknowledged that it "may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."[225] In sum, the USDOC's withdrawn regulation is of no relevance to the Panel's interpretive analysis of Article 2.4.2.

210. For these reasons, the USDOC's application of the alternative, average-to-transaction comparison methodology to all sales in the coated paper, OCTG, and steel cylinders antidumping investigations is not inconsistent with Article 2.4.2 of the AD Agreement.

[223] *EC – Bed Linen (AB)*, para. 62.

[224] *See* China's First Written Submission, para. 187.

[225] *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930, 74,931 (December 10, 2008) (Exhibit KOR-9).

5. The USDOC's Use of Zeroing in Connection with Its Application of the Alternative, Average-to-Transaction Comparison Methodology in the Coated Paper, OCTG, and Steel Cylinders Antidumping Investigations Is Not Inconsistent with Article 2.4.2 of the AD Agreement

a. Introduction

211. China's other claims relating to *how* the alternative comparison methodology is to be applied concern the 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. China claims that the USDOC acted inconsistently with Articles 2.4.2 in the coated paper, OCTG, and steel cylinders antidumping investigations by using zeroing in connection with the alternative, average-to-transaction comparison methodology.[226] China's claims are without merit.

212. China is incorrect that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement is inconsistent with the "concepts of 'dumping' and 'margin of dumping'."[227] China also is incorrect when it argues that "the logic of the Appellate Body's reasoning" in prior disputes means that zeroing is impermissible when the alternative, average-to-transaction comparison methodology is used to determine "margins of dumping" under the second sentence of Article 2.4.2.[228]

213. The Appellate Body has found zeroing impermissible in the context of the average-to-average[229] and transaction-to-transaction[230] comparison methodologies, which are to be used "normally" under Article 2.4.2. The Appellate Body also has found zeroing impermissible in the context of the U.S. application of an average-to-transaction comparison methodology in administrative reviews, in a situation where the conditions set forth in the second sentence of Article 2.4.2 were not established.[231] The Appellate Body has never found, however, that zeroing is impermissible in the context of the application of the alternative, average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. The Appellate Body has not even confronted that situation in any prior dispute.

214. As the Appellate Body emphasized in *US – Stainless Steel (Mexico)*:

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[226] *See* China's First Written Submission, paras. 200-218 and 292-296.

[227] *See* China's First Written Submission, paras. 200-208.

[228] China's First Written Submission, para. 216.

[229] *See, e.g., US – Softwood Lumber V (AB)*, para. 117; *US – Zeroing (EC) (AB)*, para. 222.

[230] *See, e.g., US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 116; *US – Zeroing (Japan) (AB)*, para. 138.

[231] *See, e.g., US – Zeroing (EC) (AB)*, para. 135; *US – Zeroing (Japan) (AB)*, para. 166.

> The Appellate Body 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. Nor is it an issue before us in this appeal. As in *US – Zeroing (Japan)*, our analysis here of the second sentence of Article 2.4.2 is therefore confined to addressing the contextual arguments of the Panel based on that provision.[232]

Likewise, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body confirmed that:

> The permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases.[233]

Accordingly, the permissibility of zeroing under the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is an issue of first impression for the Panel.

215. That being said, even though the Appellate Body has not previously made a finding with respect to the permissibility of zeroing under the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2, the United States recognizes that a number of Appellate Body and panels reports include findings that bear on the interpretive question before the Panel. The Panel should take into account the relevant findings in adopted panel and Appellate Body reports where it finds the reasoning in those reports persuasive.

216. Appellate Body reports addressing zeroing in other contexts, as well as the interpretation and general applicability of certain terms of the AD Agreement, will be of particular relevance to the Panel's interpretive analysis. For example, in *US – Stainless Steel (Mexico)*, the Appellate Body provided the following summary of its findings relating to the legal interpretation of certain terms in the AD Agreement:

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[232] *See US – Stainless Steel (Mexico) (AB)*, para. 127.

[233] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.

> [I]t is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*.[234]

The Appellate Body also has found that, when examining situations involving multiple transaction-specific comparisons, "the results of the transaction-specific comparisons are not, in themselves, 'margins of dumping'."[235]

217. The United States would like to state from the outset that we do not take the position that the results of transaction-specific comparisons are themselves "margins of dumping" when the alternative, average-to-transaction comparison methodology is applied pursuant to the second sentence of Article 2.4.2. Rather, as the Appellate Body has found:

> [W]hen an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."[236]

The United States does not ask the Panel to depart from these or any other findings of the Appellate Body related to zeroing. We do ask the Panel, though, to recognize and mirror the caution exercised by the Appellate Body in making those findings and in drawing interpretive conclusions from the text and context of the AD Agreement.

218. As explained below, the Panel should find that an examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This conclusion follows from a proper application of the customary rules of interpretation of public international

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234 *US – Stainless Steel (Mexico) (AB)*, para. 94 (italics in original).

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

236 *US – Zeroing (Japan) (AB)*, para. 115; *see also US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes.

b. Initial Comments on the Text and Context of the Second Sentence of Article 2.4.2 of the AD Agreement

219. We begin by considering the relevant text of the second sentence of Article 2.4.2 of the AD Agreement, in its context. The second sentence of Article 2.4.2 provides, in pertinent part, that, if the two conditions set forth in the "pattern clause" and the "explanation clause" discussed above are met, then:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions . . . .

Read in the context of Article 2.4.2 as a whole, it is evident that the alternative, average-to-transaction comparison methodology described in the second sentence of Article 2.4.2 is, like the two normal comparison methodologies provided in the first sentence of Article 2.4.2, a means by which "the existence of margins of dumping . . . [may] be established."[237]

220. While it is worded somewhat differently, the term "[a] normal value established on a weighted average basis" in the second sentence of Article 2.4.2 appears to have the same meaning as the term "a weighted average normal value" in the first sentence of Article 2.4.2. When read together with Article 2.1 of the AD Agreement, the term "normal value" can be understood to mean "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[238]

221. A weighted-average normal value is calculated based on, and incorporates multiple transactions in the home market (or it is calculated based on the factors of production, as in proceedings involving a nonmarket economy country like China), and can be distinguished from a normal value based on an individual sales transaction in the home market, such as would be used when making "a comparison of normal value and export prices on a transaction-to-transaction basis."[239] 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 than the "normal value established on a weighted average basis" described in the second sentence of Article 2.4.2. 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 alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2.

222. We also observe that both of the references to weighted average normal value in Article 2.4.2, in the first sentence as well as in the second sentence, are singular. That is, the first

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[237] AD Agreement, Art. 2.4.2, first sentence.

[238] AD Agreement, Art. 2.1; *see also* AD Agreement, Art. 2.2. Because China is a nonmarket economy country (*i.e.*, China does not operate on market principles of cost and pricing structures), the sales of merchandise in China do not reflect fair value of the merchandise, and, thus, the normal value is based on the factors of production.

[239] AD Agreement, Art. 2.4.2, first sentence.

sentence refers to "a weighted average normal value" and the second sentence likewise refers to "a normal value established on a weighted average basis." This is further contextual support for understanding that these terms share a common meaning.

223. Of course, the Appellate Body has recognized that "multiple averaging" is possible under the weighted average-to-weighted average comparison methodology, in which case transactions may be divided into groups, for instance, according to model or product type.[240] There is no textual basis to indicate that this is not equally true under the alternative, average-to-transaction comparison methodology. In the coated paper, OCTG, and steel cylinders antidumping investigations, the USDOC, in fact, did calculate multiple weighted average normal values for different averaging groups to ensure price comparability.[241] The USDOC used the same "multiple averaging" methodology[242] to calculate normal value in its application of both the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology in the challenged antidumping investigations.

224. The term "prices of individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement appears to be synonymous with the term "export prices" in the first sentence of Article 2.4.2. Article 2.1 of the AD Agreement indicates that the term "export price" means the "price of the product exported from one country to another," and the "price of individual export transactions" appears simply to be another way of conveying the same meaning, but in a situation wherein there is more than one export transaction. Put another way, "prices of individual export transactions" and "export prices" both mean the prices of the sales transactions when the product is sold in the export market (here, the prices of coated paper, OCTG, and steel cylinders from China that were sold in the United States).

225. The term "may be compared to" in the second sentence of Article 2.4.2 links the term "[a] normal value established on a weighted average basis" and the term "prices of individual export transactions" and indicates that it is permissible for an investigating authority to "compare[]", or "[c]onsider or estimate the similarity or dissimilarity of" those two things.[243] The reference in the second sentence of Article 2.4.2 to "prices of individual export transactions"

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[240] *See US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.

[241] *See Antidumping Duty Investigation of Certain Coated Paper from the People's Republic of China: Allegation of Ministerial Errors*, dated October 27, 2010, at Attachment 1, program lines 176-200 and program lines 751-791 (pp. 10-11 and 29 of the PDF version of Exhibit USA-19) (BCI); *Amended Final Determination Analysis Memorandum for Tianjin Pipe (Group) Corporation and Tianjun Pipe International Economic and Trading Corporation (collectively "TPCO")*, dated May 19, 2010, at Attachment 2, p. 4 (program lines 175-200) and pp. 15-16 (program lines 637-677) (pp. 10-11 and 29 of the PDF version of Exhibit USA-21) (BCI); *Analysis of the Final Determination of the Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Beijing Tianhai Industry Co., Ltd. ("BTIC")*, dated April 30, 2012, at Attachment 2, p. 6 (program lines 209-233) and pp. 16-17 (program lines 615-655) (pp. 12 and 22-23 of Exhibit USA-23) (BCI).

[242] *See US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.

[243] Definition of "compare" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 457 (Exhibit USA-11).

in the plural suggests that the comparison exercise undertaken pursuant to that provision "will generally involve multiple transactions."[244]

226. At this point in the textual and contextual analysis, it appears that, when certain conditions are met, the second sentence of Article 2.4.2 permits an investigating authority to examine multiple export sale transactions in order to estimate, measure, or note the similarity or dissimilarity between the prices of those export sale transactions and the price of the like product, on average, when it is sold in the home market.

227. The textual and contextual analysis thus far does not yet suggest an answer to the question of whether zeroing is or is not permissible when the methodology provided in the second sentence of Article 2.4.2 is applied. Additional contextual analysis, however, will demonstrate that zeroing is permissible – and indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology provided for in the second sentence of Article 2.4.2 of the AD Agreement.

c. The Average-to-Transaction Comparison Methodology in the Second Sentence of Article 2.4.2 Is an Exception to the Comparison Methodologies in the First Sentence of Article 2.4.2 and Should Be Interpreted So that It May Yield Results that Are "Systematically Different" from the Comparison Methodologies "Normally" Applied

228. As noted above, the Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."[245] The Appellate Body has reasoned that it would be illogical if these two comparison methodologies were to yield "results that are systematically different."[246]

229. The Appellate Body has further observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[247] As an exception to the two comparison methodologies that an investigating authority must use "normally," each of which logically should *not* "lead to results that are systematically different,"[248] the alternative, average-to-transaction comparison methodology, by logical extension, *should* "lead to results that are systematically different" from the "normal[]" comparison methodologies when the conditions for its use have been met. The Appellate Body

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[244] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

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

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

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

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

has also found that this exceptional methodology provides a means by which Members can "unmask targeted dumping."[249]

230. That the average-to-transaction comparison methodology is an exception to the comparison methodologies that "shall normally" be applied, and that it can be used to "unmask targeted dumping,"[250] is strong contextual support for the proposition that the rules that apply to the alternative, average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the alternative, average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law.

231. The Appellate Body has observed previously that "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness."[251] As the Appellate Body has explained:

> One of the corollaries of "the general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[252]

232. The Appellate Body has referenced this "fundamental tenet of treaty interpretation" previously when considering the meaning of Article 2.4.2 of the AD Agreement. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body posited that "[i]t could be argued . . . that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile*."[253] We note that an implication of the Appellate Body's observation in this regard is that it is *possible* to use zeroing "to capture pricing patterns constituting 'targeted dumping.'"[254]

233. Of course, in the same dispute, the Appellate Body found "the concerns of the Panel and the United States over the third comparison methodology (weighted average-to-transaction)

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

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

[251] *See Japan – Alcoholic Beverages II (AB)*, p. 12.

[252] *See US – Gasoline (AB)*, p. 23.

[253] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.

[254] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100. Of course, the Appellate Body has never found that it is permissible to use zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in Article 2.4.2, just as it has never found that it is impermissible to do so, because it has never had occasion to examine that issue. *See US – Stainless Steel (Mexico) (AB)*, para. 127.

being rendered *inutile* by a prohibition of zeroing under the transaction-to-transaction methodology to be overstated."[255] The Appellate Body reasoned that:

> One part of a provision setting forth a methodology is not rendered *inutile* simply because, *in a specific set of circumstances*, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision. In other words, the fact that, *under the specific assumptions of the hypothetical scenario provided by the United States*, the weighted average-to-transaction comparison methodology could produce results that are equivalent to those obtained from the application of the weighted average-to-weighted average methodology is insufficient to conclude that the second sentence of Article 2.4.2 is thereby rendered ineffective. It has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results. Even if that were the case, it would not be sufficient to compel a finding that zeroing is permissible under the transaction-to-transaction comparison methodology, because this methodology is not involved in the "mathematical equivalence" argument.[256]

234. The final sentence of this passage is key to distinguishing the situation in *US – Softwood Lumber V (Article 21.5 – Canada)* from the situation in this dispute. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body was rejecting the panel's concern about effectiveness in connection with a review of the panel's contextual analysis of the first sentence of Article 2.4.2 when it was examining whether zeroing is prohibited under the transaction-to-transaction comparison methodology. Earlier in the same report, the Appellate Body confirmed that "[t]he permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases."[257] Since there had been no finding that zeroing was prohibited under the alternative, average-to-transaction comparison methodology, the Appellate Body considered that the "hypothetical" possibility of "mathematical equivalence" did not support a finding that zeroing is permissible *under the transaction-to-transaction methodology*.

235. The reverse, however, would not be true. That is, in a situation, such as in this dispute, where the permissibility of zeroing in the alternative, average-to-transaction comparison methodology is at issue, if it is proven that "in all cases, or at least in most of them,"[258] prohibiting zeroing under the alternative, average-to-transaction comparison methodology would lead to that methodology yielding results that are mathematically identical to the results of the average-to-average comparison methodology (and, by logical extension, they also would be systematically similar to the results of the transaction-to-transaction comparison methodology),

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[255] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.

[256] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99 (emphasis added).

[257] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.

[258] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99.

then the concern about effectiveness would be well founded. An interpretation that led to such a result would not be consistent with the principle of effectiveness.

236. In the next section, the United States demonstrates that, if the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is prohibited, then that comparison methodology will, as a mathematical certainty, in every case, yield an aggregate margin of dumping that is identical to the aggregate margin of dumping calculated using the average-to-average comparison methodology (also without zeroing). This has been referred to in previous disputes as the "mathematical equivalence" argument.[259]

d. "Mathematical Equivalence" Demonstrated

237. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results, with respect to the total amount of all comparison results, the total amount of dumping, and the margin of dumping for an exporter for the product under investigation as a whole. This is true because, for both methodologies, all of the normal value and export sales data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. As shown below, though, those mathematical operations can be rearranged to reveal that the two comparison methodologies, without zeroing, actually are identical.

238. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. The associative principle states that you can combine addition or multiplication operations in different groupings and get the same results.[260] The commutative principle states that you can perform addition or multiplication operations in different orders and get the same results.[261] The distributive principle states that you can extend, or distribute, addition and multiplication operations into different groups and get the same results.[262]

239. Below, we will present a simple hypothetical scenario to demonstrate how these properties are at work in the average-to-average and average-to-transaction comparison

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[259] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 97-100; *US – Zeroing (Japan) (AB)*, paras. 133-135; *US – Stainless Steel (Mexico) (AB)*, paras. 124-126.

[260] *See, e.g.,* Definition of "associative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 133 (Exhibit USA-12) ("*Math.* Governed by or stating the condition that where three or more quantities in a given order are connected together by operators, the result is independent of any grouping of the quantities, e.g. that (a X b) X c = a X (b X c).").

[261] *See, e.g.,* Definition of "commutative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 456 (Exhibit USA-13) ("*Math*. governed by or stating the condition that the result of a binary operation is unchanged by interchange of the order of quantities, e.g. that a X b = b X a."). Subtraction, on the other hand, is not commutative: 2 - 1 is not equal to 1 - 2.

[262] *See, e.g.,* Definition of "distributive" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 709 (Exhibit USA-14) ("*Math*. Governed by or stating the condition that when an operation is performed on two or more quantities already combined by a second operation, the result is the same as when it is performed on each quantity individually and products then combined, e.g. that a X (b + c) = (a X b) + (a X c).").

methodologies when zeroing is prohibited in connection with both. For simplicity, the following scenario involves 5 export sales transactions of 1 unit each of 1 model of a product to 5 different purchasers.

240. By having each sale in our hypothetical involve only 1 unit, we are stripping away the complexity of weight averaging. We are also stripping away the complexity of adjustments, which are made to ensure price comparability. When these complexities are incorporated, however, for example, in an actual application such as in the challenged antidumping investigations, they have no effect on mathematical equivalence because of the mathematical principles identified above and the fact that the same basis for weight averaging and the same adjustments are made in both the average-to-average and average-to-transaction comparison methodologies. Nothing in Article 2.4.2 of the AD Agreement suggests that weight averaging and adjustments for price comparability should be any different in the application of the two methodologies.

241. By having our hypothetical at this point involve only 1 model, we also are stripping away the complexity of multiple averages and intermediate comparisons to account for different models. Again, though, when this complexity is incorporated, as in the challenged antidumping investigations, it has no effect on "mathematical equivalence" because the different "model averaging" groups, when combined, still yield the same mathematical result under both comparison methodologies.

242. For our hypothetical scenario, our export prices are as follows:

Export Price to Purchaser 1	13
Export Price to Purchaser 2	13
Export Price to Purchaser 3	11
Export Price to Purchaser 4	10
Export Price to Purchaser 5	4

In this hypothetical, we will not apply the kind of analysis that the USDOC has applied to identify a "pattern of export prices which differ significantly," but it should be readily apparent that the export price to Purchaser 5 is significantly lower than the export prices to any of the other purchasers. So, we will assume for the purpose of this demonstration that the "pattern clause" condition set forth in Article 2.4.2 has been met.

243. In our hypothetical, we will posit that the weighted average normal value is 10. As explained above, nothing in the text or context of Article 2.4.2 of the AD Agreement suggests that the "weighted average normal value" used in the average-to-average comparison methodology should be any different from the "normal value established on a weighted average basis" used in the alternative, average-to-transaction methodology. Thus, in our hypothetical, normal value for the purpose of both comparison methodologies will be 10.

244. For the average-to-average comparison methodology, we will first calculate the weighted average export price. Again, as this hypothetical involves 5 sales transactions of 1 unit each, a weighted average is the same as a simple average. To calculate this average, we add the export

prices and divide by 5 (the total quantity of the export transactions). That calculation looks like this:

$$\frac{13+13+11+10+4}{5} = 10.2$$

245. Thus, the weighted average export price is 10.2. To determine the average comparison result for this model, this weighted average export price is “compared to,” or subtracted from our weighted average normal value, which, again, is 10:

$$10 - 10.2 = -0.2$$

Then the difference calculated, -0.2, is multiplied by the total quantity, 5 units, to determine the total amount of the comparison results for all units of the model:

$$-0.2 \times 5 = -1$$

246. Thus, the total amount of the comparison results calculated using the average-to-average comparison methodology in our hypothetical example is -1. The total amount of dumping (and the margin of dumping) when using the average-to-average comparison methodology would be zero in this scenario. The dumping that would be evidenced by the export sale to Purchaser 5, at a price of 4, which is 6 below the normal value of 10, has been masked by higher priced sales to other purchasers.

247. The complete calculation under the average-to-average methodology can be expressed as an algebraic equation as follows:

$$\left(10 - \left(\frac{13+13+11+10+4}{5}\right)\right)5 = -1$$

As can be seen, this equation simply combines the preceding steps in a format that is modestly different, visually. All of the operations, however, remain the same. We will return to this algebraic representation of the average-to-average methodology shortly.

248. Now, we will demonstrate the calculation of the total amount of the comparison results and the total amount of dumping using the average-to-transaction comparison methodology. In the average-to-transaction comparison methodology, each individual export price is “compared to” the weighted average normal value, which is to say that each individual export price is subtracted from the weighted average normal value. Comparing each of our export prices above with our weighted average normal value on an individual, transaction-specific basis, we get the following comparison results:

$$10 - 13 = -3$$

$$10 - 13 = -3$$

$$10 - 11 = -1$$

$$10 - 10 = 0$$

$$10 - 4 = 6$$

The amount of comparisons yielding negative results is -7 (*i.e.,* (-3) + (-3) + (-1)). The amount of comparisons yielding positive results, which is evidence of dumping, is 6. If zeroing is prohibited, then the amount of comparisons yielding negative results is combined with the amount of comparisons yielding positive results to calculate the total amount of the comparison results, as follows:

$$(-3) + (-3) + (-1) + (0) + (6) = -1$$

In this scenario, when using the average-to-transaction comparison methodology, the total amount of comparison results is -1, and the total amount of dumping (and the margin of dumping) would be zero.

249. As can be seen from the above, the total amount of the comparison results, the total amount of dumping, and the margin of dumping calculated using the average-to-average comparison methodology (without zeroing) are identical to the calculations that result from the application of the alternative, average-to-transaction comparison methodology (also without zeroing).

250. The complete calculation under the average-to-transaction methodology can be expressed as an algebraic equation as follows:

$$(10 - 13) + (10 - 13) + (10 - 11) + (10 - 10) + (10 - 4) = -1$$

251. Applying the mathematical principles referenced above, this equation can be rearranged, separating out each 10, as follows, with the same mathematical result:

$$(10 + 10 + 10 + 10 + 10) - (13 + 13 + 11 + 10 + 4) = -1$$

This equation can again be rearranged as follows, so that instead of adding the 10s, we multiply 10 by 5, once again with the same mathematical result:

$$(5 \times 10) - (13 + 13 + 11 + 10 + 4) = -1$$

Finally, the same equation can be rearranged one more time as follows, again with the same mathematical result:

$$\left(10 - \left(\frac{13 + 13 + 11 + 10 + 4}{5}\right)\right)5 = -1$$

This equation is the equivalent of the three equations that immediately precede it and, of course, it is the very same algebraic equation presented earlier for the average-to-average comparison methodology.

252. If zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies will always be identical, or "mathematically equivalent," in every case, because, ultimately, the mathematical operations in each are identical and are only structured in different orders.

253. As a consequence, if zeroing is prohibited in the application of the average-to-transaction comparison methodology, the dumping that would be evidenced by the export sale to Purchaser 5, or the amount of the positive comparison result, is masked by higher priced sales to other purchasers, even though there is a "pattern" of export prices which differ significantly among the different purchasers. That evidence of dumping can be "unmasked" using zeroing, in which case the negative comparison results are set to zero and do not offset the positive comparison results, such that the total amount of dumping would be 6.

254. It is equally true that the average-to-average and average-to-transaction comparison methodologies (both without zeroing) yield identical results even when there are multiple models that are segregated into "averaging groups" for which intermediate comparison results are generated. For another, only slightly more complicated hypothetical example, we will posit that the data from the hypothetical example above represents Model A in a scenario where there are two models, Model A and Model B. The only difference is that the total amount of the comparison results and the total amount of dumping result from an aggregation of the comparison results of the two models. We will return to this after setting out the hypothetical data and calculations for Model B.

255. For Model B, we will posit that the weighted average normal value is 15, and our export price data is as follows:

Export Price to Purchaser 1	17
Export Price to Purchaser 2	17
Export Price to Purchaser 3	14
Export Price to Purchaser 4	13
Export Price to Purchaser 5	7

256. Using the same steps laid out above for the application of the average-to-average methodology, and relying on the same premise that each sale involves only one unit, we first calculate the weighted average export price:

$$\frac{17 + 17 + 14 + 13 + 7}{5} = 13.6$$

This weighted average export price of 13.6 is then subtracted from our weighted average normal value of 15 to determine the average comparison result for this model:

$$15 - 13.6 = 1.4$$

Then the difference calculated, 1.4, is multiplied by the total quantity, 5 units, to determine the amount of the comparison result for this model:

$$1.4 \times 5 = 7$$

Thus, the application of the average-to-average comparison methodology for Model B yields a comparison result of 7.

257. For the average-to-transaction comparison methodology, again, each individual export price is subtracted from the weighted average normal value:

$$15 - 17 = -2$$

$$15 - 17 = -2$$

$$15 - 14 = 1$$

$$15 - 13 = 2$$

$$15 - 7 = 8$$

If zeroing is prohibited, then the amount of comparisons yielding negative results is -4 (*i.e.,* (-2) + (-2)), and the amount of comparisons yielding positive results is 11 (*i.e.,* 1+2+8).

258. To recall, the comparison results yielded are as follows for each model and comparison methodology:

	Average-to-Average Comparison Methodology		Average-to-Transaction Comparison Methodology	
	Negative Comparison Results	Positive Comparison Results	Negative Comparison Results	Positive Comparison Results
Model A	-1	n/a	-7	6
Model B	n/a	7	-4	11
Total	-1	7	-11	17

259. The average-to-average comparison methodology yields just one comparison result for each model group, while the average-to-transaction comparison methodology may yield both negative and positive comparison results for a given model group, especially in a situation where targeting is occurring.

260. Based on the data above, for the average-to-average comparison methodology, the total amount yielded by positive comparison results for both models is 7, the total amount yielded by negative comparison results for both models is -1, and thus the total amount of the aggregated comparison results, and the total amount of dumping for the product under investigation, is 6 (*i.e.*, 7 + (-1)).

261. Also based on the data above, for the average-to-transaction comparison methodology, the total amount yielded by positive comparison results for both models is 17 (*i.e.*, 6 + 11), the total amount yielded by negative comparison results for both models is -11 (*i.e.*, (-7) + (-4)), and

thus the total amount of the aggregated comparison results, and the total amount of dumping for the product under investigation is, once again, 6 (*i.e.,* 17 + (-11)).

262. The Panel will note that, in the hypothetical example with two model groups, the total amounts yielded by positive and negative comparison results are different for each of the comparison methodologies, due to the way that the positive and negative results are grouped in the different methodologies. As shown, though, even with multiple models, if zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies, then the total amounts of the comparison results calculated using those two methodologies will always be equal.

263. Like the total amount of dumping, the margin of dumping will also be equal under both comparison methodologies because the total amount of dumping for each comparison methodology is divided by the same denominator (*i.e.,* total export value) to calculate the margin of dumping.[263] Nothing in Article 2.4.2 of the AD Agreement suggests that the denominator used in the average-to-average and average-to-transaction comparison methodologies should be different. In fact, the calculation of a margin of dumping, "expressed as a percentage of the export price," is described elsewhere in the AD Agreement, in Article 5.8.

264. The United States hopes that the above discussion is helpful in illustrating the problem that necessarily would result from finding that zeroing is prohibited for both the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology. That is, the second sentence of Article 2.4.2 of the AD Agreement would be deprived of any meaning, contrary to the principle of effectiveness, because the "exceptional"[264] comparison methodology set forth therein would always yield results that are identical, or "mathematically equivalent," to one of the two comparison methodologies that must be used "normally" (average-to-average), and would thus also, as a matter of logic, always yield results that are not "systematically different"[265] from the other normal comparison methodology (transaction-to-transaction). It is important to note that this problem will result no matter what values or numbers are used in the hypothetical example above.

265. However, we must emphasize that this problem is not merely hypothetical. Even with all of the complexities of weighted averaging, intermediate comparisons based on multiple averages, and various adjustments to ensure price comparability, the actual result in the challenged antidumping proceedings, if zeroing is prohibited under both methodologies, would

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[263] The AD Agreement does not recognize the concept of "negative dumping." Accordingly, where the total, aggregated amount of comparison results is less than zero, *i.e.*, when it is a negative number, then the total, aggregated amount of comparison results is set to zero, the total amount of dumping is zero, and the weighted-average dumping margin is zero. This should not be confused with "zeroing," which China challenges in this dispute. Rather, this is just reflects that an aggregated amount of comparison results that is negative leads to a conclusion that there is no dumping, and the margin of dumping is zero.

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

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

be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results.

266. This can be seen by looking at the output of the USDOC's margin programs for APP China, in the coated paper investigation, TPCO, in the OCTG investigation, and BTIC, in the steel cylinders investigation.[266] Those calculations show that, without zeroing, the total amount of dumping would be the same under both the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology.

267. For APP China, the total amount of the comparison results between the normal value and export prices using the average-to-average comparison methodology is [[* * *]]. This is calculated by combining the total amount of positive comparison results, [[* * *]], and the total amount of negative comparison results, [[* * *]].[267]

268. Under the alternative, average-to-transaction comparison methodology, for APP China, the USDOC calculated total positive comparison results of [[* * *]] and total negative comparison results of [[* * *]].[268] As in the hypotheticals above, the Panel will note that the total amounts of positive and negative comparison results are different for each of the comparison methodologies, due to the way that the positive and negative results are grouped in the different methodologies. However, when the total positive comparison results are combined with, or, in other words, are offset by, the total negative comparison results, the total amount of the comparison results would be [[* * *]], which is the same total amount of such results calculated under the average-to-average comparison methodology.

269. The same holds true for TPCO. Under the average-to-average comparison methodology, TPCO's total amount of comparison results is [[* * *]], which is derived by combining the negative comparison results, [[* * *]], with the positive comparison results, [[* * *]].[269]

270. Application of the alternative, average-to-transaction comparison methodology, without zeroing, yields the same total amount of comparison results for TPCO. If the positive comparison results under the average-to-transaction comparison methodology, [[* * *]], are offset by the negative comparison results, [[* * *]], then the resulting total amount of comparison

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[266] *See* Coated Paper OI Program Output for APP China (program run on April 10, 2015), pp. 144-145 (pp. 239-240 of the PDF version of Exhibit USA-18); OCTG OI Program Output for TPCO (program run on April 10, 2015), pp. 63 (p. 139 of the PDF version of Exhibit USA-20) (BCI); Steel Cylinders OI Program Output for BTIC (program run on April 10, 2015), p. 55 (p. 124 of the PDF version of Exhibit USA-22) (BCI).

[267] *See* Coated Paper OI Program Output for APP China (program run on April 10, 2015), p. 144 (p. 239 of the PDF version of Exhibit USA-18).

[268] *See* Coated Paper OI Program Output for APP China (program run on April 10, 2015), p. 145 (p. 240 of the PDF version of Exhibit USA-18).

[269] *See* OCTG OI Program Output for TPCO (program run on April 10, 2015), pp. 63 (p. 139 of the PDF version of Exhibit USA-20) (BCI). Note that the relevant sum of the comparison results is identified as "A-to-A Evidence of Dumping (US$)." The value listed under "Total Comparison Results (US$)" different, and larger, because it includes the value listed under "Facts Avail Evidence of Dumping US$)." The same is true in the presentation of the results of the average-to-transaction comparison methodology. *See id.*, p. 64 (p. 140 of the PDF version of Exhibit USA-20) (BCI).

result is [[* * *]], which, again, is the same total amount of comparison results calculated under the average-to-average comparison methodology.[270]

271. The result is no different for BTIC. Under the average-to-average comparison methodology, BTIC's total amount of comparison results is a negative number, [[* * *]], which is derived by combining the negative comparison results, [[* * *]], with the positive comparison results, [[* * *]].[271]

272. Application of the alternative, average-to-transaction comparison methodology, without zeroing, yields the same total amount of comparison results for BTIC. If the positive comparison results under the average-to-transaction comparison methodology, [[* * *]], are offset by the negative comparison results, [[* * *]], then the resulting total amount of comparison results is [[* * *]], which, again, is the same total amount of comparison results calculated under the average-to-average comparison methodology.[272]

273. We note, in addition, that the result is no different for DuPont Teijin and Green Packing in the third administrative review of the antidumping order on PET film from China, which China also challenges in this dispute.[273] BCI information demonstrates that, in that administrative review, for both companies, if zeroing is prohibited under both the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology, the result would be that both comparison methodologies yield mathematically equivalent results.

274. The United States has requested that DuPont Teijin and Green Packing provide letters authorizing the parties to provide to the Panel BCI that the companies submitted to the USDOC during the course of the third administrative review of the antidumping order on PET film. At the time of the filing of this submission, however, the companies have not yet provided authorization letters to the United States. We will continue to seek authorization letters from these companies, and we will keep the Panel apprised as the situation develops.

275. In light of the above, the United States respectfully requests that the Panel make a factual finding that, if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies will yield mathematically equivalent results in all cases, including in the challenged antidumping proceedings.

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[270] *See* OCTG OI Program Output for TPCO (program run on April 10, 2015), pp. 64 (p. 140 of the PDF version of Exhibit USA-20) (BCI). As noted above, for the average-to-average comparison methodology, the sum of the positive and negative comparison results actually is listed under "A-to-A Evidence of Dumping (US$)."

[271] *See* Steel Cylinders OI Program Output for BTIC (program run on April 10, 2015), p. 55 (p. 124 of the PDF version of Exhibit USA-22) (BCI).

[272] *See* Steel Cylinders OI Program Output for BTIC (program run on April 10, 2015), p. 56 (p. 125 of the PDF version of Exhibit USA-22) (BCI).

[273] We respond to China's claims concerning the third administrative review of the antidumping order on PET film below, in section IV.C.

e. The Appellate Body's Consideration of "Mathematical Equivalence" in Previous Disputes Can Be Distinguished and Does Not Compel Rejection of the "Mathematical Equivalence" Argument in this Dispute

276. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes,[274] though never in the context of an actual application of the alternative, average-to-transaction comparison methodology in which a finding that the use of zeroing is prohibited in connection with that methodology would, in fact, result in "mathematical equivalence." The factual situations of those previous disputes can be distinguished from the factual situation here, and the Appellate Body's consideration of the "mathematical equivalence" argument in those previous disputes neither supports nor compels rejection of the "mathematical equivalence" argument in this dispute.

277. The Appellate Body first addressed the "mathematical equivalence" argument in *US – Softwood Lumber V (Article 21.5 – Canada)*.[275] In that dispute, the Appellate Body "disagree[d] with the Panel's analysis of the 'mathematical equivalence' argument for several reasons."[276] Some of the reasons the Appellate Body gave are distinguishable from the current situation, while others are instructive.

278. The first reason offered by the Appellate Body was that the United States had "never applied the methodology provided in the second sentence of Article 2.4.2, nor has it provided examples of how other WTO Members have applied this methodology. Thus, the United States' argument on 'mathematical equivalence' rests on an untested hypothesis."[277] As explained above, that is no longer the case. The United States applied the alternative, average-to-transaction comparison methodology in the challenged antidumping proceedings and has demonstrated above that, for the final determinations in those proceedings, the "mathematical equivalence" argument holds true, if the use of zeroing in connection with the alternative, average-to-transaction methodology is prohibited.

279. The Appellate Body's second reason for disagreeing with the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* was that, "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average."[278] In this dispute, the United States does not offer the "mathematical equivalence" argument to support a proposed interpretation of the transaction-to-transaction and average-to-average comparison methodologies in the first sentence of Article 2.4.2 of the AD Agreement. The Appellate Body has found that the use of zeroing is not permitted in connection with those comparison methodologies, and the United

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[274] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 97-100; *US – Zeroing (Japan) (AB)*, paras. 133-135; *US – Stainless Steel (Mexico) (AB)*, paras. 124-126.

[275] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 97-100.

[276] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.

[277] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.

[278] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.

States has brought itself into compliance with the Appellate Body's findings. The "mathematical equivalence" argument is offered here to support the contextual argument that, as an exception, the alternative, average-to-transaction comparison methodology should not be interpreted in a way that would lead, invariably, to that comparison methodology yielding results that are identical or systematically similar to the normal comparison methodologies.

280. For its third reason, the Appellate Body observed in *US – Softwood Lumber V (Article 21.5 – Canada)* that "the United States' 'mathematical equivalence' argument assumes that zeroing is prohibited under the methodology set out in the second sentence of Article 2.4.2. The permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases."[279] The Appellate Body is correct, of course, that the "mathematical equivalence" argument is premised on the assumption, for the purpose of argument, that zeroing is prohibited under the alternative, average-to-transaction comparison methodology. We offer the "mathematical equivalence" argument here as an argument *against* finding that that is the case. That the Appellate Body suggested that the U.S. assumption in *US – Softwood Lumber V (Article 21.5 – Canada)* was a reason for its disagreement with the panel's analysis of the "mathematical equivalence" argument hints that the Appellate Body might agree that the use of zeroing is *not* prohibited in connection with the alternative, average-to-transaction comparison methodology in the second sentence of Article 2.4.2 of the AD Agreement.

281. The Appellate Body also noted in *US – Softwood Lumber V (Article 21.5 – Canada)* that "there is considerable uncertainty regarding how precisely the third methodology should be applied."[280] In that dispute:

> Canada and several third participants argued before the Panel that, even assuming that zeroing were prohibited also under the weighted average-to-transaction comparison methodology, mathematical equivalence would be limited to a specific set of circumstances. Canada and these third participants offered their own hypothetical scenarios showing that the weighted average-to-transaction comparison methodology would not yield necessarily the same results as the weighted average-to-weighted average methodology, even if the prohibition to use zeroing were to extend to the former. Thailand also explains that the mathematical equivalence argument works only under very specific assumptions, one of them being that the weighted-average normal value used in both the weighted average-to-weighted average and weighted average-to-transaction comparison methodologies be the same.[281]

282. Similarly, in *US – Stainless Steel (Mexico)*, Mexico and the third participants argued that "the 'mathematical equivalence' argument works only under the assumption that the weighted

[279] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.

[280] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.

[281] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99.

average normal value used in the weighted average-to-transaction ('W-T') comparison methodology is identical to that used in the [average-to-average] comparison methodology," and Mexico pointed out that that was "not the case under the United States' system."[282]

283. In both *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the Appellate Body signaled that it saw merit in the arguments of the participants and third participants described above.[283] In *US – Stainless Steel (Mexico)*, the Appellate Body expressed the view that "the 'mathematical equivalence' argument works only under a specific set of assumptions, and . . . there is uncertainty as to how the [average-to-transaction] comparison methodology would be applied in practice."[284]

284. Those disputes, however, did not involve an actual application of the alternative, average-to-transaction comparison methodology. In the challenged antidumping proceedings, and generally, the weighted average normal value used in the application of the average-to-average comparison methodology is no different from the weighted average normal value used in the application of the alternative, average-to-transaction comparison methodology. As explained above, nothing in Article 2.4.2 of the AD Agreement suggests that "a weighted average normal value" under the first sentence should be calculated any differently than "a normal value established on a weighted average basis" in the second sentence.

285. Because of the substantially different underlying factual situations in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, as contrasted with the factual situation in this dispute, this aspect of the Appellate Body's consideration of the "mathematical equivalence" argument in those disputes is not germane to the Panel's consideration of this argument here.

286. Finally, the Appellate Body also considered the "mathematical equivalence" argument in *US – Zeroing (Japan)*.[285] There, after noting the reasons it gave in *US – Softwood Lumber V (Article 21.5 – Canada)* for rejecting the argument, the Appellate Body disagreed with an underlying assumption of the panel in that dispute.[286] The Appellate Body explained that:

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[282] *US – Stainless Steel (Mexico) (AB)*, paras. 124-125.

[283] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99; *US – Stainless Steel (Mexico) (AB)*, para. 126.

[284] *US – Stainless Steel (Mexico) (AB)*, para. 126.

[285] *See US – Zeroing (Japan) (AB)*, paras. 133-135.

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

> [T]he Panel's reasoning appears to assume that the universe of export transactions to which these two comparison methodologies apply is the same, and that these two methodologies differ only in that, under the [average-to-transaction] comparison methodology, a normal value is established on a weighted average basis, while it is established on a transaction-specific basis under the [transaction-to-transaction] comparison methodology.[287]

The Appellate Body indicated that, in its view:

> The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs [sic] significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern.[288]

287. The United States suggests that, to the extent that the Panel takes into account this discussion by the Appellate Body, it should exercise caution in doing so. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the alternative, average-to-transaction comparison methodology.

288. Furthermore, the Appellate Body "emphasize[d] … that our analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."[289] Thus, in reading the text of Article 2.4.2, the Appellate Body expressly was not making findings of legal interpretation that resulted from a complete analysis pursuant to the customary rules of interpretation of public international law.

289. Additionally, it is unclear what precisely the Appellate Body meant when it suggested that, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[290] As we explained above in section IV.B.4, the Appellate

[287] *US – Zeroing (Japan) (AB)*, para. 134.

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

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

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

Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the alternative, average-to-transaction methodology only to transactions found to have been priced significantly lower than other transaction, *i.e.*, those found to be "targeted." To do so would have been illogical because a "pattern" within the meaning of the "pattern clause" necessarily includes both lower and higher export prices that "differ significantly" from each other.

290. Moreover, nothing in the second sentence of Article 2.4.2 or any other provision of the AD Agreement suggests that, in limiting application of the alternative, average-to-transaction methodology, an investigating authority could exclude from consideration entirely certain export transactions. Doing so would, ironically, result in what could be called "double zeroing," in which negative comparison results are zeroed, or removed, from the numerator of the margin of dumping, and the export value of the transactions yielding those negative comparison results also would be zeroed, or removed, from the denominator in the calculation of the margin of dumping. This would have the effect of increasing the margin of dumping even more than zeroing does, but would not, in the view of the United States, be an appropriate means of "unmasking targeted dumping."

291. If, on the other hand, zeroing is prohibited and application of the alternative, average-to-transaction comparison methodology is limited to "targeted" sales while other sales are examined using the average-to-average comparison methodology, then "mathematical equivalence" still would result. We can demonstrate this by returning to the first hypothetical scenario we presented in the preceding section.

292. Recall that, in that hypothetical scenario, weighted average normal value is 10 and the export prices are as follows:

Export Price to Purchaser 1	13
Export Price to Purchaser 2	13
Export Price to Purchaser 3	11
Export Price to Purchaser 4	10
Export Price to Purchaser 5	4

293. Also recall that the total amount of the comparison results calculated using the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology was -1.

294. Finally, recall that, above, the application of the alternative, average-to-transaction methodology was not limited to the targeted sales and then combined with the results of an application of the average-to-average comparison methodology to the remaining sales, as China suggests is required.[291] That type of application, which we call a mixed approach, is what we will now discuss, and we will show that the total amount of the comparison results calculated using such an application also would be -1, if zeroing is prohibited.

[291] *See, e.g.,* China's First Written Submission, paras. 198-199.

295. First, under this mixed approach to the application of the alternative comparison methodology provided for in the second sentence of Article 2.4.2, the average-to-transaction comparison methodology would be applied to the one low-priced sale found to "differ significantly" from the others. In this hypothetical example, that is the sale to Purchaser 5. Thus, the comparison result for this particular transaction is as follows:

$$10 - 4 = 6$$

296. The result of the application of the average-to-transaction comparison methodology is a positive comparison result of 6. This, of course, is an intermediate calculation and not, by definition, a margin of dumping for the exporter and for the product under investigation as a whole.

297. Next, the remaining exports would be examined using the average-to-average comparison methodology. We will first calculate the weighted-average export price for this group. Note that, since only 4 sales of 1 unit each are included in this group now, the quantity here is 4, not 5, as before. Thus, the weighted-average export price is calculated as follows:

$$\frac{13 + 13 + 11 + 14}{4} = 11.75$$

298. To determine the average comparison result for this average-to-average comparison, this weighted-average export price is "compared to," or subtracted from our weighted-average normal value, which, again, is 10:

$$10 - 11.75 = -1.75$$

Then the difference calculated, -1.75, is multiplied by the total quantity for the group, 4 units, to calculate the total amount of the comparison results:

$$-1.75 \times 4 = -7$$

Thus, the result of the application of the average-to-average methodology for this group of transactions is a negative comparison result of -7.

299. When the total amounts of the comparison results for each comparison methodology are aggregated, the aggregate total amount of the comparison results is -1 (*i.e.*, 6 + (-7)). This result, of course, is identical to the result of the application of the average-to-average comparison methodology and the average-to-transaction comparison methodology in the original hypothetical examples above, in section IV.B.5.d.

300. The complete calculation under the mixed approach can be expressed as follows, where the average-to-transaction comparison is the first element on the left-hand side of the equation (*i.e.,* (10 – 4)) and the average-to-average comparison is the second element on the left-hand side of the equation:

$$(10 - 4) + \left(10 - \left(\frac{13 + 13 + 11 + 10}{4}\right)\right)4 = -1$$

301. Applying the mathematical principles referenced above in section IV.B.5.d., the average-to-average comparison element can be rearranged so that the equation appears as follows:

$$(10 - 4) + \big(10 + 10 + 10 + 10 - (13 + 13 + 11 + 10)\big) = -1$$

302. The full equation can further be rearranged as follows:

$$(10 + 10 + 10 + 10 + 10) - (13 + 13 + 11 + 10 + 4) = -1$$

303. The equation can be further be rearranged as follows:

$$(10 \times 5) - (13 + 13 + 11 + 10 + 4) = -1$$

304. Finally, the equation can further be rearranged as follows:

$$\left(10 - \left(\frac{(13 + 13 + 11 + 10 + 4)}{5}\right)\right)5 = -1$$

305. The Panel will note that this algebraic representation of the mixed approach calculation is the very same equation that represents the calculation of the total amount of the comparison results using the average-to-average comparison methodology and the calculation of the total amount of the comparison results using the average-to-transaction comparison methodology, as shown above in section IV.B.5.d.

306. Without zeroing, a mixed approach – combining the average-to-transaction comparison methodology and the average-to-average comparison methodology – will always yield a result that is mathematically equivalent to the average-to-average comparison methodology, as well as the average-to-transaction comparison methodology, when each of those methodologies is applied to all export sales.

307. For these reasons, the Appellate Body's consideration of the "mathematical equivalence" argument in previous disputes neither supports rejection of the "mathematical equivalence" argument nor compels it. However, the evidence before the Panel demonstrates that, if zeroing is not applied, the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology will yield mathematically equivalent results.

f. The Negotiating History of the AD Agreement Confirms that Zeroing is Permissible when Applying the Alternative, Average-to-Transaction Comparison Methodology Set Forth in the Second Sentence of Article 2.4.2 of the AD Agreement

308. We recall that the first sentence of Article 2.4.2 of the AD Agreement provides that the comparison methodology used to establish margins of dumping "shall normally" be symmetrical, *i.e.*, either the average-to-average or transaction-to-transaction comparison methodology, while the second sentence of Article 2.4.2, by its terms, permits the application of an asymmetrical comparison methodology, the alternative, average-to-transaction comparison methodology. The

Appellate Body has observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[292]

309. The "asymmetrical" nature of the "third methodology," and the fact that it may be used "only in exceptional circumstances," when considered together with the negotiating history of the AD Agreement, confirms that zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

310. Article 32 of the Vienna Convention has been recognized by the Appellate Body as reflecting a customary rule of interpretation of public international law.[293] Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation," including the "preparatory work of the treaty," or its negotiating history, to confirm the meaning of the text or to determine the meaning when the interpretation according to the general rule of interpretation "(a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable."

311. Consistent with the interpretive arguments set forth above, the United States certainly does not consider that an interpretation according to the general rule of interpretation "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." We do, however, believe that the meaning of the second sentence of Article 2.4.2, specifically that zeroing is permissible when applying the comparison methodology set forth in that provision, can be confirmed through recourse to documents from the negotiating history of the AD Agreement. We note that China has drawn the Panel's attention to such negotiating documents as well.[294]

312. Of particular relevance are proposals from Contracting Parties that sought changes to the Tokyo Round Antidumping Code to address concerns about certain investigating authorities that used an asymmetrical comparison methodology, in which "the 'negative' dumping margin by which the normal value falls below the export price in the value term will be treated as zero instead of being added to the other transactions to offset the dumping margin."[295] It is clear from these proposals that the *demandeurs* viewed asymmetry and zeroing as one and the same problem.

313. Hong Kong explained one of its proposals in the following terms:

> <u>Negative dumping margin</u> (Article 2.6)

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

[293] *See Japan – Alcoholic Beverages II (AB)*, p. 10.

[294] *See* China's First Written Submission, para. 146.

[295] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, para. 14 (December 22, 1989) (Exhibit CHN-94).

> In calculating the overall dumping margin of the producer under investigation, certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis. For transactions where normal value is higher than the export price (i.e., dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. For transaction where normal value is lower than the export price (i.e., no dumping occurs), the "negative" dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.

We propose that such practices should be discontinued and that the Code be amended to require comparison to be made between the weighted average normal value and the weighted average export price.[296]

314. Japan similarly linked its concerns about asymmetry and zeroing, in particular in situations where "export prices vary over time":

Price comparison in cases where sales prices vary

> In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way that the sum of the dumping margins of transactions export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.
>
> Consequently, dumping margins occur in cases where export prices vary over time (<u>Figure 2</u>) or where export prices vary due to different routes of sale (<u>Figure 3</u>), even if the average level of export prices is equal to that of domestic sales prices.[297]

Japan proposed that its concern be addressed as follows:

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[296] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, paras. 14-15 (December 22, 1989) (Exhibit CHN-94) (italics added; underlining in original).

[297] *Communication from Japan,* GATT Doc. No. MTN.GNG/NG8/W/30, p. 3 (June 20, 1988) (Exhibit USA-15) (underlining in original).

> (b) The Code should set out clear guidelines that ensure symmetrical comparison of "normal value" and "export price" at the same level of trade, and eliminate the possibility of asymmetrical comparison, in disregard of certain costs actually incurred, and thereby artificially creating "dumping" when none actually exist. *The Code should also be clarified, as another aspect of "symmetrical comparison", to disallow the practice of calculating "normal value" on an average basis and then to compare it to "export price" on an individual basis.*[298]

315. The minutes of a meeting of the Negotiating Group on MTN Agreements and Arrangements reflects that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked:

> Use of weighted averages in the comparison of export price and normal value
>
> The following were among comments made:
>
> > - *the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis*. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, *any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased*;
> >
> > - *if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted* to a particular portion of a product line or to a particular region; *sales at fair value in one region or in one portion of a product line did not offset injury caused in the other*;
> >
> > - given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);
> >
> > - *the issue at stake was masked, selective dumping, the effects of which could be considerable*;

[298] *Communication from Japan,* GATT Doc. No. MTN.GNG/NG8/W/81, p. 2 (July 9, 1990) (Exhibit USA-16) (italics added; underlining in original).

- an important question was whether non-dumped imports should also have to be included in the examination of injury.[299]

316. The ultimate compromise agreed by the WTO Members is, of course, reflected in the text of Article 2.4.2 of the AD Agreement, which provides that "normally" a symmetrical comparison methodology must be used, but when certain conditions are met, an investigating authority "may" use an asymmetrical comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[300] The negotiating history documents referenced above confirm that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

g. The USDOC's Use of Zeroing in Connection with Its Application of the Alternative, Average-to-Transaction Comparison Methodology in the Challenged Investigations Is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

317. For the reasons given above, the USDOC's use of zeroing in connection with the alternative, average-to-transaction comparison methodology in the coated paper, OCTG, and steel cylinders antidumping investigations is not inconsistent with Article 2.4.2 of the AD Agreement. Accordingly, the Panel should reject China's "as applied" claims related to the USDOC's use of zeroing in the challenged antidumping investigations.

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

318. In addition to its "as applied" claims regarding the coated paper, OCTG, and steel cylinders antidumping investigations, China also claims that "the United States acted inconsistently with Article 9.3 of the *Anti-Dumping* Agreement and Article VI:2 of the GATT 1994 by applying zeroing procedures in an administrative review of the anti-dumping order concerning PET Film from China."[301] China's claims lack merit.

319. As an initial matter, we note China's acknowledgement that, in the PET film third administrative review, the USDOC "applied its targeted dumping methodology, which included the calculation of a margin of dumping using the [average-to-transaction] comparison methodology, with zeroing."[302] Indeed, China itself points to the portions of the preliminary and final determinations in the PET film third administrative review that demonstrate that the USDOC applied the alternative, average-to-transaction comparison methodology "consistent

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[299] *Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989*, MTN.GNG/NG8/13, p. 10 (November 15, 1989) (Exhibit USA-17) (emphasis added).

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

[301] China's First Written Submission, para. 298.

[302] China's First Written Submission, para. 299.

with [the USDOC's] approach for handling 'masked' or 'targeted' dumping in the context of original investigations."[303]

320. China does not argue, however, that the USDOC's application of "its targeted dumping methodology" in the PET film third administrative review is inconsistent with any provision of the AD Agreement, except with respect to the USDOC's use of zeroing. That is, unlike its claims under Article 2.4.2 of the AD Agreement with respect to the three challenged antidumping investigations, China does not contest either the USDOC's determination that a pattern of export prices which differ significantly among different purchasers, regions, or time periods existed or the USDOC's determination that such differences could not be taken into account by the use of the average-to-average or transaction-to-transaction comparison methodologies.[304]

321. Additionally, China appears to agree that the AD Agreement "does not restrict the ability of an investigating authority to use the [average-to-transaction] comparison methodology in administrative reviews,"[305] and presumably China also would agree that an investigating authority may do consistent with the second sentence of Article 2.4.2 of the AD Agreement, as the USDOC did in the PET film third administrative review. Certainly, China does not contend in its first written submission that the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 may not be applied in assessment proceedings (such as refund proceedings and administrative reviews).[306]

322. Rather, China contends only that the USDOC's application of zeroing in the PET film third administrative review is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 because, as China explains, Article 9.3 provides that "the amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2" of the AD Agreement and Article VI:2 of the GATT 1994 similarly provides that a Member "may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."[307]

323. China's argument fails because it is dependent upon the Panel finding that the use of zeroing is impermissible when applying the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. However, as demonstrated above in section IV.B.5., zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology. Accordingly, when an antidumping duty is calculated in an administrative review pursuant to the second sentence of Article 2.4.2 – *i.e.*, using the alternative, average-to-transaction comparison methodology, with zeroing – that antidumping duty necessarily does not exceed the margin of dumping as

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[303] *See* China's First Written Submission, paras. 302-305.

[304] China's First Written Submission, paras. 298-316.

[305] China's First Written Submission, para. 300.

[306] *See* China's First Written Submission, para. 300.

[307] China's First Written Submission, para. 309.

established under Article 2 of the AD Agreement. On the contrary, it is, by definition, the margin of dumping as established under Article 2 of the AD Agreement.

324. China references a number of Appellate Body findings, but does not suggest any other basis for finding that the United States has acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[308] While the Appellate Body has found previously that the use of zeroing in administrative reviews, including in connection with the use of an average-to-transaction comparison methodology, is inconsistent "as such" with the AD Agreement,[309] the Appellate Body has never found that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement.[310] As with investigations, the permissibility of using zeroing in administrative reviews when applying the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is an issue of first impression for the Panel.

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

V. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES HAS BREACHED ARTICLES 6.10 AND 9.2 ON ACCOUNT OF A 'SINGLE RATE PRESUMPTION"

A. Introduction

326. In its first written submission, China claims that the United States has breached various obligations under the AD Agreement because USDOC maintains a so-called "Single Rate Presumption"[311] – a term which USDOC has never utilized with respect to any U.S. measure, practice or policy. Based on China's description, it appears that China is challenging, with respect to both particular antidumping proceedings and "as such," USDOC's treatment of Chinese firms as part of a government entity, and USDOC's requests to Chinese firms to provide evidence in order "to prove an absence of government control, both in law and in fact over their export activities."[312] As the United States will demonstrate below, China's claims are both factually and legally untenable for a number of reasons – and must be dismissed as a result.

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[308] *See* China's First Written Submission, paras. 310-312.

[309] *US – Zeroing (Japan) (AB)*, para. 166; *US – Stainless Steel (Mexico) (AB)*, para. 133; *US – Continued Zeroing (AB)*, para. 199.

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

[311] *See e.g.*, China's First Written Submission, paras. 317-319.

[312] China's First Written Submission, paras. 317-318.

327. *First*, China's "as such" claims cannot be sustained because China's evidence fails to meet the high standard such claims must meet. In particular, the evidence cannot establish that there is any norm of general and prospective application because it does not support a finding that USDOC is legally or otherwise obliged to treat Chinese firms in the future in the manner that China claims.

328. Second, China's arguments rest on an incorrect premise: that USDOC has no basis for its treatment of Chinese firms as part of a government entity in antidumping proceedings involving China, which frustrates the ability of Chinese exporters and producers to obtain their rightful antidumping margin. [313]This is not so. USDOC has not denied any Chinese exporter or producer its proper antidumping rate. Rather, as demonstrated below, China's Accession Protocol provides the basis by which USDOC may rightfully presume that China controls or materially influences all entities within China, and thereby consider all exporters or producers as part of a single China-government entity, absent positive evidence to the contrary, entitled to the same antidumping rate. This interpretation is further supported by the AD Agreement, which, contrary to what China claims, does not require an investigating authority to find that every company is a known exporter or a known producer entitled to an individual margin of dumping. This holds especially true in instances where it is appropriate to treat multiple companies as a single government entity.

329. Moreover, as discussed below, unlike the arguments raised in *EC-Fasteners*, China has not challenged or otherwise addressed the propriety of USDOC's treatment of China as a non-market economy ("NME"), which is based on USDOC's factual findings. In addition, USDOC provided Chinese firms the opportunity to establish that they are independent from the China-government entity. Thus, the United States will demonstrate that China's treatment of Chinese companies under common government control is not as such or as applied inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement.

330. *Finally*, the United States will address China's legal analysis with respect to each of the particular provisions of the AD Agreement it has invoked. The United States will demonstrate that China's analysis of those provisions is misplaced, including because it neglects to undertake a proper textual analysis or consider keys aspects of the Appellate Body and a prior panel's analysis concerning those provisions including the circumstances in which investigating authorities can treat various firms as part of a single entity.

331. In short, China has omitted critical aspects of the pertinent factual background, has failed to establish its *prima facie* case with respect to its as such claims, and misinterpreted the applicable law. Once these issues are clarified, it will become clear that the United States has had a sufficient basis for examining whether Chinese firms are independent of the Chinese government – and that China has no valid basis for its claims.

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[313] China's First Written Submission, para. 322.

B. Factual Background: USDOC Provides Exporters and Producers Their Proper Dumping Margin

332. China in this dispute does not challenge the WTO-consistency of any U.S. laws or regulations. Rather, China challenges determinations in certain specific antidumping proceedings, and also advances an "as such" challenge to an alleged unwritten measure. Nonetheless, as background information, the United States will explain the basic principle for how U.S. law treats exporters and producers.

333. Specifically, under a U.S. statute, USDOC is required to determine a dumping margin for each known exporter or producer except where it not practicable because of the large number of exporters or producers involved:

> (c) Determination of dumping margin
>
> (1) General rule
>
> In determining weighted average dumping margins under section 1673b (d), 1673d (c), or 1675 (a) of this title, the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.
>
> (2) Exception
>
> If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.[314]

This requirement applies in all antidumping investigations conducted by USDOC.

[314] 19 U.S.C. § 1677f-1(c) (Exhibit USA-26).

334. The critical issue, which the United States discusses in its legal arguments, is that not every legal entity should be treated as a distinct exporter or producer. With respect to the present dispute, and as discussed in more detail *infra* in Section V.D, China's Accession Protocol identified the very real concern that China controls or materially influences all entities within China. Nonetheless, in the investigations and reviews China challenges, Chinese companies had the opportunity to submit information about their relationship with the China-government entity to demonstrate independence from the government.[315] For those investigations that occurred before Policy Bulletin 05.1, companies could provide positive evidence to USDOC that the Chinese government did not materially influence their export activities.[316] In investigations after Policy Bulletin 05.1, companies had the opportunity to respond to USDOC's "Separate Rate Application"[317] – which streamlined their ability to secure a separate rate by helping to identify the requisite evidence required by USDOC to make such a determination.[318] In the reviews China challenges, if a company had previously provided positive evidence to USDOC that the Chinese government did not materially influence its export activities, then the company needed only certify that its status had not changed.[319] If the company had not previously provided this positive evidence, then the entity needed to do so by responding to USDOC's "Separate Rate Application."[320] Assuming the company certified that it remained unrelated to the Chinese government or completed an acceptable Separate Rate Application, USDOC assigned the entity an individual margin of dumping (or "separate rate").[321] However, if a company could not demonstrate that it was sufficiently free from government influence, USDOC considered that company ineligible for its own individual rate.[322] Instead, that company was identified as being part of the China-government entity, *i.e.*, the entity comprised of companies that have not demonstrated that they are free of government control.[323]

335. Specifically, in each challenged investigation and review proceeding, USDOC notified companies within the China-government entity of the information needed to determine their independence from the China-government entity. This information included whether there were any restrictive stipulations associated with a producer's or exporter's business and export

[315] *See, e.g.* Aluminum Extrusions OI, Preliminary Determination, 75 Fed. Reg. at 69408-09 (Exhibit CHN-111); Aluminum Extrusions AR1, Preliminary Results, 78 Fed. Reg. at 34987-88 (Exhibit CHN-465).

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

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

[318] *See supra* (discussing Policy Bulletin 05.1's process for separate rate applications).

[319] *See, e.g.* Wood Flooring AR1, Preliminary Results, Preliminary Decision Memorandum at 6-10 (Exhibit CHN-263).

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

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

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

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

licenses and whether any legislative enactments indicate the decentralization of the control of companies.[324] Further, USDOC examined whether a company sets its own export prices independent of the government, whether it had the authority to negotiate and sign contracts and agreements, whether it had autonomy from the government regarding selection of management, and whether it retained the proceeds from its export sales.[325]

336. In the antidumping proceedings at issue, various legal entities may likely be controlled by the government – and thus should be treated as a single entity to accurately capture that there is only one producer or exporter at issue. In the legal discussion below, the United States will establish that absent positive evidence to the contrary, it is not inconsistent with the AD Agreement to consider all Chinese companies in an antidumping investigation as part of a single China-government entity that should be afforded the same antidumping rate.

C. China Has Failed To Establish that the So-Called Single Rate Presumption is a Rule Or Norm Of General And Prospective Application That May Be Challenged "As Such"

337. China fails to establish that the so-called Single Rate Presumption is a "rule" or "norm of general and prospective application" that can be challenged "as such."[326] As demonstrated below, China has not met the high evidentiary burden it faces in these circumstances to establish that an unwritten measure will have general and prospective application.[327]

338. As a preliminary matter, it is important to emphasize that China is not challenging a written measure. In instances of written measures, "there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged."[328] The Appellate Body has recognized however, that:

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[324] *See, e.g.* Aluminum Extrusions OI, Preliminary Determination, 75 Fed. Reg. at 69,408-09 (Exhibit CHN-111); Aluminum Extrusions AR1, Preliminary Results, 78 Fed. Reg. at 34,987-88 (Exhibit CHN-465).

[325] *See, e.g.* Aluminum Extrusions OI, Preliminary Determination, 75 Fed. Reg. at 69,408-09 (Exhibit CHN-111); Aluminum Extrusions AR1, Preliminary Results, 78 Fed. Reg. at 34,987-88 (Exhibit CHN-465).

[326] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172 ("'[A]s such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an 'as such"' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members ex ante from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims.")

[327] In *EC – Fasteners,* the Appellate Body found that the EC's regulation at issue, which embodied the EC's presumption of China government control over Chinese exporters, constituted a challengeable written measure that was as such inconsistent with Article 6.10 and 9.2 of the AD Agreement. *EC – Fasteners (AB)*, para. 385. However, the fact that China is challenging an unwritten measure in this dispute unlike its challenge to the EC's regulation in *Fasteners* mandates that China clearly demonstrate that such a challengeable measure exists. China has failed to do so.

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

> The situation is different…when a challenge is brought against a 'rule or norm' that is *not* expressed in the form of a written document. In such cases, the very existence of the challenged 'rule or norm' may be uncertain."[329]

For this reason, "as such" challenges are normally targeted towards a "rule" or "norm" that is expressed in a law, regulation, or other written measure.[330] In contrast, "particular rigor is required … to support a conclusion as to the existence of a 'rule or norm.' that is *not* expressed in the form of a written document."[331] Indeed, the Appellate Body's analysis has cautioned that a "panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document" because to do so would mean the Panel "would act inconsistently with its obligations under Article 11 of the DSU to "make an objective assessment of the matter."[332] Thus, a complainant in order to discharge its high burden[333] must demonstrate, at the very least: (1) that the rule or norm embodied in that measure is attributable to the responding Member; (2) the precise content of the rule or norm; and (3) that the rule or norm has general and prospective application.[334] Here, China has failed to establish the third element: that the rule or norm has general and prospective application.[335] Specifically, the three types of evidence China draws upon to establish that particular point are insufficient: (i) the language in Policy Bulletin 05.1 and the Antidumping Manual, (ii) the panel's findings in *Shrimp II*, and (iii) USDOC practice. The United States addresses each in turn.

339. First, the United States notes that neither Policy Bulletin 05.1 nor the Antidumping Manual should be construed as evidence of the unwritten measure China seeks to challenge.[336] With respect to Policy Bulletin 05.1, China quotes language it describes as a "statement of policy."[337] But the precise language China quotes is not from the section in Policy Bulletin 05.1 that it actually titled "Statement of Policy."[338] Instead, the language China references is found in

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329 *Id.*

330 *Id.*, para. 173 (such measures typically would "have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations…and the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations.").

331 *US – Zeroing (EC) (AB)*, para. 198 (emphasis original).

332 *Id.* at para. 196.

333 *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 88.

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

335 Unlike its arguments with respect to USDOC's use of facts available in Section VI of its submission, China does not acknowledge this test or attempt to demonstrate this test with respect to the Single Rate Presumption. *See* China's First Written Submission, paras. 429-430.

336 The United States notes that China is not challenging Policy Bulletin 05.1 itself. Although China argues that Policy Bulletin 05.1 could be "amenable to challenge," it make no attempt to demonstrate that Policy Bulletin 05.1 is inconsistent with the AD provisions which it challenges here. China's First Written Submission, para. 323.

337 China's First Written Submission, paras. 324-325.

338 Policy Bulletin 05.1, p.3 (exhibit CHN-109).

the "Background" section. What Policy Bulletin 05.1 speaks to in its Statement of Policy is about a procedural separate rate application process.[339] Even accepting that the language China references should have any value, it is deficient with respect to the scope of claims China is bringing in this dispute. The referenced language on its face is speaking only to an "NME antidumping investigation,"[340] and thus cannot be extended to periodic review proceedings.

340. The Antidumping Manual[341] is likewise insufficient evidence to establish a general and prospective norm. The Antidumping Manual itself clearly states on the very first page that it "is for the internal training and guidance of Import Administration (IA) personnel only, and the practices set out herein are subject to change without notice. <u>This manual cannot be cited to establish DOC practice</u>."[342] Thus, Policy Bulletin 05.1 and the Antidumping Manual, given every favorable inference (which is not warranted considering the high burden for an unwritten measure) merely describe a procedure that is subject to change at any time.

341. Second, China tries to establish that the alleged Single Rate Presumption has general and prospective application by attempting to import the panel's findings in *US – Shrimp II (Viet Nam)*.[343] A prior panel's findings cannot alleviate China's own burden, however, to demonstrate that an unwritten measure has general and prospective application.[344] Moreover, in any event, the panel's findings in that dispute concern USDOC's treatment of another Member's companies, not China's.

342. Third, China cites to other USDOC documents involving different "practices" or "policies" involving non-market economy countries.[345] These documents are irrelevant to the issues here – namely, whether China has met its burden of establishing that the so-called "single rate presumption" is an unwritten measure. Even under China's presentation, these documents only illustrate what USDOC has practiced in particular instances in the past, not what it will generally and prospectively do.

343. There is also a fundamental legal constraint in trying to utilize such past practice to establish the existence of a measure because repeated application in and of itself in sufficient to establish such. For example, the panel in *US – Zeroing (Japan)* identified the concepts of a

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[339] *Id*. Moreover, the revised application process announced in the Policy Bulletin applied only with respect to "NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy. . . [and] only . . . to antidumping investigations."[339] In other words, Policy Bulletin 05.1 did not even cover investigations predating April 5, 2005, which includes, for instance, Retail Bags OI, Furniture OI, and Shrimp OI, which China challenges here.

[340] Policy Bulletin, (Exhibit CHN-109) at 1-3.

[341] Unlike its arguments with respect to Policy Bulletin 05.1, China does not allege that the Antidumping Manual constitutes a written measure that is even amenable to being challenged as such.

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

[343] China's First Written Submission, para. 330.

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

[345] *See* China's First Written Submission, paras. 329, 331-333.

"consistent practice" or "the simple repetition of the application of a certain methodology to specific cases", as distinguishable from "the notion of a rule or norm of general and prospective application."[346] The Panel explained that its finding that a measure existed in that instance did not rest on repeated application of a methodology:

> The evidence before us indicates not only that USDOC *invariably applies* zeroing but also that USDOC has repeatedly described its zeroing methodology in terms of a long-standing policy that it considers to be consistent with its statutory obligations. Therefore, while we believe an 'as such' claim based solely on consistent practice raises serious conceptual questions, we consider that it is not necessary for us in the present case to opine on those questions.[347]

Other panels have also rejected arguments that a "practice" can be a measure that gives rise to a breach of WTO obligations.[348] Importantly, even where a past panel may have reached a determination with respect to the existence of a measure which promulgates a rule or norm of general or prospective application, this does not alleviate the burden of a new complaining Member to establish its *prima facie* case that such a measure exists.[349]

344. The United States agrees with the analysis of these panels. It does not see, and China does not explain, how a "practice" can set out a binding norm of general or prospective application. In this regard, the United States notes that, although in past cases the United States methodology for assessing antidumping duties, which pre-dated its 2006, 2007, and 2012 modifications,[350] has been found to constitute a norm of general and prospective application, such a methodology is clearly distinguishable from the practice alleged here. For instance, the prior methodology for assessing antidumping duties has been described as an essentially "passive" methodology which requires USDOC to "exclu[de] from the numerator of weighted

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[346] *US – Zeroing (Japan)*, para. 7.50-7.52.

[347] *Id.* para. 7.54.

[348] *See, e.g. US – Export Restraints*, para. 8.126 ("[P]ast practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of doing something or requiring some particular action…US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada."); *US – Steel Plate (India)*, paras. 7.19-7.22 (rejecting claim that the U.S. practice in the application of facts available was a challengeable measure).

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

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

average dumping margins of results of comparisons in which export prices are above the normal value", and is invariably applied in every case.[351]

345. In contrast, China challenges USDOC's practice involving a presumption of common control which parties have the opportunity to rebut with evidence and argument in each investigation. Thus, USDOC is not applying the same outcome to every case without consideration of the record evidence or a party's arguments, but evaluates, in each instance where a party provides such information and argument, whether that party is under common government control. Moreover, the Government of China could request the Department re-examine its NME status under U.S. antidumping duty law. Given that this flexibility exists, and USDOC does not automatically reach the same outcome in each case, China has failed to demonstrate that this is anything more than a "consistent practice" that USDOC applies in a discrete number of cases.[352]

346. Thus, the evidence China has presented fails to demonstrate the alleged practice involving the so-called "single-rate presumption" gives rise to a norm of general and prospective application.

D. China Has Misapplied the Legal Analysis With Respect to Articles 6.10, 9.2, and 9.4 of the AD Agreement

347. As explained at the outset, China's claims of breach rest on flawed legal and factual premises. Legally, China fails to recognize that the critical issue in the provisions that it invokes is that not every legal entity is necessarily a distinct exporter or producer under the AD Agreement. To the contrary, where warranted, these provisions permit investigating authorities to treat the export activity of multiple companies as the pricing behavior of a single producer. Factually, China fails to address the basis for USDOC's treatment of Chinese firms as part of a single government entity, or USDOC's continued finding that China should be treated as an NME. Moreover, China does not address that the information solicited by the United States allows Chinese firms to demonstrate whether they should be treated as part of a common Chinese government entity or not. Because of such failings, China's various claims of breach are deficient and must fail.

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

[352] In this respect, we note that Commerce's treatment of Chinese companies under common control is akin to the practice examined by the panel in *US – Steel Plate (India)*. *See* para. 7.22 ("[A] practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC. We note in this regard that the USDOC decisions on application of facts available turn on the particular facts of each case, and the outcome may be the application of total facts available or partial facts available, depending on those facts. India argues that at some point, repetition turns the practice into a 'procedure', and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.").

1. The Proper Interpretation of Articles 6.10 and 9.2

a. Article 6.10 does not require each legal entity be afforded a separate dumping margin

348. Article 6.10 of the AD Agreement provides:

> The authorities shall, as a rule, determine an individual margin of dumping for each *known exporter or producer* concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.[353]

In applying this provision, the initial question is to identify the entity, or group of entities, that constitute each known "exporter" or the known "producer."[354] China has no basis for asserting that related entities, simply because they may be organized as a formal matter as separate companies, must be treated as individual exporters for the purpose of Article 6.10. To the contrary, context in the AD Agreement indicates that whether producers are related to each other affects the investigating authority's analysis of those firms.

349. In particular, the language in this provision speaks to an individual margin of dumping for "known exporters or producers," not companies, firms, or foreign participants. Accordingly, the text of Article 6.10 does not require an investigating authority to find that every company or legal entity is *ipso facto* a known exporter or producer entitled to an individual margin of dumping. Additional context in the AD Agreement also confirms that whether producers are related to each other affects the investigating authority's analysis of those firms. For example, in the context of defining the domestic industry, producers should be deemed related to each other

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[353] (emphasis added).

[354] The Appellate Body outlined at least four exceptions to the Article 6.10 requirement to determine an individual margin of dumping: (1) sampling (Article 6.10); (2) unknown exporters or producers (Article 6.10); (3) impractical to do so (Articles 6.10 and 9.2); and (4) related exporters or producers (Article 9.5). *EC – Fasteners (AB)*, paras. 319, 324, 326, 329, 348.

> if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third period; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. . . . [O]ne shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.[355]

Similarly, Article 9.5 establishes an obligation to carry out a review to determine an "individual" margin of dumping for a new shipper "provided that the[] exporter[] or producer[] can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." This provision indicates that such an exporter that cannot demonstrate that it is not related to an exporter or producer subject to the duty would not be entitled to an "individual" margin of dumping

350. Thus, nothing in Article 6.10 or elsewhere in the AD Agreement limits the flexibility of an investigating authority to investigate and determine whether a particular entity constitutes a "known exporter or producer." Accordingly, an investigative authority may reasonably consider actual commercial activities and relationships of companies in deciding whether they should be treated as a single exporter or producer as opposed to simply accepting their nominal status as legally distinct companies.[356] Depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single "exporter" or "producer" based on their activities and relationships.

351. This textual analysis is consistent with the Appellate Body findings in *EC – Fasteners*. In that dispute, the Appellate Body (although it used the term 'exporter' rather than 'entity'), expressly found certain exporters could be combined for a single rate provided circumstances for such treatment existed:

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[355] AD Agreement, Article 4.1(i).

[356] Indeed, such an investigation is often essential to ensure that antidumping duties are effectively levied. As one participant in the negotiations of the Uruguay Round Agreements noted:

> [E]xperience in investigations … has shown that exporters have attempted to take advantage of certain corporate structures in order to try to dissimulate dumping practices, e.g. by transferring certain activities normally undertaken by a sales department to a legally separate sales company. Through such a device, costs and profits can be easily transferred between different parts of the same economic entity with the effect that normal value would be artificially lowered.

Communication from the European Communities, MTN.GNG/NG8/W/28.

> In our view, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* do not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. 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, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity. These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output. We note that the *Anti-Dumping Agreement* addresses pricing behaviour by exporters; <u>if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single margin and duty could be assigned to that single exporter</u>.[357]

352. In reaching its conclusion, the Appellate Body approvingly drew from the panel report in *Korea – Certain Paper*.[358] In *Korea – Certain Paper*, the panel also found that treating multiple nominally-independent exporters or producers as a single entity may be justified in a particular proceeding.[359] The panel also acknowledged the absence of a specific directive in Article 6.10 requiring a Member to treat companies independently if the evidence indicated otherwise.[360] China does not address this aspect of the Appellate Body's decision in *EC – Fasteners* or the panel's finding in *Korea – Certain Paper*.

353. In sum, Article 6.10 does not require an investigating authority to find that every company is a known exporter or a known producer entitled to an individual margin of dumping.

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[357] *EC – Fasteners (AB)*, para. 376 (emphasis added).

[358] *Id.* para. 380 ("[T]he test developed by the panel in *Korea – Certain Paper* may not capture all situations where the State effectively controls or materially influences and coordinates several exporters such that they can be considered a single entity. The panel in *Korea – Certain Paper* addressed the question of when two or more legally distinct private companies can be deemed a 'single exporter' under Article 6.10 of the *Anti-Dumping Agreement* due to their commercial and structural relationship. The situation analyzed by the panel in *Korea – Certain Paper* presents some relevance to the determination of whether the State and several exporters constitute a single entity. However, the criteria used for determining whether a single entity exists from a corporate perspective, while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty.").

[359] *Korea – Certain Paper*, para. 7.157.

[360] *Id.*

Therefore, contrary to China's argument, Article 6.10 does not preclude USDOC from treating multiple companies as a single entity, including, where appropriate, a China-government entity.

b. Article 9.2 Also Permits Investigating Authorities To Treat Multiple Companies In China As Parts Of A Single Exporter Or Producer For The Purpose Of Imposing Antidumping Duties

354. Article 9.2 of the AD Agreement provides:

> When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

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

355. Contrary to China's arguments,[361] nothing in the text of Article 9.2, as with the text of Article 6.10, precludes USDOC from treating multiple companies as a single entity, including, where appropriate, a China-government entity. As the above referenced quotation to *EC – Fasteners* confirms, the Appellate Body has found that Article 9.2, like with Article 6.10, does not prohibit an investigating authority from imposing a single anti-dumping duty on a number of entities. China argues that Article 9.2 reinforces the mandatory requirement of Article 6.10 that an investigating authority should determine individual margins of dumping for each exporter or producer and duties must be imposed in the appropriate amounts.[362] China's argument regarding Article 9.2 suffers from the same misunderstanding that underlies its argument regarding Article 6.10, *i.e.*, that neither Article 6.10 nor Article 9.2 require an authority to find that every company is a known exporter or a known producer entitled to an individual margin of dumping. Therefore, contrary to China's argument, Article 9.2 does not preclude USDOC from assigning the same rate to multiple companies as a single entity, including, where appropriate, a China-government entity.

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[361] China's First Written Submission, para. 360.

[362] China's First Written Submission, para. 360.

356. China's attempts to rely on *EC – Fasteners*[363] to avoid this interpretation is misplaced because it ignores the Appellate Body's conclusion in that case that "if the State instructs or materially influences the behavior of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single margin and duty could be assigned to that single exporter."[364] Thus, according to the Appellate Body, and contrary to China's argument, Article 9.2 "does not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*."[365]

357. Thus, as in the case of its Article 6.10 argument, China fails to recognize that determining whether a group of companies are in a close enough relationship to support their treatment as a single entity is a decision that an investigating authority must make before it can know how to determine and apply duties to those companies' imports. If an investigating authority concludes that the relationship between multiple companies is sufficiently close to support treating it as a single entity or "source," an investigating authority may apply a single rate duty to all of those companies' imports, even under China's construction of Article 9.2. Nothing in Article 9.2 prohibits such treatment, nor does Article 9.2 set out criteria for an investigating authority to examine before concluding that a particular firm or group of firms constitutes a single entity.

358. In addition, a pertinent distinction between Articles 6.10 and 9.2 concerns their respective applicability. Article 9.2 addresses the "antidumping duty . . . collected" while Article 6.10's coverage is of the "dumping margin" "determined…" While China does not dispute this dichotomy,[366] its analysis fails to recognize a logical consequence.

359. Specifically, to the extent China's Article 9.2 arguments concern investigations, they are not only misplaced generally because they fail to recognize the provision allows for multiple entities to be treated as a single producer, but that it is also facially inapplicable because Article 9.2 applies to the anti-dumping duties that are collected, and does not apply to the cash deposit rate that is set for an exporter or producer following the conclusion of an investigation. In the United States' retrospective system, USDOC's antidumping investigation serves two purposes: (1) to determine whether certain merchandise is being, or is likely to be sold, in the United States at less than its fair value; and (2) to determine estimated weighted average dumping margins.[367] These estimated margins of dumping established in the investigation set forth a cash deposit rate for merchandise entering the United States after USDOC's determinations. However, the cash deposit rate is only an estimate of the final duties that may be owed by a respective importer; because of the retrospective nature of USDOC's system, the actual collection of antidumping duties in the appropriate amounts does not occur until USDOC conducts administrative reviews.

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[363] *Id.* para. 359 (citing *EC – Fasteners (AB)*, para. 339).

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

[365] *Id.*

[366] *Id.* para. 360.

[367] USDOC's antidumping investigations also rely in part on an affirmative finding of injury pursuant to the International Trade Commission's investigation, however, we only address USDOC's analysis here.

360. In sum, Article 9.2 is a non-discrimination provision that directs Members to apply antidumping duties in "the appropriate amounts in each case" for all sources found to be dumped and causing injury. Under a proper interpretation of Article 9.2, taking into account the framework of Article 9.3 which expressly allows for the final amount of the duty collected to be set at a later time in a retrospective system, the "appropriate" amount of the antidumping duty to be collected is not necessarily the cash deposit rate set in an investigation. Thus, China has not demonstrated that its claims under Article 9.2 apply to USDOC's antidumping investigations.

c. China's Protocol of Accession supports treating companies as part of a single PRC entity in antidumping proceedings

361. China's Protocol of Accession justifies USDOC's recognition of Chinese government control over the Chinese producers and exporters and its approach with respect to the proceedings it has conducted to date. In its submission, China does not address the implications or consequences in China's Protocol of Accession, apparently because it relies entirely on selective aspects of the Appellate Body's analysis in *EC – Fasteners*.[368] This panel, however, must make an objective assessment of the matter before it, and the analysis upon which China relies is unsupported by the text of the WTO Agreement when properly interpreted.

362. As demonstrated below, the relationships among entities concurrently affect the calculation of normal value and export price, and therefore China's Accession Protocol provides a basis by which an importing Member may presume that China controls or materially influences all producers and exporters and thereby consider all exporters or producers as part of a single China-government entity absent positive evidence to the contrary.

363. As a general matter, China's Accession Protocol reflects the rights and obligations of China upon accession to the WTO.[369] During the accession process, China described its ongoing shift away from central planning. Members' concerns about the extent to which this shift had occurred are reflected in the 2001 Working Party Report on the Accession of China. These concerns demonstrate that not all Members were convinced that market-economy conditions prevailed in China.[370]

[368] China's First Written Submission, para. 4.

[369] The Protocol of Accession of China to the WTO provides, at paragraph 1.2, that: "This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." *See* Protocol on the Accession of the People's Republic of China to the WTO, Decision of 10 November 2001, WT/L/432 (Exhibit US-33) ("Accession Protocol"); *See* also Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, at para. 342 (Exhibit US-34) ("Working Party Report") ("The Working Party took note of the explanations and statements of China concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs 18-19, 22-23, 35-36, 40, 42, 46-47, 49, 60, 62, 64, 68, 70, 73, 75, 78-79, 83-84, 86, 91-93, 96, 100-103, 107, 111, 115-117, 119-120, 122-123, 126-132, 136, 138, 140, 143, 145, 146, 148, 152, 154, 157, 162, 165, 167-168, 170-174, 177-178, 180, 182, 184-185, 187, 190-197, 199-200, 203-207, 210, 212-213, 215, 217, 222-223, 225, 227-228, 231-235, 238, 240-242, 252, 256, 259, 263, 265, 270, 275, 284, 286, 288, 291, 292, 296, 299, 302, 304-305, 307-310, 312-318, 320, 322, 331-334, 336, 339 and 341 of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.").

[370] Working Party Report, para. 44 (Exhibit US-34).

364. Against this backdrop, Members had two options. The first option was to make a factual determination and reach consensus on whether China was a market economy or non-market economy and to devise common antidumping rules for all Members to apply. The second option was for Members to retain discretion to decide individually, under their own respective national laws, on their understanding of China's economy and on the appropriate treatment for Chinese respondents on a case-by-case basis. Members elected, and China agreed, to reserve discretion to determine the appropriate treatment of Chinese respondents in antidumping proceedings on a case-by-case basis. Therefore, under the Protocol, a Member can presume that non-market economy conditions prevail in China, as the starting point for a discussion about the extent to which market economy conditions actually prevail, to decide whether market treatment for Chinese respondents is warranted.[371] This approach preserved for Members the flexibility to adjust their antidumping policy and practice depending on the progression of China's reforms.

365. Article 15 of the Protocol provides in pertinent part as follows:

> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> ***
>
> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event,

[371] *See Id.* para. 26 (Exhibit US-34).

> the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

As is evident, the Protocol, by design, does not impose on Members any market or non-market characterization of China's economy, factual or otherwise, as a general rule. But it does permit a Member the discretion to presume that either market economy conditions prevail or non-market economy conditions prevail in the industry in question. The Accession Protocol thus provides important context in terms of deciding which entities in China should be considered as a single entity for purposes of Article 6.10. In particular, the Protocol supports USDOC's: (1) decision to calculate the normal value for the industry in question based on an NME methodology and its continued use of this methodology; (2) recognition that multiple companies may comprise a single exporter or producer, *i.e.*, a single China-government entity; and (3) understanding regarding export price and output that the Government of China exerts control or material influence over entities located in China and can impact such decisions.

i. Normal Value

366. During the accession process, Members expressed concerns in the Working Party Report about how the fact that China had not yet transitioned to a full market economy would affect the conduct of antidumping and countervailing duty investigations and the application of the AD and SCM Agreement. As a result, the Working Party Report as incorporated into China's Accession Protocol allows Members to calculate the normal value for the like product destined for consumption in China based on a NME methodology.

367. Specifically, Paragraph 15 of the Accession Protocol indicates that China confirmed on accession that importing WTO Members need not calculate normal value on the basis of Chinese prices or costs for an industry subject to an antidumping investigation.[372] Paragraph 15 further indicated, in part, that "the non-market economy provisions" of paragraph 15 shall no longer apply to a specific industry or sector in situations where China "establish[ed], pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector."[373] Therefore, to the extent that China has not established under the national law of the importing WTO member, or to the extent the Chinese exporters or producers under investigation have failed to "clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product," an importing Member can calculate normal value based on a NME methodology.[374]

368. The Accession Protocol thus expressly provides support for USDOC's decision to calculate the normal value for industries in China based on a NME methodology and its continued use of this methodology. In this regard, it is notable that China does not challenge

[372] Accession Protocol, para. 15 (Exhibit US-33).

[373] *Id.*, para. 15(d) (Exhibit US-33).

[374] *Id.*, para. 15(a)(ii) (Exhibit US-33).

before the Panel USDOC's decision to calculate the normal value for industries in China based on a NME methodology, nor does China challenge the NME methodology that USDOC selected for its calculation of this normal value.

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

369. In permitting Members to determine normal value in China pursuant to a methodology not based on prices or costs in China, the Protocol also provides a basis for treating multiple companies in China as part of a China-government entity contrary to China's arguments.[375] Specifically, in the course of China's accession process,[376] the descriptions of its economy in the Working Party Report indicated that China planned to develop an economy where the State continued to play a predominant role.[377] Members expressed concern about the significant level of influence of the Government of China on its economy and how such influence could affect trade remedy proceedings, including cost and price comparisons in antidumping duty proceedings,[378] and noted that special difficulties could arise because China had not yet transitioned to a full market economy.[379]

370. In particular, Members of the Working Party noted that special difficulties could arise because China had not yet transitioned to a full market economy.[380] Paragraph 15 of the Accession Protocol specifically reflects the concern among Members that government influence may create special difficulties in determining cost and price comparability in the context of antidumping investigations, and that a strict comparison with Chinese costs and prices might not always be appropriate.[381]

371. Thus, underlying the Accession Protocol is evidence that non-market economy conditions prevail in China until otherwise demonstrated. The understanding that market economy conditions do not prevail and the logical consequence that this entails state control over firms,

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[375] China's First Written Submission, paras. 368-382.

[376] Working Party Report paras. 43-44 (Exhibit USA-34). The Working Party Report includes a number of examples of the GOC's role in economic activity: First, rather than fully privatize its SOEs, the Government of China had opted for a program of equitization whereby SOEs were converted into joint-stock or limited liability companies in which the State can hold any percentage of shares. In fact, line ministries (which controlled SOEs during the central planning era) would hold the State's stakes in these companies. *Id.*, paras. 43-49 (Exhibit USA-34). China further envisioned that an indefinite number of SOEs, including large and important ones as well as the banks, would remain wholly or majority state-owned for an undefined time period; the open-ended list of such enterprises in the Working Party Report is extensive and encompasses industries and sectors far beyond those normally considered national security-related or a natural monopoly natural monopolies. *Id.*, paras. 43-49 (Exhibit USA-34).

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

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

[379] *See id.*, paras. 147-152 (Exhibit USA-34).

[380] *See id.* (Exhibit USA-34).

[381] Accession Protocol, para. 15 (Exhibit USA-33). *See* also Working Party Report, para. 150 (Exhibit US-34) ("[I]n the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations.").

resulting in treating certain enterprises as parts of a government-controlled entity, is not inconsistent with Article 6.10. As explained above, Article 6.10 requires a margin of dumping for each known exporter or producer but does not require a separate margin for each legally distinct exporter that is, in fact, related to the government. The Accession Protocol supports the conclusion that USDOC may consider that there exists a China-government entity to which exporters belong.

iii. Pricing and Output of Exports

372. Because relationships among entities concurrently affect the calculation of normal value and export price, China's Accession Protocol provides the basis by which an importing Member may presume that China controls or materially influences all entities and thereby consider all exporters or producers as part of a single China-government entity absent positive evidence to the contrary.

373. USDOC's finding that the Government of China is legally or operationally in a position to exercise restraint or direction over entities located in China and can impact their decisions about the production, pricing, or costs of products destined for consumption in China is not subject to dispute. As a result, given that China's Accession Protocol provides importing Members the basis on which to presume that the Government of China exerts control or material influence over commercial entities with respect to the pricing and output of products destined for consumption in China, it is also reasonable to presume that that the Government of China simultaneously exerts control or material influence over these entities with respect to the pricing and output of identical or similar products destined for export.

2. *EC – Fasteners* Does Not Preclude Investigating Authorities from Finding that Multiple Companies in China Constitute a Single China-Government Entity for the Purpose of Determining Dumping Margins

374. The lynchpin to China's arguments is its comparison to this dispute with the situation examined by the Appellate Body in *EC – Fasteners*. In *EC – Fasteners*, the Appellate Body considered China's challenge to the European Union's presumption that multiple Chinese companies could comprise a single exporter or producer such that an individual dumping margin could be calculated for and applied to that entity. The Appellate Body determined that Article 9(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 ("Article 9(5)"), which codified the EU's practice and presumption, was inconsistent with Articles 6.10 and 9.2 of the AD Agreement. Specifically, the Appellate Body decided that the regulation improperly "conditions the determination of individual dumping margins for and the imposition of individual anti-dumping duties on NME exporters or producers to the fulfillment of the IT test," which requires an exporter or producer to demonstrate that it is separate from the government by fulfilling certain criteria.[382]

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[382] *EC – Fasteners (AB)*, para. 385. The "individual treatment ('IT') test" refers to the criteria outlined in Article 9(5) of the Council Regulation (EC) No. 1225/2009, which provides for an exception to the specification of a "country-wide" rate in European Union cases. *See* European Communities – Definitive Antidumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397, adopted 28 July 2011, para. 7.48-7.49 (EC – Fasteners

375. China's reliance on *EC-Fasteners* is inapposite. First, a careful reading confirms the essential point for why China's claims under Articles 6.10 and 9.2 are without merit: where "the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the Anti-Dumping Agreement and be assigned a single dumping margin and anti-dumping duty."[383] The United States will proceed by demonstrating that the logic of this finding is that the Protocol, should despite the Appellate Body's finding otherwise, serve as a basis for USDOC's treatment of Chinese entities. Second, the United States will explain that despite the reasoning of EC—Fasteners concerning the Protocol, its treatment is not inconsistent with the AD Agreement.

a. The Protocol Provides a Factual Predicate for Chinese State Control of Chinese firms

376. Although the Appellate Body determined that the EC's presumption that entities in a non-market economy are related to the Chinese government was inconsistent with the AD Agreement, it did not rule they were required to be treated as independent exporters or producers. To the contrary, the Appellate Body recognized in *Fasteners* that nominally or legally-independent entities may be treated as a single exporter or producer when that determination is based on facts and evidence.[384] According to the Appellate Body, "[w]hether 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, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity"[385]:

> These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common

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(Panel)). ("If a producer demonstrates that it meets these conditions and is thus entitled to IT, the EU authorities will specify an individual duty rate for that producer." *Id*. Article 9(5) provides:

> Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:
>
> (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
>
> (b) export prices and quantities, and conditions and terms of sale are freely determined;
>
> (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
>
> (d) exchange rate conversions are carried out at the market rate; and
>
> (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty

[383] *EC—Fasteners (AB)*, para. 380.

[384] *Id*., paras. 376, 382.

[385] *Id*., para. 376.

> control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output. We note that the *Anti-Dumping Agreement* addresses pricing behaviour by exporters; if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the Anti-Dumping Agreement and a single margin and duty could be assigned to that single exporter. . . .[386]

Further, the Appellate Body recognized that "the criteria used for determining whether a single entity exists from a corporate perspective," as in *Korea – Certain Paper*, "while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be considered as a single entity for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* and be assigned a single dumping margin and anti-dumping duty."[387]

377. As discussed above, neither Article 6.10 or 9.2 require each legally separate entity to be treated as independent producers or exporters. Where producers or exporters are so related that they constitute a single economic entity, it only makes sense that the single entity would have an "individual" margin. An investigating authority is therefore permitted to determine whether a given entity constitutes an "exporter" or "producer" as a condition precedent to determining an individual dumping margin for that entity. Here, there is a predicate for recognizing that entities in China are likely to be related: China's Protocol of Accession, which, as already noted, reflects the carefully negotiated understanding of China's non-market economy status.

378. The Appellate Body's findings in *EC – Fasteners* rejecting the Accession Protocol as such a predicate appear to result in an irreconcilable discrepancy. Specifically, it contradicts the notion accepted by the Appellate Body that state control is a basis for collapsing multiple companies into a single entity by simultaneous ignoring the very basis WTO Members have for treating China as a non-market economy: the Accession Protocol.

379. Therefore, given that China's Accession Protocol memorializes the concerns about the Chinese government's influence and provides the basis for USDOC's presumption that China controls entities (until otherwise demonstrated), the Panel should reject continuing the contradiction proposed by the analysis in *EC – Fasteners.*[388]

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[386] *Id.*, para. 376 (emphasis added).

[387] *Id.*, para. 380.

[388] China relies on the Panel's findings in *US – Shrimp (Viet Nam) II* to suggest extending the illogic to this dispute. China's First Written Submission, para. 375. Prior panel reports of course are not binding on panels considering other disputes. *See US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcoholic Beverages II (AB)* and *US – Shrimp (Malaysia) (21.5) (AB)*). As the Appellate Body noted in its *US – Softwood Lumber Dumping* report, adopted reports "'are not binding, except with respect to resolving the particular dispute between the parties to that dispute.'" *US – Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan – Alcoholic Beverages II (AB)*). *See also China – Broiler Products*, para. 7.92 ("However, if the holding of the panel in China – X-Ray Equipment were to stand for the premise that the investigating authority does not have to disclose the formula used to make the calculations, as explained above, we respectfully disagree.")

b. China has failed to demonstrate that USDOC's treatment of Chinese companies breached articles 6.10 and 9.2 of the AD Agreement both as such and as applied in the 32 challenged proceedings

380. Relying on its erroneous legal interpretations of Articles 6.10 and 9.2, China argues that USDOC's treatment of the China-government entity is both as such and as applied inconsistent with these provisions.[389] However, as demonstrated above, Article 6.10 does not require an authority to find that every company is a known exporter or a known producer entitled to an individual margin of dumping. Therefore, contrary to China's argument, Article 6.10 does not preclude USDOC from treating multiple companies as a single entity, including, where appropriate, a China-government entity. In addition, China rests its arguments on *EC – Fasteners*, however, as demonstrated above, the Appellate Body in *EC – Fasteners* confirmed that such a finding could be consistent with Article 6.10, provided that the evidence supported such a determination. Moreover, beyond its cursory statement that "USDOC's Single Rate Presumption" is like the EC's regulation which formed the basis for the EC's presumption, China makes no attempt to demonstrate that the Appellate Body's conclusion with respect to the EC's regulation should apply equally here.[390] In any event, the United States demonstrates below that USDOC's treatment of the China-government entity in the 32 challenged proceedings is supported by the evidence and differs from the EC's regulation, and thus, the Panel should find that this treatment is not inconsistent with Article 6.10 both as applied and as such.

1. In addition, with respect to China's claims under Article 9.2, as demonstrated above, China has not established that USDOC's treatment of the China-government entity in investigations in general, and in the 13 challenged investigations at issue, is inconsistent with Article 9.2. Contrary to China's arguments, it is permissible under Article 9.2 for USDOC to apply a single antidumping duty to the China-government entity where the evidence supports such a determination. Moreover, in investigations, USDOC may assign a single dumping margin to the China-government entity, however, the resulting cash deposit rate does not result in the collection of an antidumping duty for purposes of Article 9.2 since under the U.S. retrospective system, the amounts to be collected are determined in an administrative review process. Thus, China has not demonstrated that its claims under Article 9.2 apply to USDOC's antidumping investigations. Accordingly, we establish that China's as such claims must fail along with its as applied claims in the 32 challenged proceedings

i. USDOC Has Established that China Is A Nonmarket Economy

381. At no time during the 13 challenged investigations and 19 challenged reviews proceedings did China, or any Chinese exporter, request that USDOC reconsider China's nonmarket economy status.[391] This is a fundamental distinction between this dispute and *EC –*

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389 *See* China's First Written Submission, paras. 368-382.

390 *Id.*, para. 375.

391 *See* 19 U.S.C. § 1677(18)(C) (Exhibit USA-35) ("Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority."). *See, e.g.* Retail Bags OI, Preliminary Determination, 69 Fed. Reg. at 3546 (Exhibit CHN-267) ("No party in this investigation has requested a

Fasteners. In *EC – Fasteners*, China challenged the EC's finding that China is a nonmarket economy. China argued that the EC improperly relied on China's Accession Protocol to determine, as a basic fact, that China is a nonmarket economy such that it may be treated differently with respect to the calculation of dumping margins. The Appellate Body agreed with China that the Protocol did not necessarily provide a basis for the presumption that China is a nonmarket economy.[392] In contrast, the United States made a factual finding that China is a nonmarket economy, and this conclusion has not been challenged by China in several years.[393] This finding is consistent with the concerns expressed in the Accession Protocol. Unlike in *EC – Fasteners*, there is no question for the Panel to resolve as to whether China is a nonmarket economy under U.S. law. Thus, to the extent *EC – Fasteners* rested on a determination that China was not necessarily a nonmarket economy,[394] or that such status is irrelevant,[395] the Panel

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revocation of NME status for the PRC. Therefore, we have preliminarily determined to continue to treat the PRC as an NME."); Retail Bags OI, Final Determination, 69 Fed. Reg. at 34127-28 (Exhibit CHN-53) (list of issues raised does not contain the issue of China's nonmarket economy status); Coated Paper OI, Preliminary Determination, 75 Fed. Reg. at 24894 (Exhibit CHN-63) (describing Commerce's determination to treat China as a nonmarket economy); Coated Paper OI, Final Determination, 75 Fed. Reg. at 59223 (Exhibit CHN-12) (list of the issues does not contain the issue of China's nonmarket economy status). In Tires OI, the Chinese government raised arguments that Commerce should apply market economy calculation methodologies, but "the GOC stops short of requesting that the Department grant [market economy] status to the PRC". Tires OI, Final Determination Issues and Decision Memorandum at Comment 1 (Exhibit USA-36). Similarly, in Solar OI, the Chinese government argued that Commerce should apply market economy calculation methodologies, but did not challenge China's status as a nonmarket economy country. *See* Solar OI, Final Determination Issues and Decision Memorandum at Comment 13 (Exhibit US-36).

[392] *EC – Fasteners (AB)*, para 366 ("Neither can paragraph 15(d) {of China's Accession Protocol} be interpreted as authorizing WTO Members to treat China as an NME for matters other than the determination of normal value. As explained above, paragraph 15(d) does not pronounce generally on China's status as a market economy or NME.").

[393] *See* Memorandum for David Spooner from Shauna Lee Alai et. al., A-570-91, Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China Status as a Non-market Economy ("Spooner Memo") (Aug. 30, 2006), at p. 82 (August 30, 2006) (Exhibit USA-37) ("In conducting its analysis of China's status as an NME for purposes of the U.S. antidumping law, the Department has considered the totality of China's economic reforms. While China has enacted significant and sustained economic reforms, our conclusion, as stated in the May 15th memorandum, is that market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis. The Department shall, therefore, continue to treat China as an NME for purposes of the U.S. antidumping law."). Coated Free Sheet Paper, Final Determination of Sales at Less Than Fair Value, Issues and Decision Memorandum at Comment 1 (Exhibit USA-38) ("Whether to Reconsider China's NME Status and Whether to Treat Certain PRC Companies as Market Oriented Enterprises"); *See also* Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, 73 Fed. Reg. 31970 (June 5, 2008) (Exhibit USA-39) and Issues and Decision Memorandum at Comment 2 (Exhibit USA-40) ("As an initial matter, the Department notes that Weifang East Pipe's request that the PRC be graduated to ME status has not been endorsed by the Government of China ("GOC"). The GOC has not submitted any document to the record of this investigation in which it requests or endorses graduation to ME status. The Department does not consider requests to graduate a country from NME to ME status unless such a request is endorsed by that country's government.")

[394] *EC – Fasteners (AB)*, para 366.

[395] *Id.*, para 369 ("We are also of the view that the evidence submitted by the European Union concerning NMEs in general and China in particular is not relevant to the *legal* question of whether the European Union is permitted to presume under Article 9(5) of the Basic AD Regulation that the State and the exporters are a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-dumping Agreement*."); *id*, para. 328 ("{W}e do not find

should find that USDOC's determination that China is a nonmarket economy is based on record evidence and that China's status as a nonmarket economy under U.S. law in this case is relevant to an inquiry of the level of government involvement in China's economy.

ii. USDOC Provided Exporters the Opportunity to Demonstrate Independence from the China-Government Entity

382. As the table below demonstrates, the evidence that USDOC asks a company to provide is fully consistent with those factors that the Appellate Body in *EC – Fasteners* suggests should be probed to ascertain situations "which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity"[396]:

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any provision in the covered agreements that would allow importing Members to depart from the obligation to determine individual dumping margins only in respect of imports from NMEs.").

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

Appellate Body Report, EC – Fasteners, para. 376	Separate Rate Application (Exhibit CHN-31), p. 2 USDOC Analysis of State Control
"[C]ontrol or material influence by the State in respect of pricing and output"	"whether each exporter sets its own export prices independent of the government and without the approval of a government authority" "whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses" "whether each exporter has the authority to negotiate and sign contracts and other agreements"
"[T]he existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management"	"whether each exporter has autonomy from government regarding the selection of management" "an absence of restrictive stipulations associated with an individual exporter's business and export licenses" "any legislative enactments decentralizing control of companies" "any other formal measures by the central and/or local government decentralizing control of companies"

383. Thus, USDOC's separate rate analysis allows for an in-depth and individualized review of a company's relationship with the Chinese government. Such an analysis goes beyond the criteria that formed the individual treatment test at issue in *Fasteners*, and that the Appellate Body found was inconsistent with Articles 6.10 and 9.2:

> Only one of the five criteria of the IT test, for example, directly relates to the structural relationship of the company with the State: the requirement that the majority of the shares belong to private persons and that State officials holding management positions be in the minority. Another criterion relates to the State interference with prices and output. All the other criteria, however, appear to be related to State interference with exporters or State intervention in the economy in general and are likely to lead to the denial of individual treatment with respect to exporters that have little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State. This is because the criteria of the IT test apply on a cumulative basis and that failure to comply with only one of them will result in the denial of individual treatment under Article 9(5).[397]

384. As discussed above, China simply tries to transpose *EC – Fasteners* here. China makes no attempt to actually address the specifics of USDOC's approach, including USDOC's separate rate analysis that renders *EC – Fasteners* inapposite. In other words, USDOC ensured that respondents had an opportunity to establish that they are independent from the China-government entity. In *EC – Fasteners*, the Appellate Body did not preclude an investigating authority from collecting and offering enough evidence to justify a presumption that a single government entity exists[398] and, as discussed below, in the challenged proceedings USDOC has done so. Contrary to China's arguments, USDOC's treatment of the companies as part of the China-government entity was thus adequately supported by the evidence and consistent with Articles 6.10 and 9.2.[399]

385. Furthermore, as demonstrated above, the United States' separate rates practice is an information gathering exercise that permits USDOC to determine whether a company should be considered individually or as part of another entity. The collection of relevant information in antidumping proceedings is a standard practice of USDOC in market economy cases as well. In such cases, USDOC requests information regarding a company's affiliates, including information regarding percentage of ownership, control, and USDOC ultimate decision making authority. If the data indicate that companies are affiliated and the relationships are sufficiently close so as to allow one company to influence another, USDOC treats the companies as a single entity for the purpose of setting export prices.[400] In the non-market economy context, this information allows USDOC to balance the non-market economy considerations described above with the necessary flexibility to respond to changes in such economies, for example, when companies may be sufficiently autonomous in their export activities so as to permit calculation of individual margins of dumping for such companies.

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

[398] *EC – Fasteners (AB)*, para. 364.

[399] *See* China's First Written Submission, paras. 369-382.

[400] *See* 19 C.F.R. 351.401(f) (Exhibit USA-40).

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

VI. CHINA'S CLAIMS UNDER ARTICLE 9.4 MUST FAIL

387. China makes two separate arguments with respect to Article 9.4. First, China argues that USDOC's so-called "Single Rate Presumption" is as such inconsistent with Article 9.4 "because it imposes an additional condition for access to individual duties", and "therefore violates the requirement under Article 9.4 that the authorities apply individual duties to any non-selected producer/exporter that provides the necessary information contemplated by Article 6.10.2."[401] China also argues that, "[b]ecause the Single Rate Presumption is inconsistent, as such, with Article 9.4, the application of this Presumption in each of the challenged determinations is also inconsistent with Article 9.4."[402] Second, China argues that "[t]o the extent the PRC-wide entity was *not* individually investigated in any of the 26 determinations in which a rate was determined for the entity, USDOC failed to assign a rate consistent with the discipline imposed by Article 9.4 of the Anti-Dumping Agreement."[403] The United States demonstrates below that each of China's claims under Article 9.4 are without merit.

A. Article 9.4 Applies Only When the Investigating Authority Has Limited its Examination Per Article 6.10

388. Article 9.4 provides:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

[401] China's First Written Submission, para. 384.

[402] *Id.*, para. 386.

[403] *Id.*, para. 718

> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

Thus, by its very terms, Article 9.4 applies *only* to the "anti-dumping duty applied to imports from exporters or producers not included in the examination."[404] In other words, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. As the United States discusses below, Article 9.4 is thus inapplicable either to the unwritten measure "as such" or as applied because of this predicate condition.

B. China Has Failed To Establish Its Prima Facie Case That The Alleged Single Rate Presumption Is Inconsistent With Article 9.4 Both As Such And As Applied In The 32 Challenged Determinations

389. China argues that USDOC applies the so-called "Separate Rate Presumption" in NME proceedings, and that such application is inconsistent with Article 9.4 both as such and as applied in 32 challenged determinations. In particular, China argues that the alleged "Separate Rate Presumption" "imposes an additional condition for access to individual duties",[405] and therefore

> by imposing this additional requirement, the Single Rate Presumption *precludes* a producer/exporter included within the NME-wide entity from benefiting from an individual rate, even where the producer/exporter *provides* the necessary information described in the final sentence of Article 9.4 and where the number of exporters or producers is *not* so large that individual examinations would be unduly burdensome on the authorities and would prevent timely completion of the investigation, in the sense of Article 6.10.2.[406]

390. As discussed above, Article 9.4 governs the rate applied to those companies that are not included in the examination. Thus, before even considering China's argument that the so-called

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[404] The second sentence of Article 6.10 states that:

> In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

[405] China's First Written Submission, para. 384.

[406] *Id.*, para. 385.

Single Rate Presumption precludes a company from receiving its appropriate rate under Article 9.4, China has not addressed this critical aspect of Article 9.4's application. In particular, China has not demonstrated that the China-government entity, which includes those companies within the entity, was not included in the examination. Therefore, China has failed to establish its *prima facie* case that the alleged "Single Rate Presumption" is as such inconsistent with Article 9.4.

391. China's as applied claims are deficient as well. Rather than describe with particularity how the alleged "Single Rate Presumption" is inconsistent with Article 9.4 in each of the 32 determinations which it challenges, China merely states: "Because the Single Rate Presumption is inconsistent, as such, with Article 9.4, the application of this Presumption in each of the challenged determinations is also inconsistent with Article 9.4."[407] But this is insufficient where China has not made its *prima facie* case that the alleged application of the so-called "Single Rate Presumption" is as such inconsistent with Article 9.4.

C. China Has Failed to Establish that the United States Breached Article 9.4 Because of USDOC's Application Of Facts Available In The 26 Challenged Determinations

392. China's argument that "[t]o the extent the PRC-wide entity was *not* individually investigated in any of the 26 determinations in which a rate was determined for the entity, USDOC failed to assign a rate consistent with the discipline imposed by Article 9.4 of the Anti-Dumping Agreement"[408] is without merit.

393. As an initial matter, China makes no attempt to demonstrate that the China-government entity was not included in the examination, and therefore, Article 9.4 is implicated. For instance, China makes no argument to demonstrate that the China-government entity was an "exporter or producer not included in the examination" such that Article 9.4 applies. Instead China states that "[t]o the extent the PRC-wide was not individually investigated" the Panel should find such rates inconsistent with Article 9.4. But China has not met its *prima facie* case to demonstrate that the rate applied to the China-government entity in each of the 13 challenged antidumping proceedings should be considered an Article 9.4 rate.

394. In any event, in each of the 13 challenged antidumping proceedings (Aluminum Extrusions, Coated Paper, Shrimp, Tires, OCTG, Diamond Sawblades, Steel Cylinders, Wood Flooring, Ribbons, Retail Bags, PET Film, and Furniture), the China-government entity received its own rate, and thus, Article 9.4 does not apply. Beginning with the original investigations in each of the 13 challenged proceedings the China-government entity received its own rate based on facts available consistent with Article 6.8 of the AD Agreement. This rate was assigned to the companies that had not claimed or established that they are free from government control, particularly with respect to their export activities, and thus are properly considered to be parts of the China-government entity. Moreover, as discussed in Section XX, the rate assigned to the China-government entity was based on facts available because of the failure of certain companies within the China-government entity to cooperate in the original investigations.

[407] China's First Written Submission, para. 386

[408] *Id.*, para. 718

Because the China-government entity received its own rate in each of the challenged proceedings, Article 9.4 does not apply.

395. China also offers several purported textual arguments concerning Article 9.4. For instance, China argues that Article 9.4 does not allow an investigating authority to differentiate between those non-selected companies that are uncooperative, and those non-selected companies that are cooperative.[409] Rather, according to China, the phrase "any anti-dumping duty applied" means that there can only be one rate applied to the non-selected companies.

396. However, the text of Article 9.4 of the AD Agreement does not impose an obligation to calculate a "single anti-dumping duty." Article 9.4 merely provides that *any* antidumping duty for those producers or exporters not under examination "shall not exceed" the weighted-average margin of dumping for the investigated exporters or producers, and restricts the use of zero and *de minimis* margins and margins based on facts available in calculation of that ceiling. China improperly seeks to create a new obligation to calculate a "single" rate, which is not present in Article 9.4 of the AD Agreement, in addition to the obligation to apply this ceiling. Moreover, as we explained above, because the China-government received its own rate, Article 9.4 does not apply to the China-government entity.

397. The Appellate Body reports, which addressed obligations under Article 9.4, provide additional support to the United States' position. In *US-Hot Rolled Steel*, for example, the Appellate Body explained that "Article 9.4 simply identifies a maximum limit, or ceiling, which authorities 'shall not exceed' in establishing an 'all others' rate."[410] The Appellate Body also identified specific restrictions on how such ceiling should be determined, namely the restrictions on using zero, *de minimis* and facts available margins.[411] The Appellate Body did not interpret Article 9.4 to contain an additional "sub-ceiling" requirement, which China advocates here. In *US-Zeroing (EC) (Article 21.5)*, the Appellate Body similarly stated that Article 9.4 contains <u>two</u> obligations that restrict the discretion of investigating authorities:

> First, Article 9.4 establishes that, in cases where the investigating authorities have limited their examination to a sample of selected exporters or producers, any anti-dumping duty applied to exporters that were not individually investigated 'shall not exceed the weighted average margin of dumping established for exporters that have been individually examined. Secondly, Article 9.4 directs investigating authorities to disregard, 'for purposes of this paragraph,' any zero or *de minimis* margins of dumping, and margins of dumping established on the basis of facts available pursuant to Article 6.8.[412]

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409 China's First Written Submission, paras. 589-600.

410 *See* Appellate Body Report, *US-Hot Rolled Steel*, para.116.

411 *Id.*, para.449.

412 *See US-Zeroing (EC) (21.5) (AB)*, para.449 and paras. 451-453.

398. Moreover, Article 9.4 does not use the term "a single antidumping duty." To the contrary, Article 9.4 uses both "anti-dumping duty" and "anti-dumping duties." Accordingly, the use of the term "any antidumping duty" in Article 9.4 does not mean "single" rate, as China suggests. Furthermore, as the Appellate Body explained, "Article 9.4 simply identifies a maximum limit, or ceiling, which authorities 'shall not exceed' in establishing an 'all others' rate."[413] Accordingly, Members are permitted to determine multiple rates for different exporters within this maximum ceiling or limit. Members retain their discretion in determining the appropriate amount of the antidumping duty in Article 9 assessment reviews as long the duty amount for a non-examined producer or exporter does not exceed the ceiling imposed by Article 9.4.[414] However, as established above, in the 13 proceedings which China challenges here, the rate assigned to the China-government entity is not an Article 9.4 rate.

399. Moreover, the Appellate Body did not find that a single rate is required under Article 9.4.[415] Rather the Appellate Body explained that "the investigating authorities' discretion to impose duties on non-investigated exporters is subject to the disciplines provided in Article 9.4, including the exclusion of any facts available margins of dumping in the calculation of the maximum permissible duty applied to those exporters."[416] The Appellate Body explained that "Article 9.4 seeks to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps and shortcomings in the information supplied by the investigated exporters."[417] The Appellate Body's logic draws a clear demarcation between the cooperating and non-cooperating respondents in the context of Article 9.4 of the AD Agreement. Given that the Appellate Body's analysis supports the United States' position, the panel should disregard China's arguments in which it relies on the panel's findings in *US – Shrimp (Viet Nam) I*.[418]

400. Accordingly, China is incorrect in asserting that Article 9.4 requires the investigating authority to assign an average rate of cooperating exporters, which are not controlled by the government of China, to the China-government entity, which had been investigated, failed to cooperate, and received its own rate consistent with Article 6.8 of the AD Agreement in each of the 13 challenged proceedings.

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[413] *See US-Hot Rolled Steel (AB)*, para.116.

[414] China's focus on the use of the term "any" is misplaced, because the term "any" may encompass both singular and plural construction: "As *sing*., a - , some - , no matter which, or what. As *pl.*, some – no matter which, of what kind or how many." *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Vol. 2, p. 91 (meaning 1) (Exhibit USA-48). Moreover, the term may have a quantitative meaning such as in an indeterminate amount: "A quantity or number of, however great, or however small." *Id.* (meaning 2).

[415] The United States also notes that the Appellate Body repeatedly referred to "an 'all others' rate," which suggests the possibility of multiple all others rates. *See, e.g.*, *US – Zeroing (EC) (21.5) (AB)*, para. 459 ("Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which authorities 'shall not exceed' in establishing an 'all others' rate.") (emphasis added); *US-Hot Rolled Steel (AB)*, para.116 (same).

[416] *US – Zeroing (EC) (21.5)(AB)*, para. 459 (emphasis added).

[417] *US – Zeroing (EC) (21.5)(AB)*, para. 452.

[418] China's First Written Submission, paras. 594-95.

VII. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT THROUGH ASSIGNING A RATE TO THE CHINA-GOVERNMENT ENTITY

401. China raises several arguments alleging that USDOC acted inconsistently with Article 6.8 and Annex II of the AD Agreement in assigning a rate to the China-government entity. None of China's arguments have merit. Indeed, a number of China's arguments are directly refuted by the Appellate Body findings in *US – Hot-Rolled Carbon Steel (India)*, which was issued last December, well after China initiated this dispute. As demonstrated below, China has failed to demonstrate that USDOC's use of facts available in assigning a rate to the China-government entity is a rule or norm of general and prospective application that may be challenged on an "as such" basis. Further, as we demonstrate below, China's arguments rely on an erroneous interpretation of the obligations contained in Article 6.8 and Annex II. As explained in full below, USDOC's determinations to apply facts available to the China-government entity and its use of adverse inferences, in response to failures to respond to requests for information, in selecting from the available facts on the record in a proceeding are fully consistent with Article 6.8 and Annex II.

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

402. China alleges that USDOC's use of facts available in assigning a rate to the China-government entity is a norm or rule of general and prospective application which may be challenged on an "as such" basis.[419] In particular, China asserts that this "norm established a process that is designed to select adverse information" that is inconsistent with Article 6.8 and Annex II of the AD Agreement.[420] As the United States demonstrates below, China fails to demonstrate that USDOC's use of facts available in assigning a rate to the China-government entity is anything more than a fact-specific determination which is made on a case-by-case basis. Therefore, China has failed to, and cannot, demonstrate that any measure exists that may be subject to an "as such" challenge.

403. To establish its *prima facie* case, China must demonstrate the existence of a measure which expresses a norm or rule of general and prospective application. The Appellate Body has distinguished the initial inquiry of 1) whether a measure exists in specific as-applied contexts, from the secondary inquiry of 2) whether a measure expresses a rule or norm of general and prospective application that may be challenged on an as such basis.[421] On the first question, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[422] However, "[t]hat a particular response to a

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[419] *See* China's First Written Submission, paras. 427-494.

[420] *See id.* paras. 404-405, 429.

[421] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81; see also Appellate Body Report, *EC and Certain Member States – Large Civil Aircrafr (AB)*, para. 7.64; *Argentina – Import Measures (AB)*, paras. 5.137-5.143.

[422] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81.

particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, … transform it into a measure."[423]

404. On the second question, as we addressed above concerning the Single Rate Presumption, panels may not lightly infer norms on account of unwritten measures. To the contrary, "particular rigor is required … to support a conclusion as to the existence of a 'rule or norm.'"[424] A complainant in order to discharge its high burden[425] must demonstrate, at the very least: (1) that the rule or norm embodied in that measure is attributable to the responding Member; (2) the precise content of the rule or norm; and (3) that the rule or norm has general and prospective application.[426]

405. China has not established that USDOC's use of facts available in assigning a rate to the China-government entity constitutes a measure which expresses a rule or norm of general and prospective application.

406. As an initial matter, it appears that the precise content of the alleged "norm" China challenges relates *only* to USDOC's alleged systematic selection of facts from "secondary source information" in assigning a rate to the China-government entity.[427] In other words, China's references to USDOC's initial determination of non-cooperation, which forms the basis for its decision to use adverse inferences in selecting from the various facts available on the record, is not part of the alleged "norm." Indeed, the language used by China in defining its alleged unwritten measure – "findings of non-cooperation by an NME-wide entity . . . are typically based on presumptions*"*[428] demonstrates China's acknowledgment that findings of non-cooperation may vary from case to case. Thus, to the extent that China argues that USDOC's finding of non-cooperation of the China-government entity based on the non-cooperation of one or more companies within the China-government entity is inconsistent with the AD Agreement, China has not demonstrated that any such determination could be a norm of general and prospective application that may be challenged as such. In any event, we demonstrate that China's claim that USDOC's use of facts available in assigning a rate to the China-government entity is a challengeable measure must fail.

407. Both a panel and the Appellate Body have previously rejected similar "as such" challenges against USDOC's application of facts available. In *US – Steel Plate (India)*, India alleged that USDOC "always applies total facts available in particular factual circumstances, and has done so consistently since 1995."[429] The panel found:

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[423] *US – Steel Plate (India)*, para. 7.22

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

[425] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 88.

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

[427] China's First Written Submission, paras. 436-442.

[428] *Id.* para. 493 (emphasis in original).

[429] *US – Steel Plate (India)*, para. 7.15.

> [A] practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC. We note in this regard that the USDOC decisions on application of facts available turn on the particular facts of each case, and the outcome may be the application of total facts available or partial facts available, depending on those facts. India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.[430]

Similarly, in *US – Hot-Rolled Carbon Steel (India)*, the Appellate Body rejected the argument that USDOC's "'practice' of presumptively applying the highest prior non-*de minimis* subsidy rate" was evidence that USDOC's application of the facts available statute and regulations at issue resulted in an "as such" inconsistency with Article 12.7 of the SCM Agreement.[431] The Appellate Body found that a practice "is not necessarily applied in all instances of non-cooperation."[432]

408. As these cases demonstrate, 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 given case. Moreover, the U.S. statutory and regulatory framework provides USDOC with the discretion to make such a determination based on the facts and information before it; it does not compel that USDOC to reach the same determination in every case.[433] In other words, USDOC is not obliged to reach the same conclusion with respect to the determination of facts available from one case to another; it is simply unsurprising that USDOC may choose to do something similar when confronted with similar factual scenarios. China has not demonstrated that this same response to a particular set of facts rises to the level of a measure, let alone a measure that expresses a rule or norm of general and prospective application. Indeed, China has not challenged the specific U.S.

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[430] *Id.* para. 7.22.

[431] *US – Hot-Rolled Carbon Steel (India) (AB)*, para. 4.477-4.483; *Id.* para. 4.483 ("We also make no findings on the consistency of any distinct and separate 'practice' of the investigating authority in the application of the measure, since this was not subject to an 'as such' challenge by India.").

[432] *Id.* para. 4.477.

[433] *See* 19 USC § 1677e (Exhibit CHN-153); 19 CFR 351.308(c) (Exhibit CHN-152).

measures concerning the application of facts available, nor could it given they provide USDOC the discretion to select the most appropriate.[434]

409. China acknowledges that there is no written document that sets forth USDOC's use of facts available as a "norm", and does not challenge the laws and regulations that give USDOC the discretion to use adverse inferences in selecting from the available facts on the record in a proceeding[435] Instead, China challenges USDOC's alleged "practice" in applying these laws and regulations.[436] As discussed above with respect to the so-called Single Rate Presumption, a challenge to a "practice" as a measure raises the same "serious conceptual difficulties" referred to by the *US – Zeroing (Japan)* panel, *US – Export Restraints panel,*[437] and other panels.[438] The United States does not see, and China does not explain, how a "practice" can set out a binding norm of general or prospective application. Despite this lack of explanation, China proceeds to argue that it can demonstrate that USDOC's alleged "practice", although unwritten, is a measure which embodies a rule or norm of general and prospective application.[439] Although China is correct that the Appellate Body has found that under certain factual scenarios, unwritten measures may be challenged in a WTO dispute, the Appellate Body also continues to recognize that that there is a high burden for Members to demonstrate that such an alleged measure has general and prospective application.[440] China has failed to do so here.

410. In *US – Zeroing (EC)*, the Appellate Body explained that a Member challenging an unwritten measure on an as such basis must demonstrate that the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the rule or norm; and that the rule or norm has general and prospective application.[441] China has failed to identify the precise content of the rule or norm and has failed to demonstrate that the alleged rule or norm has general and prospective application.

411. China describes the precise content of the alleged norm as follows:

> Pursuant to the Use of Adverse Facts Available norm, in setting the rate for an NME-wide entity, in circumstances in which the China-government entity is considered not to have cooperated, USDOC systematically assigns to the NME-wide entity dumping rates based on information from a secondary source that yields a dumping rate that USDOC considers to be "sufficiently adverse".

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434 *See US – Carbon Steel (AB)*, paras. 4.467-4.469.

435 *See* China's First Written Submission, paras. 427-429.

436 *See id.* paras. 435-436.

437 Para. 8.126.

438 *See e.g.*, *US — Steel Plate*, para. 7.23

439 *See id.* paras. 429-430.

440 *US – Zeroing (EC) (AB)*, para. 198; *Argentina – Import Measures (AB)*, paras. 5.137-5.143.

441 *US – Zeroing (EC)*, para. 198.

> As "sufficiently adverse" rates, USDOC systematically assigns dumping rates to NME-wide entities, including each of the producers/exporters included within that fictional entity, that are substantially higher than the rate determined for the separate rate respondents that have not been individually investigated. Indeed, these rates are frequently multiples of the rate determined for the separate rate respondents that have not been individually investigated.[442]

412. Thus, it appears that China's challenge boils down to USDOC's alleged practice of seeking a "sufficiently adverse" rate to apply to the China-government entity when USDOC determines that the China-government entity is uncooperative. As demonstrated below, China's characterization is wrong. Furthermore, China fails to recognize that the application of a "sufficiently adverse" rate is too subjective and vague to equate to a rigid norm or rule of general and prospective application. Nor can China demonstrate the existence of a "sufficiently adverse" practice when one examines concrete situations. As China's examples demonstrate, USDOC's selection from among available facts in cases of non-cooperation is dependent on the facts and circumstances of each proceeding, and is further tempered by the requirement that USDOC corroborate the rate to the extent practicable if it is based on secondary information.[443] For instance, in some cases USDOC may be left with only one viable rate to use as a facts available rate,[444] while in other cases USDOC may have a broad selection of rates to use.[445] Still in others, USDOC does not always use the highest, or "most adverse" rate, on the record.[446] Thus, China's own description of the alleged "norm" demonstrates that no such thing exists.

413. Perhaps recognizing the vulnerability in raising such a nebulous claim, China attempts to distinguish its claim from the rejected claim at issue in *US – Shrimp (Viet Nam) II*:

> In contrast to the position advanced by Vietnam, China does not argue that USDOC *always* applies punitive rates based on adverse facts available to NME-wide entities, but rather that USDOC selects adverse facts for an NME-wide entity, including all the producers/exporters included within that fictional entity, in *particular circumstances*; namely, whenever USDOC considers that the NME-wide entity failed to cooperate to the best of its ability.[447]

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[442] China's First Written Submission, paras. 437-438 (internal footnotes omitted). China also relies on Table NME2 in Annex 4 and the descriptions of the challenged determinations in Annex 1, as well as TableAFA4 in Annex 12 and Table AFA5 in Annex 13.

[443] *See Id.* paras. 439-442.

[444] *See*, e.g. Aluminum Extrusions, OI Final Determination, 76 Fed. Reg. at 18529-30 (Exhibit CHN-32); Ribbons OI, Final Determination, 75 Fed. Reg. at 41810-12 (Exhibit CHN-33). *See* also Section D.3 below.

[445] *See*, e.g. Steel Cylinders OI, Final Determination, 76 Fed. Reg. at 26741-42 (Exhibit CHN-65); Wood Flooring OI, Final Determination, 76 Fed. Reg. at 64322-24 (Exhibit CHN-49). *See* also Section D.3 below.

[446] *See*, e.g. Wood Flooring OI, Final Determination, 76 Fed. Reg. at 64322-24 (Exhibit CHN-49). *See* also Section D.3 below.

[447] *Id.* para. 436 fn. 484 (citing Panel Report, *US – Shrimp (Viet Nam) II*, para. 7.123).

414. China's claim is seemingly based on the premise that whenever a particular set of circumstances presents itself, USDOC applies the same response.[448] But the specific language China uses to describe its claim only serves to highlight its weakness: any party can of course circumscribe events and circumstances to those that favor their position. The issue is whether the portrayal of those events and circumstances accurately reflects the reality of the matter. Here, with respect to China's portrayals of USDOC's decision-making, they do not.[449] Moreover, it appears that China seeks to use the unwritten nature of this alleged norm to its advantage – but in actuality, this results in a burden on China to demonstrate that the alleged norm exists.

415. Failing to establish that a norm or rule even exists, the rest of China's argument must fail. For instance, China argues that the Antidumping Manual provides evidence of the general and prospective application of the alleged norm.[450] But the Antidumping Manual merely describes the non-binding nature of USDOC's practice, *i.e.*, lists the instances in which USDOC "may" apply adverse inferences in selecting the available facts to determine the rate for the China-government entity, and the instances in which the rate can be changed in an administrative review proceeding.[451] Indeed, the manual itself clearly states 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[,]" and that "[t]his manual cannot be cited to establish DOC

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[448] *See Id.* para. 436.

[449] China ignores for instance that Commerce provides the China-government entity and the companies within the China-government entity with the opportunity to cooperate in a proceeding. In some cases, where all companies within the China-government entity subject to the investigation or review have cooperated, Commerce has not relied on facts available. *See* Containers OI, Preliminary Determination, Preliminary Decision Memorandum at 14-15 (Exhibit USA-49) ("[Because] CIMC has responded to our requests for information and has been cooperative throughout this proceeding, we preliminarily calculated the PRC-wide entity rate using CIMC's reported sales and factor-of-production data."); *See* also Welded Stainless Pressure Pipe from Vietnam, Final Determination, 79 Fed. Reg. at 31093 (Exhibit USA-45) (setting the rate for the mandatory respondent, a separate rate respondent, and the Vietnam-government entity at 16.25 percent); Tapered Roller Bearings from Romania, Final Results, 61 Fed. Reg. at 51433 (Exhibit USA-47) (because the only mandatory respondent did not demonstrate independence from the Romania-government entity, only one rate for the Romania-government entity was calculated in the review).

In other cases, even if a company within the China-government entity subject to the investigation or review has not provided requested information, this does not automatically result in Commerce finding non-cooperation of the China-government entity. *See* Ribbons AR1, Preliminary Results, 77 Fed. Reg. at 47363 fn. 4, 47637-69 (Exhibit CHN-171) (no finding of AFA for the China-government entity even though a company within the China-government entity failed to respond to a quantity and value questionnaire), unchanged in Ribbons AR1, Final Results, 78 Fed. Reg. at 10131 (Exhibit CHN-51); Furniture AR8, Preliminary Results, Preliminary Decision Memorandum at 12-14 (Exhibit CHN-302) (no finding of AFA for the China-government entity even though two companies within the China-government entity failed to fully respond to a dumping questionnaire), unchanged in Furniture AR8, Final Results, 79 Fed. Reg. at 51954 (Exhibit CHN-60) (note that China has an incorrect cite for this Exhibit). However, as demonstrated below, where Commerce does find that non-cooperation of a company within the China-government entity supports a finding of non-cooperation of the China-government entity, this determination is fully consistent with Article 6.8 and Annex II of the AD Agreement.

[450] *See* China's First Written Submission, paras. 444-446 (citing Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual (Exhibit CHN-23) ("Antidumping Manual")).

[451] *See Id.* paras. 444-446 (citing Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual (Exhibit CHN-23)).

practice."[452] Thus, the Antidumping Manual does not establish China's claim that there exists a norm or rule of general and prospective application.[453] Nor do the descriptions of USDOC's practice by USDOC and U.S. courts demonstrate that there exists a norm or rule of general and prospective application.[454] Rather, these all demonstrate that, when USDOC finds non-cooperation and determines to apply a rate based on facts available, it seeks a rate that may be sufficient to induce cooperation from respondents, and that USDOC's selection of facts available is dependent on the facts and circumstances of each proceeding, and is further tempered by the requirement that USDOC corroborate the rate.

416. Likewise, China's sample of USDOC's NME cases over a 12-year period does not demonstrate the existence of a norm or rule of general and prospective application[455] but rather, demonstrates that the use of facts available varies in every proceeding based on the facts and circumstances at issue. Moreover, China's argument that USDOC invariably uses adverse inferences in selecting from the facts available in every case in which it has found the NME-government entity to be uncooperative suffers from the same flawed premise identified above: That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not make something a rule or norm of general and prospective application. In addition, China's argument that USDOC "systematically selects information that results in high rates for the NME-wide entity" does not demonstrate that USDOC disregards the facts and information in each and every proceeding in pursuit of a "high rate." China disregards, for instance, those cases in which there may be only one viable rate to use,[456] or where USDOC does not use the highest rate on the record.[457]

417. Lastly, China attempts to demonstrate the rigid application of the alleged norm of China's own description:

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[452] 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).

[453] The fact that the panel in *US – Shrimp (Viet Nam) II* found the Antidumping Manual to provide relevant evidence of the existence of a norm of general and prospective application, i.e. Commerce's alleged presumption of NME-government control, does not establish that the Manual likewise would prove the existence of the alleged norm which China describes here related to the use of facts available. *See* Panel Report, *US – Shrimp (Viet Nam) II*, para. 7.109.

[454] *See* China's First Written Submission, paras. 447-455 and Table AFA1 in Annex 8.

[455] *See Id.* para. 457-472 and Annexes 9-15.

[456] *See*, e.g. Aluminum Extrusions, OI Final Determination, 76 Fed. Reg. at 18529-30 (Exhibit CHN-32); Ribbons OI, Final Determination, 75 Fed. Reg. at 41810-12 (Exhibit CHN-33). *See* also Section D.3 below.

[457] *See*, e.g. Wood Flooring OI, Final Determination, 76 Fed. Reg. at 64322-24 (Exhibit CHN-49). *See* also Section D.3 below.

> [W]henever it finds non-cooperation, USDOC indiscriminately resorts to facts available and selects adverse facts that result in a high rate for the NME-wide entity and all of the producers/exporters included within that fictional entity. Specifically, USDOC selects this information based solely on the "procedural circumstance" of non-cooperation, and without regard to the factual circumstances underlying the individual determination.[458]

But this is inconsistent with China's own characterization of the alleged norm. As discussed above, China is *not* alleging that USDOC's finding of non-cooperation of the China-government entity, based on the non-cooperation of one or more companies within the China-government entity, which leads USDOC to apply facts available, constitutes part of the norm which it challenges here. Rather, China describes the finding of non-cooperation and decision to apply facts available as "the trigger condition" which leads to the alleged norm.[459] Therefore, it is not entirely clear why China raises USDOC's decision to apply facts available to the China-government entity in this section of its argument if it is not alleging that such a decision is part of a norm. Thus, China's arguments regarding the "relevant factual circumstances" which lead to USDOC's decision to apply facts available to the China-government entity are misplaced in this section of China's argument.[460]

418. In any event, China's own characterization of the numerous instances which led USDOC to find non-cooperation of the China-government entity does not demonstrate any rigid application, but rather, demonstrates that a finding of non-cooperation is based on the facts and circumstances at hand. For instance, China acknowledges that there are "at least two categories of producers/exporters included within the NME-wide entity."[461] In addition, China's argument that "USDOC's findings of non-cooperation by NME-wide entities are *frequently* based on presumptions rather than facts"[462] concedes that there are instances in which China agrees that USDOC's findings of non-cooperation are supported by the factual record, and not simply based on presumptions.[463] In sum, China has not demonstrated that there is a rule which always leads USDOC to apply facts available to the China-government entity.

419. In conclusion, China has failed to demonstrate that there exists a measure which embodies a rule or norm of general and prospective application that may be challenged on an as such basis. In particular, China has failed to demonstrate that USDOC's *use* of facts available is

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[458] China's First Written Submission, para. 473 (footnotes omitted). *See also id.* paras. 458-462 and Table AFA2 in Annex 10 and AFA3 in Annex 11.

[459] *See*, e.g. *id.* para. 436 ("China emphasizes that a finding of non-cooperation is the trigger for the Use of Adverse Facts Available norm."); *Id.* para. 493 ("USDOC's findings of non-cooperation by an NME-wide entity – the trigger condition for application if the Use of Adverse Facts Available norm – are typically based on *presumptions*.") (emphasis in the original).

[460] *See* also below which describes that this part of China's as such claim is outside the panel's terms of reference.

[461] *Id.* para. 475. We further address this argument in Section D.1 below.

[462] *Id.* para. 480 (emphasis added).

[463] We demonstrate in Section D.1 below that in those challenged determinations in which Commerce applied facts available to the China-government entity this was based on the facts of the proceeding rather than presumptions and was fully consistent with Article 6.8 and Annex II.

anything more than a fact-specific determination that must be made in each case. Although in considering the best information to use to determine a margin for a non-cooperating entity, USDOC may seek a rate that is sufficient to induce cooperation, the fluidity of USDOC's actions do not equate to a rule or norm of general and prospective application. In addition, China does not allege that USDOC's decision to apply facts available, *i.e.*, its determination that the China-government entity is non-cooperative on the basis of the non-cooperation of one or more companies within the China-government entity, forms part of the alleged norm, but rather, explains that a finding of non-cooperation is the "trigger condition" for that norm. In any event, that USDOC may apply a similar response to a similar set of facts does not demonstrate the existence of a challengeable measure. For these reasons, China has failed to establish its *prima facie* case that it may challenge USDOC's determination of facts available on an as such basis.

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

420. In addition to the fact that China has not established the existence of any norm of general application involving the use of facts available, China's arguments suffer from a fundamental misunderstanding of the obligations in these provisions. For instance, China misinterprets "any interested party" and "necessary information" under Article 6.8 to argue that USDOC must request from each company within the China-government entity information pertaining to the calculation of a dumping margin, *i.e.*, issue a dumping questionnaire to each of these companies, before it resorts to facts available. As demonstrated below, because China's arguments rest on erroneous legal interpretations, China's claims of breach must fail.

1. Investigating Authorities May Resort To Facts Available If Any Interested Party Has Refused Or Failed To Provide Necessary Information, Or Has Otherwise Significantly Impeded The Investigation

421. Article 6.8 of the AD Agreement provides:

> In 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, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Article 6.8 thus enables investigating authorities to make determinations on the basis of facts available when any interested party has refused or failed to provide necessary information, or has otherwise significantly impeded the progress of the investigation. The application of this provision is also subject to the provisions of Annex II, in particular, the requirements of paragraph 1 that an investigating authority should "specify in detail the information required from any interested party" and that interested parties "shall be given notice of the information which the authorities require".[464] However, "[n]either Article 6.8 nor Annex II specify what

[464] *China – GOES*, para. 7.384.

form the request for information should take or how the authority should communicate its request to the interested party concerned."[465]

422. Moreover, China's interpretation of Article 6.8 identifies three limitations, none of which are supported by the text of the provision. First, for purposes of Article 6.8 in this dispute, China effectively limits "any interested party" to mean only those producers or exporters that received a request for information specifically related to the calculation of a margin of dumping.[466] Second, China argues that facts available may not be applied with respect to "information that is *unconnected* to the task of calculating a margin of dumping, such as the aggregated Q&V data that an authority sometimes uses to select producers/exporters for individual investigation."[467] Third, China argues that facts available may be used "only to replace the specific necessary information that the authority requested but did not receive, following its request."[468]

423. As demonstrated below, such a reading of Article 6.8 is not supported by the plain text of the provision, nor shared by any previous panel or the Appellate Body. Moreover, such an interpretation would seriously undermine the ability of investigating authorities to determine appropriate dumping margins and "to proceed[] expeditiously" in reaching preliminary and final determinations in accordance with Article VI of the GATT 1994 and the AD Agreement. China's proffered construal would also undermine the facts available provision, which "is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation,"[469] and could otherwise allow an interested party to benefit from its non-cooperation.[470]

424. China provides no support for its interpretation of "any interested party" and "necessary information" to mean only those producers or exporters who received a request for detailed information related to the calculation of a dumping margin.[471] In other words, China would limit these terms to only those interested parties to whom an investigating authority issued a dumping questionnaire, notwithstanding that the investigating authority may require other information that is necessary for its determination before it issues a dumping questionnaire. However, the phrase "any interested party" is clearly not so limited, nor does it contain any cross-reference to Article 6.10. In addition, the text of the AD Agreement does not require such scope in the type of information required by the investigating authority. Rather, Article 6.8 lists "necessary information", and Annex II paragraph I references "the information required". Nothing in these broad terms can be construed to mean only the very specific information related to the actual calculation of the dumping margin, *i.e.,* the information discussed in Article 2.4 related to calculating a fair comparison. If this were the case, presumably Article 6.8 would have made a

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[465] *China – Broiler Products*, para. 7.301.

[466] China's First Written Submission, para. 563.

[467] *Id.* (emphasis in original)

[468] *Id.*

[469] *Mexico – AD Measures on Rice (AD)*, para. 293.

[470] *China – Broiler Products*, para. 7.305.

[471] China's First Written Submission, para. 563.

cross-reference to that provision or some reference to such specific information. But the AD Agreement contains no such language.

425. Moreover, this simplistic and narrow view of the circumstances under which an investigating authority may resort to facts available ignores the scope of information which may be required throughout the entire investigation and the numerous ways in which a party could significantly impede a proceeding. Such an interpretation also fails to recognize that "[i]nvestigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination."[472] Thus, China's strained interpretation disregards that an investigating authority might require information for various determinations it makes in a given proceeding, aside from the ultimate determination of a dumping margin. For instance, this would disregard the process for respondent selection in which USDOC requests initial quantity and value information from numerous interested parties to aid in its initial determination of selecting mandatory respondents, *i.e.*, sampling. Without complete and accurate information pertaining to the potential pool of respondents from which to select companies for individual examination, an investigating authority may appropriately find not only that a party has failed to respond to a request for necessary information, but that the party's actions have significantly impeded the progress of the proceeding. Consistent with Article 6.8., the investigating authority is permitted to use facts available in such a situation. Contrary to China's argument, such information is not wholly "unconnected to the task of calculating a margin",[473] but rather, is a necessary first step before the investigating authority can determine to whom it should issue a dumping questionnaire.

426. For this reason, China's argument that facts available may be used "only to replace the specific necessary information that the authority requested but did not receive, following its request"[474] fails to take into account that there is no concrete "gap" to fill if the information that was not provided, for example, is necessary for the determination of whether to select a company for individual examination. In these instances, the investigating authority's investigation has been impeded before the investigating authority has had an opportunity to request or examine the information needed to calculate a dumping margin. For example, if an investigating authority requests that a producer or exporter provide information related to its quantity and value of exports as a first step to determining whether to select the company for individual examination, a failure to reply to such a request results in the investigating authority being unable to determine whether that company should be selected for individual examination. An investigating authority may find not only that there has been a failure to respond to a request for necessary information, but that such a failure to respond to this initial request for information significantly impedes the progress of the proceeding. Consistent with Article 6.8, in such instances, there is no specific "gap" of information, and so the investigating authority may find that the company is uncooperative and assign that company a rate based on facts available. This is different from a situation in which a company responding to a dumping questionnaire may provide some, but not

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[472] *US – Hot-Rolled (Japan) (AB)*, para. 73.

[473] China's First Written Submission, para. 563 (emphasis omitted).

[474] *Id.*

all information necessary to calculate a dumping margin. In those instances, the investigating authority may be able to more readily identify and fill a concrete "gap" with specific facts.

427. Previous panels support this reading of Article 6.8. In *China – Broiler Products* the panel emphasized that it is permissible under Article 6.8 and Annex II to apply facts available to a party that has failed to provide initial information at the start of an investigation which is a necessary first step for the determination of a dumping margin:

In our view, in the case of a failure by an interested party to provide some initial information necessary for the determination of a producer's margin of dumping, the authority is justified in replacing other information that it cannot collect as a result of that failure, even if it did not specifically request the other information. Such information initially required may include the producer's contact details and information necessary for the authority to decide on sampling.[475]

The panel in *US – Shrimp (Viet Nam) I* reached the same conclusion:

> Regarding Viet Nam's argument that the Article 6.8 facts available mechanism does not apply in respect of non-selected respondents, we note that the first sentence of Article 6.8 envisages the use of facts available in cases of non-cooperation by "any" interested party. The reference to non-cooperation by "any" interested party suggests that Article 6.8 is of broad application. There is nothing in the text of Article 6.8 to suggest that the facts available mechanism only applies in respect of non-cooperation by a limited category of interested parties. In particular, there is no indication in the text to suggest that, in cases of limited examination (under Article 6.10), Article 6.8 only allows the use of facts available in respect of those interested parties that were selected for individual examination, as alleged by Viet Nam.[476]

In other words, the application of facts available to those companies that failed to respond to an initial request for information that is necessary for the investigating authority's determination before the investigating authority issues a dumping questionnaire is permissible so long as the investigating authority had notified the interested parties of the information required, and specified in detail the information required.

428. China attempts to rely on *Mexico – AD Measures on Rice* for its argument, however, that dispute is not on point. In the context of reviewing Article 12.7 of the SCM Agreement (which is nearly identical to Article 6.8 of the AD Agreement), the Appellate Body found that Article 12.7 "permits the use of facts on record solely for the purpose of replacing information that may be missing, *in order to arrive* at an accurate subsidization or injury determination," and "the 'facts available' to the agency are *generally limited to those that may reasonably replace* the

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[475] *China – Broiler Products*, para. 7.306 fn. 501.

[476] *US – Shrimp (Viet Nam) I*, para. 7.263.

information that an interested party failed to provide."[477] Under this framework, the Appellate Body found that Mexico's legislation which mandated indiscriminate application of the highest possible margin on the basis of facts available, even to parties that had not been notified of the information required, and without regard to any other available information, was inconsistent with Article 12.7 of the SCM Agreement.[478] But nothing in this finding limited the type of information or the parties from whom the information was requested in the way China advocates here.

2. USDOC Is Not Required To Request Specific Information Relating To The Calculation Of A Dumping Margin From Each Company Within the China-Government Entity Before Resorting To Facts Available

429. Based on its faulty interpretation of Article 6.8 and Annex II, China argues that "[i]f the authority collapses more than one individual exporter/producer into a single group, then to calculate a margin for that group, the authority requires all of this information from the group as a whole,"[479] and thus, an investigating authority, such as USDOC, may rely on facts available only if it requested this specific information from all companies within that entity.[480] China is incorrect for at least four reasons.

430. First, as demonstrated above, investigating authorities are permitted to treat the export activity of multiple companies within a nonmarket economy, such as China, as the pricing behavior of a single entity, *i.e.*, the China-government entity. Thus, to avoid a potential scenario in which the China-government entity shifts its exports through the producer/exporter of the China-government entity which is assigned the lowest rate, an investigating authority must apply the same antidumping duty rate to all of the China-government entity's exports. Otherwise, companies within the China-government entity would have no incentive to cooperate and respond to requests for information, and the investigating authority would be left with information from the only companies within the China-government entity that did cooperate.

431. Second, in determining the rate to apply to the China-government entity, the investigating authority does not consider the information provided by just one producer/exporter of the China-government entity, but rather, it must consider the information provided by all companies within the China-government entity subject to the particular investigation or review at issue. Likewise, if companies within the China-government entity do not provide requested information, the investigating authority must determine what this means for the China-government entity.[481] Nothing in Article 6.8 prohibits this determination.

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477 *Mexico – AD Measures on Rice (AB)*, para. 293-294 (emphasis added).

478 *Id.* paras. 296-297.

479 China's First Written Submission, para. 553.

480 *Id.* paras. 553-562.

481 We note that this is not unique to an NME-government entity. For instance, in one of the contested reviews at issue, Aluminum Extrusions AR1, Commerce determined that one of the mandatory respondents was a single entity comprised of three individual companies, collectively the Guang Ya Group/Zhongya/Xinya entity. Two members of this entity failed to respond to Commerce's requests for information. Although the third member,

432. Third, as discussed above, Article 6.8 allows an investigating authority to resort to facts available if "any interested party" does not respond to a request for "necessary information" or otherwise significantly impedes the proceeding. Annex II also provides that the investigating authority must notify the interested parties of the specific information required. As we have demonstrated, these provisions do not specify that facts available may be applied only to those parties that were issued and failed to respond to a dumping questionnaire. Thus, USDOC may appropriately find that a failure to respond to an initial request for information—before USDOC issues a dumping questionnaire—which is a necessary first step in USDOC's determination may result in the application of facts available. The application of facts available in such an instance is permissible so long as the investigating authority had notified the interested parties of the information required, and specified in detail the information required.[482]

433. Thus, where a company that is part of the China-government entity has been notified of and fails to respond to an initial request for quantity and value information, the investigating authority may find that the company, and by extension, the China-government entity, has failed to respond to a request for necessary information and has significantly impeded the progress of the proceeding.[483] As established above, because the China-government entity must receive the same rate, the investigating authority may take into account the non-cooperation of the companies within the China-government entity in determining a rate for the China-government entity.

434. For example, USDOC requests quantity and value information from parties to determine which respondents to select for individual examination. Therefore, complete and accurate information is pertinent to USDOC's investigation or review so that it can make an informed decision regarding its selection of mandatory respondents. Moreover, a failure to provide such information impedes USDOC's investigation, leaving it with insufficient information at the initial stages of the investigation and a demonstrated failure by parties to respond to USDOC's request for information. The AD Agreement does not require USDOC to request new information after a party has already demonstrated a failure to provide any of the requested information. Otherwise, parties would be free to select what questionnaires they will and will not respond to, and thereby potentially manipulate USDOC's proceeding. In such instances, Article 6.8 does not require USDOC to continue to request from that producer/exporter within the China-government entity, or the China-government entity, information, including information related to the calculation of a dumping margin. The company within the China-government entity, and, by extension, the China-government entity, has already demonstrated a failure to cooperate by failing to respond to an initial request for necessary information. Thus, consistent with Article 6.8 and Annex II, USDOC may appropriately determine that the China-

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Zhongya, did respond to requests for information, because two of the members of the entity failed to cooperate, Commerce determined that it must rely on facts available in determining a rate for the entity. Commerce further determined that because the company failed to respond to requests for information, the record lacked the necessary information to determine the company's independence from the China-government entity. *See* Aluminum Extrusions AR1, Preliminary Results, 78 Fed. Reg. at 34,986 (Exhibit CHN-465).

[482] *China – Broiler Products*, para. 7.306 fn. 501; *US – Shrimp (Viet Nam) I*, para. 7.263.

[483] *See* Section VII.D.1.a below.

government entity has failed to cooperate at this stage of the proceeding, and may resort to facts available in determining a dumping margin for the China-government entity.

435. Alternatively, where a company within the China-government entity has been selected as a mandatory respondent, and has been notified of and failed to respond to a dumping questionnaire, USDOC may find that the company, and by extension, the China-government entity, has failed to respond to a request for necessary information or otherwise significantly impeded the proceeding.[484] As demonstrated above, in determining a single rate for the China-government entity, USDOC must take into account the non-cooperation of the companies within the China-government entity in determining a rate for the China-government entity. Thus, where a company within the China-government entity fails to provide requested information specifically related to the calculation of a dumping margin, USDOC has been left without information that would enable it to determine a dumping margin for the China-government entity. In such instances, Article 6.8 does not require USDOC to disregard this failure to cooperate by continuing to request information from that company within the China-government entity, or the China-government entity. Consistent with Article 6.8 and Annex II, USDOC may appropriately determine that the China-government entity has failed to cooperate, and may resort to facts available in determining a dumping margin for the China-government entity.

436. In addition, in some instances USDOC may make a direct request for necessary information from the Chinese government. Given that it is permissible to treat distinct exporters within China as operating as one single China-government entity, it is reasonable for USDOC to send a request for information directly to the government. Thus, a failure of the government to respond to this request for information may lead USDOC to find that the China-government entity has failed to cooperate, and to rely on facts available in assigning a rate to the China-government entity.[485] Such a determination would be consistent with Article 6.8 and Annex II.

437. Fourth, China relies on *EC – Fasteners* for its arguments,[486] however, that dispute is inapposite. In *EC – Fasteners*, the Appellate Body examined the European Union's regulation at issue. Under this regulation, rather than calculate a single dumping margin for the NME-government entity and its constituent members, the European Union calculates a country-wide dumping margin and duty.[487] If cooperating members of the NME-government entity account for close to 100 percent of all exports from the country, the export price of the country-wide margin and duty will be based on a weighted average of the actual price of all export transactions reported by these exporters.[488] Alternatively, if cooperating members of the NME-government entity account for significantly less than 100 percent of all exports from the country, the country-wide margin and duty will be based on facts available.[489] Under such circumstances, the

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[484] *See* Section VII.D.1.b below.

[485] *See* Section VII.D.1.c below.

[486] China's First Written Submission, para. 553.

[487] *EC – Fasteners (AB)*, para. 383 (internal footnotes omitted).

[488] *Id.* para. 383 fn. 537.

[489] *Id.* para. 383.

Appellate Body determined that such a country-wide margin and duty was inconsistent with Articles 6.10 and 9.2:

> In our view, only a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for the single entity that is composed of several legally distinct exporters. We also do not consider that a country-wide duty imposed on a group of exporters could be considered as being "collected in the appropriate amounts in each case" within the meaning of Article 9.2 of the Anti-Dumping Agreement, to the extent it is determined for the group of fully cooperating non-IT exporters on the basis of facts available because cooperating exporters account for significantly less than 100 per cent of all exports.[490]

438. But the Appellate Body's conclusions, which were based in part on the European Union's distinctions between significant and non-significant cooperation of the members of the NME-government entity, would not apply in cases in which an investigating authority does not have such distinctions. For instance, the investigating authority may find that there are *no* cooperative companies within the NME-government entity. In such instances, nothing in the Appellate Body's statement precludes the use of facts available to determine a rate for the NME-government entity. Moreover, as discussed above, an investigating authority may find that certain companies within the NME-government entity have failed to cooperate by failing to respond to an initial request for quantity and value information or failing to provide requested information pertaining to the actual calculation of a dumping margin. In each instance, the investigating authority may also find that such a failure has significantly impeded the proceeding. Alternatively, the government itself may have failed to cooperate by failing to respond to a request for necessary information. In *EC – Fasteners* the Appellate Body did not foreclose the possibility that an investigating authority may need to rely on facts available pursuant to Article 6.8 if it did not have the necessary information to calculate a dumping margin for the NME-government entity because of the non-cooperation of *all* or *nearly all* companies within the NME-government entity.[491]

439. Thus, China's argument that investigating authorities only may resort to facts available in the limited instance in which a company has, or all companies within of an entity have, failed to respond to a request for information solely related to the calculation of a dumping margin is not supported by Article 6.8. Such an interpretation ignores that "[i]nvestigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination."[492] Moreover, China also disregards the

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490 *Id.* para. 384.

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

492 *US – Hot-Rolled (Japan) (AB)*, para. 73.

importance of determinations USDOC must make that are necessary for the proceeding, but which are completed before the actual calculation of a dumping margin, such as whether a producer or exporter is eligible for individual examination.

3. Relevant Circumstances

440. China carries forward its flawed legal interpretation discussed above to its interpretation of "special circumspection" within the meaning of Annex II, Paragraph 7. For instance, China argues that, in determining which information to use as facts available, an investigating authority must do so with special circumspection, meaning, it must consider the particular procedural circumstances which led to the missing information.[493] Based on this principle, China argues that:

> where an authority has collapsed many producers/exporters into a single, fictional NME-wide entity, …[it must consider the] different producers/exporters included within the China-government entity are in materially different positions: the authority sometimes requests the information necessary to calculate a margin of dumping from *some* within the group (i.e., mandatory respondents who fail to qualify for separate rate treatment); it requests Q&V information (which is *not* necessary to determine a margin of dumping) from others within the group; and it requests no information at all from others in the group.[494]

In other words, China argues that where an investigating authority has not made a direct request for information solely pertaining to the calculation of a margin of dumping (which, as explained above, China argues is the only type of "necessary information" for purposes of Article 6.8), it could not find that a producer or exporter has been uncooperative.[495] Therefore, in analyzing with special circumspection the information to use as facts available, China argues that the investigating authority must consider whether it requested such information from each of the members of the China-government entity.[496]

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[493] China's First Written Submission, paras. 571-572 ("[T]he procedural circumstances in which information is missing are relevant to an investigating authority's use of 'facts available', especially in 'ascertaining those 'facts available' on which to base a determination and in explaining the selection of facts") (quoting Appellate Body Report, *US – Hot-Rolled Carbon Steel (India)*, para. 4.426).

[494] *Id.* para. 575 (emphasis in original).

[495] *Id.* para. 576.

[496] *Id.* ("China notes that, based on the relevant circumstances, an investigating authority can 'draw inferences from the evidence before it in order to reach a conclusion'. Thus, in a case of *actual* non-cooperation by one producer/exporter included within a NME-wide entity, an *inference* may be drawn in respect of *that exporter/producer* provided there is a basis in the facts on the record. It follows *a fortiori* that, any inferences made, for purposes of applying Article 6.8 and Annex II, in relation to *other* exporters/producers included in the entity must also be made based on *facts*, and in light of the particular circumstances of the specific determination. In that instance, a relevant circumstance is that such producers have not been uncooperative.") (emphasis in original) (internal footnotes omitted).

441. As demonstrated above, Article 6.8 does not limit the type of information or the parties from whom the information was requested in the way China advocates here. Moreover, an investigating authority (such as USDOC) may find that certain companies within the NME-government entity have failed to cooperate by failing to respond to an initial request for quantity and value information or failing to provide requested information pertaining to the actual calculation of a dumping margin. In each instance, the investigating authority may also find that such a failure has significantly impeded the proceeding. Alternatively, the government itself may have failed to cooperate by failing to respond to a request for necessary information. Under such circumstances, an investigating authority may appropriately rely on facts available in determining a rate for the China-government entity. These are the appropriate procedural circumstances an investigating authority may consider in determining whether to apply facts available.[497]

442. In any event, as demonstrated below in section VII.C.1.b, USDOC appropriately applied special circumspection within the meaning of Paragraph 7 of Annex II.

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

443. Based on its flawed legal interpretation described above, China proceeds to argue that USDOC's alleged "Use of Adverse Facts Available Norm" is inconsistent with Article 6.8 and Annex II of the AD Agreement. China focuses its "as such" claim on three aspects of USDOC's alleged "Use of Adverse Facts Available Norm":

> First, … China demonstrates that the norm prevents USDOC from undertaking the comparative, evaluative process required to identify the best facts from the universe of secondary source information available, in favor of a process designed to select adverse facts.
>
> Second, …China demonstrates that, even were it permissible (quod non) under Article 6.8 and Annex II(7) to select adverse facts that are not the best facts available, the norm also prevents USDOC from properly exercising "special circumspection". Specifically, pursuant to the norm, USDOC selects adverse facts from the universe of secondary source information on the basis of the "procedural circumstance" of non-cooperation alone – a circumstance that is, moreover, frequently based on presumption rather than fact.

[497] *See US – Hot-Rolled Carbon Steel (India) (AB)*, para. 4.422 ("Whether and how such procedural circumstances should be taken into account by an investigating authority, and any appropriate inferences that may be drawn, will necessarily depend on the particularities of a given investigation. We recall, however, that determinations under Article 12.7 must be made on the basis of 'facts' that reasonably replace the 'necessary information' that is missing, and thus cannot be made on the basis of procedural circumstances alone.")

> Third, … China demonstrates that, as a result of the Use of Adverse Facts Available norm, USDOC resorts to adverse facts available even where it failed to request the necessary information.[498]

We address the first aspect of China's as such claim in Section C.1, and we address the second and third aspects of China's as such claim together in Section C.2. As demonstrated below, each of these arguments must fail.

1. China Has Failed To Demonstrate That USDOC's Selection and Application of Facts Available To The China-government Entity Is Inconsistent With Article 6.8 and Annex II of the AD Agreement

444. As discussed in section I.A above, China has failed to demonstrate the existence of a measure which expresses a norm or rule of general and prospective application concerning the use of facts available for the China-government entity. In the next section, the United States addresses the components of China's alleged rule or norm of general and prospective application, and demonstrates that no such rule exists, and that USDOC's use of facts available is fully consistent with Article 6.8 and Annex II of the AD Agreement.

445. In particular, China contends that "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."[499] China asserts that this "norm" (1) prevents USDOC from "engaging in a process to identify the best information", and (2) prevents USDOC from using "special circumspection" because USDOC "selects information from the available secondary sources based on the procedural circumstance of non-cooperation alone."[500] Not only has China failed to show any such rule exists, China has failed to show that such a rule prevented USDOC from engaging in an appropriate selection process when making determinations based on facts available, consistent with Article 6.8 and Annex II of the AD Agreement.

a. *The Use of an Adverse Inference In Selecting From Among the Available Facts Is Fully Consistent with Article 6.8 and Annex II of the AD Agreement*

446. The crux of China's argument is the premise that USDOC's use of an "adverse inference" in selecting from among the available facts is "harmful" and "punitive."[501] According to China, "Annex II contemplates the selection of the best information available, not adverse information."[502] This argument, however, fails to come to terms with fundamental concepts

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[498] China's First Written Submission, para. 640 (emphasis in original).

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

[500] China's First Written Submission, para. 405.

[501] China's First Written Submission, para. 433.

[502] China's First Written Submission, para. 398.

embodied in Article 6.8, Annex II, and expressed in panel and Appellate Body decisions that address this element of facts available.

447. Article 6.8 of the AD Agreement enables investigating authorities to make determinations when interested parties have failed to provide necessary information. Article 6.8 permits recourse to facts available when an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. Article 6.8 also provides that the "provisions of Annex II shall be observed in the application of this paragraph." Annex II(1) confirms that:

> if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of facts available, including those contained in the application for the initiation of the investigation by the domestic industry.[503]

448. In addressing the use of information from secondary sources as facts available, Annex II(7) states that authorities "should, where practicable, check the information from other independent sources at their disposal", but notes:

> 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.

449. The last sentence of Annex II(7) is of substantial importance for evaluating China's arguments: this provision of the AD Agreement confirms that the term "facts available" includes the ability of authorities to apply inferences that could lead to unfavorable results.[504]

450. Equally, nothing in Article 6.8 or Annex II limits the application of facts available to those facts that are *most favorable to the interests* of a party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to which facts should be selected. Rather, the permission to apply the "facts available" in making a determination pursuant to Article 6.8 means that an administering authority, when faced with a situation in which necessary facts have not been supplied, may apply those facts that are otherwise available. Such facts may include those that may be *less favorable* to a non-responding party.

451. Given the circumstances in which the need to resort to facts available arises, the Appellate Body has observed that the facts available provision is "intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[505] The Appellate Body recently reiterated the standard for selecting facts available with the aim of arriving at an accurate determination. That standard requires that (1)

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[503] Annex II(1) of the AD Agreement.

[504] *US-Hot Rolled Carbon Steel Flat Products from India (AB)*, paras. 4.426 and 4.420. (*US-Carbon Steel from India)*.

[505] *Mexico-Anti-Dumping Measures on Rice (AB)*, para. 293; *See also China – GOES*, para. 7.296.

"all substantiated facts on the record be taken into account"; (2) "facts available determinations have a factual foundation"; and (3) "'facts available' be generally limited to those facts that may reasonably replace the missing information."[506] In this respect, the Appellate Body recognized that the use of an inference that is "'*adverse to the interests' of a non-cooperating party*" is not inconsistent with the facts available provision, provided it comports with the above legal standard.[507]

452. For investigating authorities, the "facts available" provision, including the ability to draw appropriate inferences, is crucial. As one panel expressed it, the provision:

> is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority.[508]

453. The practical result of any interpretation of the AD Agreement that prohibits the use of an adverse inference in selecting from among the facts available, therefore, would be to incentivize non-cooperation on the part of responding parties. The panel in *EC-DRAMs* warned of this potential outcome, finding:

> if we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile.[509]

The same holds true with respect to Article 6.8 of the AD Agreement.[510] Both agreements are rooted in an investigatory format that depends upon the participation and cooperation of parties in order to function. The failure to provide necessary information not only hinders the authority's investigation, it could make it impossible for authorities to reach conclusions and make determinations, either affirmative or negative, unless authorities are permitted to take account of the fact that such parties have refused to provide the necessary information. Determinative evidence is generally in the hands of the investigated party. If that party could hope to achieve a result that is at least as good or better than it might have received had it

[506] *US-Hot Rolled Carbon Steel from India (AB)*, paras. 4.429 and 4.430.

[507] *US-Hot Rolled Carbon Steel from India (AB)*, para. 4.469.

[508] *EC-DRAMS (Panel),* para. 7.61.

[509] *EC-DRAMS (Panel),* para. 7.61.

[510] The facts available provision of the SCM is contained in Article 12.7, and substantively mirrors the language contained in Article 6.8 of the AD Agreement. Each provision serves the same function in its respective agreement. *See Mexico-Anti-Dumping Measures on Rice (AB)*, para. 295.

participated in the investigation, a responding party might choose to simply not cooperate, rather than spend the time and resources that would otherwise be needed.

454. Given the potentially limited investigative powers of an investigating authority, such as a lack of subpoena or other information gathering power over foreign parties, Article 6.8 provides investigating authorities with an essential tool for the situation that non-cooperating parties present, and for successfully completing an investigation in the circumstances of such non-cooperation. This ability to rely on facts otherwise available ensures that an interested party may not avoid the proper application of antidumping duties through non-cooperation, and may not obtain a duty margin *more* favorable to its interests for having not cooperated. That is, Article 6.8 allows an investigating authority to incentivize responding parties to participate in an investigation by relying on facts available, including unfavorable facts, in making its determinations when such cooperation is not forthcoming.

455. China characterizes the use of such inferences as "harmful" and intended to "punish" non-cooperating parties.[511] In particular, China claims that "[b]y definition, the use of an adverse inference entails the extrapolation of a conclusion from information that yields a 'harmful' or 'unfavorable' result for the NME-wide entity."[512] China notes that "in applying special circumspection, an investigating authority cannot choose alternative facts simply *because* they are adverse to the uncooperative parties."[513] China's argument, however, rests upon a fundamental misunderstanding of how facts available determinations are made in antidumping duty investigations and administrative reviews and in particular what the "adverse inference" means in this context.

456. Inferences are an inherent part of making determinations based on the available facts, for the reason that such determinations will be made only when "necessary information" is not provided. In that circumstance, there unavoidably will be informational gaps in the record, which could prevent the authorities from making their determinations. To prevent such circumstances from impeding an investigation, the AD Agreement allows authorities to make their determinations instead "on the basis of the facts available." Inferences are therefore applied, as they must, in the process of selecting from among the available facts.

457. Indeed, the need to draw inferences is fundamental to all investigatory or adjudicatory systems. For example, even though nothing in the DSU provides for the use of adverse inferences, panels and the Appellate Body have recognized that an inference that is adverse to a party's interests may be the appropriate inference if a party who is in possession of evidence refuses to provide it.[514]

458. Where a party refuses to provide its own information, however, *it is not possible for the administering authority to know whether the information it selects is in reality favorable or*

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[511] China's First Written Submission, paras. 399 and 433.

[512] China's First Written Submission, para. 433.

[513] China's First Written Submission, para. 567 (emphasis in original).

[514] *Canada – Aircraft (AB)*, n. 81 at para. 204

adverse[515] to the interests of the uncooperative party from the limited information available on the case record. In other words, the precise information is an "unknown fact."[516] However, as Annex II(7) recognizes, when facts available are applied "this situation could lead to a result which is less favourable to the party than if the party did cooperate." Thus, the use of the term "adverse inference" in this context does not mean the application is punitive, it simply reflects the selection of information from the available information that takes into account the party's failure or refusal to provide the necessary information, provided that selection comports with the legal standard discussed above.

459. Moreover, USDOC's use of an "adverse inference" in this context is not based upon a "speculative adverse inference" as was employed in *China-GOES*. In that case, the investigating authority ignored *substantiated facts* on the record in the application of a 100% subsidy utilization rate. The panel found the result "was actually at odds with information on the record suggesting that a lesser rate of utilization should be applied."[517] For these reasons, the *China–GOES* panel concluded that the investigating authority failed "to establish any factual basis" for its facts available determination.[518] Thus, the violation in that case was the investigating authority's unjustified rejection of substantiated facts in favor of a conclusion that lacked any factual basis and was contradicted by relevant facts on the record.

460. By contrast, the Appellate Body in *US-Hot Rolled Carbon Steel* found the use of an adverse inference to be consistent with the facts available provision because unlike the "speculative 'adverse inferences" found in *China-GOES*, the facts available provisions at issue in that dispute were found to "properly rest on factual foundations."[519] Similarly, in this dispute, each determination challenged by China rests upon a factual foundation and no substantiated information on the record contradicts the factual foundation relied upon by USDOC in making each determination.

461. China's efforts to conflate the concept of an "adverse inference" in selecting from among the facts available for a non-cooperative party with that of a "punitive" application of facts available should be rejected. An adverse inference simply reflects that USDOC can take account of the fact that a party failed to cooperate in selecting from among the available facts. This principle is fully consistent with Article 6.8 and Annex II, and is recognized by panels and the Appellate Body. China's allegation of "punitive" application, therefore, is without any factual or legal basis, and comes down to China's view that certain "facts available" rates are higher than China would prefer.

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515 There is no intended difference between the term "adverse" and the term "less favourable" referenced in Annex II of the AD Agreement. *See, e.g.,* The New Shorter Oxford English Dictionary (1993), at 3482, defining the term "unfavourable" to include "adverse, unpropitious". (Exhibit USA-50).

516 *US-Hot Rolled Carbon Steel from India (AB)*, para. 4.426.

517 *China-GOES (Panel),* para. 7.310.

518 *Id*.

519 *US-Hot Rolled Carbon Steel from India*, para. 7.444. *See also US-Hot Rolled Carbon Steel from India (AB)*, para. 4.467.

b. *China Has Failed To Demonstrate That The Manner of Selecting Facts Available Constitutes A Rule or Norm, or That Is Otherwise Inconsistent with Article 6.8 and Annex II of the AD Agreement*

462. China's claim of a norm or rule of general and prospective application with respect to the selection of "facts available" for the China-government entity is without merit. Neither as a general rule, nor as applied in the 26 challenged determinations, was USDOC *prevented* from exercising special circumspection or otherwise engaging in a process to identify information that reasonably replaces the missing information (*i.e.*, "there can be no better information available to be used in the *particular circumstances*"[520]), contrary to China's assertions.

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

464. Paragraph 7 of Annex II, in relevant part, states:

> If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from information obtained from other interested parties during the investigation.

465. The Appellate Body made two observations pertaining to the application of facts available that are relevant to this dispute. First, in evaluating the level of analysis required in selecting from the available facts, the Appellate Body rejected a rigid conception of the evaluation that flows from the requirements of the facts available provisions, finding that:

> *the extent to which an evaluation of the facts available is required* under Article 12.7 and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation."[521]

466. In this respect, the Appellate Body previously rejected the rigid position, like China's in this dispute[522], that "a 'comparative evaluation' is a necessary pre-requisite to making a

[520] *US-Hot Rolled Carbon Steel from India (AB)*, para. 4.434.

[521] *US-Hot-Rolled Carbon Steel Flat Products from India (AB)*, para. 4.434 (emphasis added).

[522] China's First Written Submission, para. 398.

determination in every instance in which an investigating authority has recourse to the 'facts available'."[523] The Appellate Body rejected the argument that the application of facts available "requires a comparative evaluation of the 'facts available' in every case."[524] By its nature, when authorities must resort to facts available because the precise information from the non-cooperating party is missing, the available information is limited. Depending on the extent of the limitation and the circumstances in the particular case, the evaluation required then, may also be limited, consistent with the aim of Article 6.8 to facilitate authorities by ensuring that "the failure of an interested party to provide necessary information does not hinder an agency's investigation."[525]

467. Second, due to the limited nature of facts available, determinations under Article 6.8 and Annex II are express exceptions to the normal requirements for determinations under the AD Agreement. Thus, Article 6 on "Evidence" provides an exception to the evidentiary standard set forth in Article 6. Article 6.6 states:

> *Except in circumstances provided for in paragraph 8*, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.[526]

468. In particular, the Appellate Body observed "it would not be possible for an investigating authority to 'satisfy themselves as to the accuracy of the information' in circumstances where an interested party or Member refuses access to, or otherwise does not provide, such information."[527] For Article 6.8 and Annex II to fulfill their aim of facilitating determinations by investigating authorities, continued recognition of these principles is necessary.

c. U.S. Laws Governing USDOC's Application of Facts Available

469. Under the U.S. statute and regulations (measures which China has not challenged in this dispute), USDOC is permitted to resort to facts available when parties refuse or otherwise fail to provide necessary information.[528] Where USDOC finds a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information", the law provides that USDOC "may use an inference that is adverse to the interests of that party *in selecting* from

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523 *US-Hot Rolled Carbon Steel from India (AB),* para. 4.434.

524 *US-Hot-Rolled Carbon Steel from India (AB)*, para. 4.434.

525 *Mexico-Anti-Dumping Measures on Rice (AB)*, para. 293; *See also China-GOES*, para. 7.296.

526 AD Agreement, Article 6.6 (emphasis added).

527 *US-Hot-Rolled Carbon Steel from India*, para. 4.418, n. 1077 (referring to Article 12.5 of the SCM Agreement, the parallel provision to Article 6.6 in the AD Agreement).

528 19 U.S.C. § 1677e(a) (Exhibit CHN-153); 19 CFR §351.308(a) and (b) (Exhibit CHN-152). Notably, under U.S. law, the same statutory and regulatory provisions apply to antidumping and countervailing duty determinations.

among the facts otherwise available".[529] In such cases, USDOC may[530] rely upon secondary information contained in the petition (application), a final determination in a previous investigation, a previous review or other proceeding, or any other information placed on the record.[531]

470. Where USDOC relies on secondary information, the law directs that USDOC "shall, to the extent practicable, corroborate that information from independent sources reasonably at [its] disposal."[532] The relevant regulation defines the term "corroborate" to mean that USDOC "will examine whether the information to be used has probative value."[533] In doing so, USDOC considers the reliability and relevance of the information to be used as facts available.[534] Where USDOC finds the information is unreliable or not relevant to the non-cooperating party being examined, USDOC rejects such information as "facts available", as required by law.[535] Corroboration of secondary information, however, is not a process designed to *prove* that the facts selected are, as a factual matter, the most accurate for the non-cooperating party because "proving that the facts selected are the best alternative facts would require that the facts available be compared with the missing information, which obviously cannot be done."[536]

471. These provisions of U.S. law govern USDOC's application of facts available, and apply to all parties in USDOC's anti-dumping duty investigations and administrative reviews, including the China-government entity. The judicial decisions cited by China demonstrate, if anything, that the provisions of U.S. law apply to the China-government entity, as they do with respect to all parties that refuse or otherwise fail to provide necessary information.[537] Last, these

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[529] 19 U.S.C. § 1677e(b) (Exhibit CHN-153); 19 CFR §351.308(a) and (c) (Exhibit CHN-152) (emphasis added).

[530] China's claim that Commerce "shall" calculate a margin of dumping based on information from a secondary source is incorrect. China's First Written Submission, para. 432. No such mandate to use "secondary" information exists in U.S. law.

[531] 19 U.S.C. §1677e(b) (Exhibit CHN-153); 19 CFR §351.308(a) and (c) (Exhibit CHN-152). Notably, where Commerce finds a party is non-cooperative, but necessary information is nonetheless on the record, the law requires that Commerce use the information in making its determination, provided established conditions are satisfied, consistent with Annex II(3). *See* 19 U.S.C. § 1677m(e). (Exhibit CHN-154).

[532] 19 U.S.C. §1677e(c) (Exhibit CHN-153); 19 CFR §351.308(d) (Exhibit CHN-152).

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

[534] *See Dongtai Peak Honey Ind. Co., Ltd. v. United States*, 777 F.3d 1343, 1356 (Fed. Cir. 2015) ("As to the { facts available} rate selected by Commerce for the China-wide entity, Commerce properly corroborated the rate by demonstrating why it was reliable and relevant.") (Exhibit USA-52).

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

[536] *Uruguay Round Agreement Act, Statement of Administrative Action*, H.R. Rep. 103-316, vol. 1, at 870 (1994). (Exhibit USA-51).

[537] *See, e.g.*, *Lifestyle Enterprise v. United States*, 768 F. Supp.2d 1286, 1297-98, at n. 12 (Commerce applied the same rate to both the PRC-wide entity and to other non-cooperating companies, such as Orient "because neither Orient nor the PRC provided any of the requested information. Commerce has in the past calculated the same AFA rate for separate rate respondents and the PRC-wide entity.") (Exhibit CHN-301).

provisions, taken together, make it possible to obtain the best or "most fitting and appropriate information" as facts available, including those facts selected based upon an adverse inference.

472. In examining these same provisions, the Appellate Body found the U.S. statute and regulations on "facts available" to be consistent with the provisions on facts available, finding that "as part of the process of reasoning and evaluating which 'facts available' constitute reasonable replacements, the procedural circumstances in which information is missing, including the non-cooperation of an interested party, may be taken into account."[538]

d. USDOC's Determinations Demonstrate No Rule or Norm of General and Prospective Application Exists For Selection and Application of Facts Available To The China-government Entity

473. In the determinations China relies upon, there is no separate norm or rule of general and prospective application for the China-government entity. Rather, the selection of "facts available" in each case was a function of having limited facts on the record, coupled with the same particular circumstance of non-cooperation. To make a determination in each case, where a party refused or otherwise failed to provide necessary information, USDOC looked for a proxy to be used as the dumping rate for the non-cooperating party by examining the available information on the record. This included, for example, information from cooperating parties; the particular dumping rate or rates contained in the domestic industry's application; and any other information on the record. For the rates in the application, although USDOC initially examined the adequacy and accuracy of these rates for purposes of initiating each investigation, to the extent such rates may be used as facts available for purposes of making a final determination, USDOC must examine these rates further, using information developed during the course of the investigation.[539]

474. China contends that USDOC "systematically uses inferences that are adverse to the interests of the NME-wide entity . . . by selecting adverse information from amongst the secondary source information available."[540] As noted above, repeated action when faced with the same procedural circumstances does not rise to the level of a norm or rule, nor does it reflect a "systematic" application. To be clear, limited facts accompanied by the same or similar procedural circumstances may appear systematic, however, USDOC's determination in each case reflects a reasoned analysis and is based upon a factual foundation.

475. In selecting which facts to be used as facts available, USDOC considers the universe of information on the record. USDOC also considers whether the party cooperated to the best of its ability. Where a party has not cooperated, but USDOC has the information on the record pertaining to that party, USDOC will use the information notwithstanding the party's failure to

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[538] *US-Hot Rolled Carbon Steel from India (AB)*, para. 4.468.

[539] *See Korea-Antidumping Duties on Imports of Certain Paper from Indonesia (Panel)*, para. 7.124 (The obligations under Articles 5.3 and 6.8, are different, of course. Nonetheless, "It may be the case that the obligation to corroborate under paragraph 7 may entail little substantive analysis in addition to the analysis carried out under Article 5.3 at the initiation stage.").

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

cooperate.[541] Where a party has not cooperated, and USDOC does not have the information on the record, it is consistent with Article 6.8 and Annex II to take the party's non-cooperation into account in selecting from the facts to be used for that party.[542]

476. To take the China-government entity's non-cooperation into account in selecting the rate, in the investigation of *Aluminum Extrusions* for example, USDOC first examined the dumping rates on the record and initially selected the factual information available that reflected the highest dumping rate.[543] The examination at this stage focused on whether the rate of dumping, for example, alleged in the domestic industry's application has probative value. Where no party cooperated and provided necessary information, the information on the record was limited to the information contained in the application that was used to support the domestic industry's dumping allegation.

477. By contrast, where another party or parties cooperated and provided their information to USDOC, for example in investigation of *Ribbons*, to fill in the missing information for the non-cooperating party USDOC used "the information obtained from other interested parties during the investigation" to check the reliability and relevance of the information that may be used as facts available, consistent with Annex II(7).[544] This may include, for example, examination of

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[541] Provided the information meets the requirements of 19 U.S.C. 1677m(e) (such as, that the information is timely submitted, can be verified, is not so incomplete that it cannot serve as a reliable basis for reaching the determination). *See, e.g., Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 Fed. Reg. 73155, 73162, Dec. 29, 1999 (Exhibit USA-53); *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1). Exhibit USA-54); *See also Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran*, 70 Fed. Reg. 54027 (Sep. 13, 2005) at p. 7-8 (Comment 1). (Exhibit USA-55.

[542] *US-Hot Rolled Carbon Steel Flat Products (AB)*, para. 4.468.

[543] *See Aluminum Extrusions From the People's Republic of China*, 76 Fed. Reg. 18,524 (Apr. 4, 2011) (final deter.) (Exhibit CHN-32) (Aluminum Extrusions OI).

[544] *See Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 96 (Jan. 2, 2014) (final results) (Exhibit CHN-35) (Aluminum Extrusions AR1); *Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 78,784 (Dec. 31, 2014) (final results) (Exhibit CHN-36) (Aluminum Extrusions AR2); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 Fed. Reg. 59217 (Sept. 27, 2010) (final deter.) (Exhibit CHN-12) (Coated Paper OI); *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (final deter.) (Exhibit CHN-45) (Diamond Sawblades OI); *Wooden Bedroom Furniture From the People's Republic of China*, 69 Fed. Reg. 67313 (November 17, 2004) (final deter.) (Exhibit CHN-58) (Furniture OI); *Certain Oil Country Tubular Goods from the People's Republic of China*, 75 Fed. Reg. 20,335 (Apr. 19, 2010) (final deter.) (Exhibit CHN-13) (OCTG OI); *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41808 (July 19, 2010) (final deter.) (Exhibit CHN-33) (Ribbons OI); *Narrow Woven Ribbon With Woven Selvedge From the People's Republic of China*, 79 Fed. Reg. 61288 (10 October 2014) (final results) (Exhibit CHN-52) (Ribbons AR3); *Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 Fed. Reg. 34125 (June 18, 2004) (final deter.) (Exhibit CHN-53) (Retail Bags OI); *Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70997 (Dec. 8, 2004 (final deter.) (Exhibit CHN-37) (Shrimp OI); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 77 Fed. Reg. 63,791 (Oct. 17, 2012) (final deter.) (Exhibit CHN-44) (Solar OI); and *Certain New Pneumatic Off–The-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40485 (July 15, 2008) (final deter.) (Exhibit CHN-41) (Tires OI).

transactional information, or model-specific data of the cooperating party.[545] USDOC looks to the transactional information of cooperating parties because it constitutes *actual pricing behavior in the market* during this same period of time, relative to the normal value applicable to such sales. If the alleged dumping from the domestic industry's application is also reflected in sales by a cooperating party or parties, USDOC may have reasonably concluded that the non-cooperating party can also sell subject merchandise at similar prices, unless there is information to indicate otherwise. On that basis, as in the *Ribbons* investigation, USDOC determined the rate in the application has probative value for purposes of making a determination based upon facts available.[546]

478. In evaluating the available facts on the record where transactional information is used, USDOC did not simply pluck transactional information from a different, cooperating party's data and use it as facts available, or use it as a check against the rate in the application, as China seems to suggest.[547] Rather, USDOC examined whether the transactional information would provide an effective yardstick in determining whether the information being evaluated has probative value. For example, USDOC has looked at the quantities of the various sales used, and examined whether there was anything on the record pertaining to the cooperating company or its sales that otherwise indicated the transactional information was unusual or "aberrational," and thus should not be used for purposes of the evaluation.[548]

479. In the investigation of *Diamond Sawblades*, for example, USDOC examined the reliability and relevance of the information contained in the domestic industry's application by comparing that information with information obtained from cooperating parties during the course of the investigation.[549] USDOC found that [[* * *]] of the cooperating parties made transactions like the transactions that supported the domestic industry's application. In particular, USDOC found [[* * *]] made sales that would reflect dumping rates as high as, and higher than, the rates from the application. USDOC looked at the percentage of each cooperating party's sales as a percentage of total sales, finding that [[* * *]] percent of [[* * *]] sales, [[* * *]] percent of [[* * *]] sales, and [[* * *]] percent of [[* * *]] sales were like the transactions that supported the application. USDOC concluded that the application rate had

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545 *See, e.g.*, *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (final deter.) (Exhibit CHN-45) (Diamond Sawblades OI); *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41808 (July 19, 2010) (final deter.) (Exhibit CHN-33) (Ribbons OI).

546 *See, e.g.*, *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41808 (July 19, 2010) (final deter.) (Exhibit CHN-33) (Ribbons OI).

547 China's First Written Submission, paras. 690-695.

548 *See High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 26739 (May 7, 2012) (final deter.) (Exhibit CHN-14) (Steel Cylinders OI); *See also Fresh Cut Flowers from Mexico*, 61 Fed. Reg. 6812, 6814 (Feb. 22, 1996) (final results) (where Commerce declined to assign a margin based on a company's uncharacteristic business expense). (Exhibit USA-57).

549 *Corroboration of the PRC-Wide Facts Available Rate for the Final Determination in the Antidumping Duty Investigation of Diamond Sawblades and Parts Thereof from the People's Republic of China*, Carrie Blozy, (May 15, 2006). (Exhibit CHN-206).

probative value because actual pricing of other actors in the market during the same time period showed that parties made transactions like the transactions that supported the application.

480. In the investigation of *Ribbons*, USDOC examined the reliability and relevance of the information contained in the domestic industry's application by comparing that information with information obtained from the cooperating respondent, Yama Ribbons and Bows Co., Ltd. (Yama) during the course of the investigation.[550] USDOC examined model-specific data from Yama and found that [[* * *]] models had calculated dumping rates within the range of the rates from the application.[551] In fact, USDOC found that [[* * *]] models had rates that were higher than the rate contained in the application. USDOC also considered the total sales quantity represented by the [[* * *]] models, finding they represented [[* * *]] percent of Yama's total sales during the period of investigation.[552]

481. In the investigation of *Coated Paper*, once again USDOC evaluated the reliability and relevance of the information contained in the domestic industry's application.[553] In the process, USDOC revised the rate contained in the application to reflect a more accurate labor rate.[554] USDOC then compared the revised application rate to the information obtained from the sole cooperating respondent, APP-China. In particular, USDOC reviewed the description of the production processes, material inputs, and processing described in the application which indicated it was not materially different for a producer from China. USDOC analyzed the sales experience of the sole cooperating party, APP-China, finding APP-China had transactional information that demonstrated it sold the product in excess of [[* * *]].[555] Based upon its examination, therefore, USDOC concluded the application rate had probative value for purposes of the non-cooperating party, and applied the application rate as facts available.[556]

482. By contrast, where information on the record showed the selected rate was not probative, USDOC rejected the information for purposes of "facts available" as required under the U.S. law explained above. For example, in *Wood Flooring OI, Steel Cylinders OI*, and *Plywood OI*, USDOC rejected the rate contained in domestic industry's application, finding instead that information on the record indicated that rate was not reliable, and therefore could not reasonably

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[550] *Proprietary Memorandum regarding Corroboration: Final Determination of the Antidumping Duty Investigation of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, Karine Gziryan, (July 12, 2010). (Exhibit USA-57).

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

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

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

[554] *Id.* at 3, and n. 4. (Exhibit USA-60).

[555] *Id.* at 3. (Exhibit USA-60).

[556] *Id.* at 3, and n. 4. (Exhibit USA-60).

replace the missing information.[557] Unlike the situation in *China-GOES,* where there was no factual foundation, but only a naked inference to support the conclusion of a 100% utilization rate, in this case USDOC rejected facts that had a factual foundation. In other words, one part of the standard - factual foundation - was satisfied. Nonetheless, USDOC was not *prevented* from exercising special circumspection, but instead engaged in the process of checking the reliability and relevance of the particular facts it was considering by comparing it to other independent sources. In these investigations, USDOC reasonably concluded the information was not probative and therefore rejected it for use as facts available, consistent with the safeguards contained in Annex II(7).

483. These cases demonstrate there is no rule or norm of general or prospective application when USDOC selects facts available to be applied to the non-cooperating China-government entity, or any other non-cooperating party for that matter. China has failed to establish its "as such" claim. USDOC is neither *prevented* from evaluating the information on the record in selecting information to be used as facts available, nor is it *prevented* from exercising special circumspection in determining whether the information selected has probative value. Rather, these cases demonstrate that USDOC engaged in an evaluation of the information it may use as a proxy for the China-government entity's rate. At the end of the process, the information selected had a factual foundation; no substantiated fact contradicted the information selected; and nothing indicated the information selected was an unreasonable replacement for the missing information – *i.e.*, that there was no better information available on the record under the particular circumstances.

484. China attempts to impugn the manner in which USDOC has selected facts available, with a series of arguments. First, China contends that facts available "cannot be made on the basis of procedural circumstances alone, but must always be based on the facts."[558] Second, China asserts that USDOC failed to engage in comparative evaluation of the facts on the record.[559] Third, China objects to the rates selected as facts available because they are substantially higher than those of the separate rate companies.[560] Fourth, China contends that the use of certain information – *i.e.,* information in the domestic industry's application, and transactional information from cooperating parties - is flawed.[561]

485. A close examination of these arguments shows that China is aiming to have investigating authorities engage in an evidentiary proceeding to weigh the evidence on the record and make a determination based upon the weight of the evidence. Recall, the Appellate Body warning that "it would not be possible for an investigating authority to 'satisfy themselves as to the accuracy

[557] *See Multilayered Wood Flooring From the People's Republic of China*, 76 Fed. Reg. 64318, 64,322 (18 October 2011) (final deter.) (Exhibit CHN-49) (Wood Flooring OI); *High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 26739 (May 7, 2012) (final deter.) (Exhibit CHN-14) (Steel Cylinders OI); *Hardwood and Decorative Plywood from the People's Republic of China*, 78 Fed. Reg. 58,273 (Sept. 23, 2013) (final deter.) (Exhibit USA-61).

[558] China's First Written Submission, para. 645.

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

[560] China's First Written Submission, paras. 418 and 438.

[561] China's First Written Submission, paras. 439 and 688-700.

of the information' in circumstances where an interested party or Member refuses access to, or otherwise does not provide, such information."[562] Yet this is precisely what China seeks to impose. To illustrate its point, China conducts its own comparison of rates in an effort to show that USDOC's selection cannot be accurate. China's efforts are fundamentally flawed.

486. First, on the issue of procedural circumstances, China focuses on a quotation from the Appellate Body which addresses the point that determinations "cannot be made on procedural circumstances alone."[563] Instead, such determinations must be based upon facts. China, however, does not dispute that each facts available determination on the record in this dispute is supported by a factual foundation. China recognizes, as the Appellate Body observed, that "the procedural circumstances in which information is missing are *relevant* to an investigating authority's use of 'facts available'"[564] and thus may be used in selecting the facts to be applied, consistent with Annex II at paragraphs 1 and 7. In fact, China has no real objection to having investigating authorities consider the procedural circumstances in selecting the information to be used as facts available – just not the procedural circumstance of non-cooperation. Instead, the procedural circumstance China insists be taken into account is the level of cooperation of the various components of the China-government entity. As discussed fully above at section X, however, it is not impermissible to treat different companies as part of a single entity, and China does not dispute that non-cooperation is a relevant procedural circumstance that investigating authorities are permitted to take into account in selecting from the available facts under Article 6.8 and Annex II.

487. On the issue of a proper evaluation of the information on the record, USDOC considers all the information on the record, which may include, for example, information from the domestic industry's application, information obtained from cooperating parties, which includes not only these parties' calculated dumping margins, but transactional information submitted by these parties during the course of the investigation or administrative review. USDOC considers this information, as it must, but also takes into account the refusal or failure of the party to cooperate in the investigation or administrative review, as permitted under Article 6.8 and Annex II.

488. China seeks to impugn the information contained in the domestic industry's application because it formed the basis of a dumping allegation, and is not a margin of dumping. Similarly, China dismisses transactional information as not a margin of dumping. China claims the information is considered secondary. The status of such information, however, does not prohibit its use. China appears to be arguing that such information is inherently unreliable because the information is not a "margin of dumping." China's argument cannot be sustained. The purpose of the Annex II(7) is to allow authorities to use information from secondary sources provided it uses independent information to check the reliability of such information, to the extent practicable. Notably, China does not claim the transactional information provided by

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[562] *US-Hot-Rolled Carbon Steel Flat Products from India*, para. 4.418, n. 1077 (referring to Article 12.5 of the SCM Agreement, which is the parallel provision to Article 6.6 in the AD Agreement).

[563] China's First Written Submission, para. 399 (citing *US-Hot Rolled Carbon Steel (AB)*, para. 4.422).

[564] *US-Hot Rolled Carbon Steel Flat Products from India (AB)*, para. 4.426 (emphasis added).

cooperating parties does not constitute actual pricing behavior of exporters of the product under investigation during the time period in question.

489. In its further efforts to impugn USDOC evaluation and selection, China compares selected facts available rates with the rates assigned to separate rate companies, and contends these are substantially higher than the rates for separate rate parties. The rates applied to separate rate companies, however, are based upon either a simple average or weighted-average of the calculated dumping margins.[565] By contrast, the challenged rates are based upon facts selected, taking into account the party's non-cooperation, as permitted. Separate rate companies, on the other hand, provided separate rate applications - and most important – unlike the China-government entity, these parties did not fail to cooperate in the investigation, as discussed in section X above. Where the China-government entity, as a whole, fails to cooperate, the rate it received in any of the challenged determinations was no higher than it was for any other non-cooperating party.[566]

490. Nonetheless, China employs the rates applied to the separate rate parties as a yardstick to challenge the selected rates. China does not deny, however, that the selected rates reflect actual pricing behavior of cooperating companies, nor does China cite any information on the record of the challenged determinations that would indicate the actual prices supplied by the cooperating parties, and therefore the selected rates, could not reasonably replace the missing information.

491. Furthermore, nothing in Article 6.8 or Annex II speaks to the specific process to be used in selecting from among the various evidence on the record when parties refuse or otherwise fail to cooperate. Put another way, nothing prohibits investigating authorities from examining all the information on the record and then, for example, selecting facts that may be less favorable, and evaluating those facts using independent information or data on the record to check the reliability of such information. As the Appellate Body found, the use of an adverse inference is not inconsistent with the facts available provisions, provided the selection meets the express legal standard.[567] In each challenged determination, USDOC met that standard, as discussed in the next section. Each determination provided a reasoned basis. The rates selected were based upon a factual foundation. No substantiated fact on the record contradicted the selected rates. Nor is there any information on the record of those determinations that showed the selected rates were not the best or most appropriate facts available for the non-cooperating party.

492. Based on the foregoing, the United States requests that the Panel find China has failed to establish that a norm or rule of general and prospective application exists, or is otherwise inconsistent with Article 6.8 of the AD Agreement.

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[565] *See, e.g.*, *Multilayered Wood Flooring From the People's Republic of China*, 76 Fed. Reg. 64318, 64,322 (18 October 2011) (final deter.) ("The separate rate is normally determined based on the weighted average of the estimated dumping margins established for exporters and producers individually investigated, excluding zero and *de minimis* margins or margins based entirely on adverse facts available.") (Exhibit CHN-49).

[566] *See, e.g.*, *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 78 Fed. Reg. 10130 (Feb. 13, 2013) (final results) (Exhibit CHN-51) (Ribbons AR1).

[567] *US-Hot-Rolled Carbon Steel from India (AB)*, para. 4.469.

2. China's Remaining "As Such" Arguments Must Fail

493. The next two aspects of China's as such claim must fail. First, China argues that:

> [E]ven were it permissible (*quod non*) under Article 6.8 and Annex II(7) to select *adverse* facts that are not the best facts available, the norm also prevents USDOC from properly exercising 'special circumspection'. Specifically, pursuant to the norm, USDOC selects adverse facts from the universe of secondary source information on the basis of the "procedural circumstance" of non-cooperation alone – a circumstance that is, moreover, frequently based on *presumption* rather than fact.[568]

Second, China argues that "as a result of the Use of Adverse Facts Available norm, USDOC resorts to adverse facts available even where it failed to request the necessary information."[569] It appears that these two arguments are actually related to USDOC's initial decision to apply facts available, *i.e.*, its finding that the China-government entity is non-cooperative on the basis of the non-cooperation of one or more companies within the China-government entity. If so, these "as such" arguments must be rejected because they are outside of the panel's terms of reference, and are not otherwise identified by China as being part of a rule or norm of general and prospective application. In any event, as demonstrated in the next section, USDOC's decision to apply facts available to the China-government entity is based on the facts and circumstances of each proceeding and is consistent with Article 6.8 and Annex II of the AD Agreement.

494. As an initial matter, China's claims are inconsistent with DSU Article 6.2 because China did not raise these claims on an "as such" basis in its panel request consistent. Article 6.2 of the DSU "serves a pivotal function in WTO dispute settlement." It provides in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly....

Compliance with Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances."[570] The Appellate Body has observed that Article 6.2 has "two distinct requirements," namely:

> a) Identification of the specific measures at issue; and
> b) The provision of a brief summary of the legal basis of the complaint.[571]

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

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

[570] *US – Carbon Steel (AB)*, para. 127.

[571] *Australia – Apples (AB)*, para. 416.

These elements comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under Article 7.1 of the DSU.[572] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[573]

495. Here, China explained that "[f]or purposes of this request, the measures at issue include the determinations and related measures listed in Annex 4, in which the USDOC applied practices described in paragraph 18 above."[574] Thus, China argued that these alleged practices as applied in the determinations listed in Annex 4 were inconsistent with Article 6.8 and Annex II of the AD Agreement for the following reasons: [575]

> Article 6.8 and Annex II, because, *inter alia*, with regard to the failure to request information and the failure to provide rights of defense in the challenged measures, the USDOC did not specify in detail the information required from all interested parties, and, with regard to the recourse to facts available in the challenged measures, the USDOC resorted to facts available in making dumping determinations without having requested from the interested parties the information necessary to make such determinations;
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> Article 6.8 and Annex II, because, *inter alia*, with regard to the recourse to facts available in the challenged measures, the USDOC did not assess the facts properly and objectively in finding that the NME-wide entity failed to cooperate in providing information necessary to determine a margin of dumping for that entity, failed to use the best information available, and failed to exercise special circumspection when basing its findings on information from secondary sources;[576]

496. Separately, under the next section of its panel request, China described the alleged norm which it intended to challenge on an as such basis:

> 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 the USDOC's approach as the "Use of Adverse Facts Available".[577]

497. China thus drew a distinction between USDOC's decision to apply facts available to the China-government entity, *i.e.*, USDOC's finding of non-cooperation of the China-government

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[572] *Id.*

[573] *Id.*

[574] *Id.* para. 19.

[576] *Id.* para. 20(b) and (c).

[577] *Id.* paras. 21-26.

entity based on the non-cooperation of one or more companies within the entity, which China challenged on an as applied basis,[578] and the separate issue of USDOC's use of facts available in assigning a rate to the China-government entity, which China challenged on an as such basis.[579]

498. As discussed above in Section A.2, China's first written submission at first appears to adhere to this distinction by describing the precise content of the alleged norm or rule of general and prospective application as only relating to USDOC's use of facts available in assigning a rate to the China-government entity.[580] China further clarified throughout its submission that it does not allege that USDOC's decision to apply facts available, *i.e.*, its determination that the China-government entity is non-cooperative on the basis of the non-cooperation of one or more companies within the China-government entity, forms part of the alleged "Use of Facts Available Norm", but rather, is the "trigger condition" for that norm.[581]

499. However, China raises arguments related to USDOC's decision to apply facts available to the China-government entity in its "as such" arguments. As discussed in Section VI.D.3(a)(ii)-(iii) of its first written submission, China argues that 1) USDOC fails to exercise special circumspection because it selects "adverse" facts from the universe of secondary source information on the basis of the 'procedural circumstance' of non-cooperation alone – a circumstance that is, moreover, frequently based on *presumption* rather than fact"[582] and 2) USDOC's resort to facts available where it allegedly failed to request the necessary information,[583] are as such inconsistent with Article 6.8 and Annex II. But these arguments are actually challenging USDOC's decision to apply facts available to the entity, which, as discussed above, form the as applied arguments raised in China's panel request.[584] These arguments are also not part of the alleged norm which China purports to challenge,[585] but rather, are related to the "trigger" condition for the norm described above. Thus, to the extent that China argues that USDOC's decision to apply facts available to the China-government entity, based on the non-

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578 China's panel request, paras. 20(b) and (c).

579 *Id.* paras. 21-26.

580 *See* China's First Written Submission, para. 436-438.

581 *Id.* para. 436 ("China emphasizes that a finding of non-cooperation is the trigger for the Use of Adverse Facts Available norm."); *Id.* para. 461 (noting that in one sample proceeding, Commerce "did not make a finding of non-cooperation by the NME-wide entity, such that the Use of Adverse Facts Available norm was not triggered."); *Id.* para. 465 (discussing instances in which the Use of Adverse Facts Available norm was not triggered in the sample proceedings.); *Id.* para. 480 ("Pursuant to the Use of Adverse Facts Available norm, a finding of non-cooperation by an NME-wide entity is the trigger for USDOC's selection of adverse facts in order to set the rate for the NME-wide entity, including all the producers/exporters within that fictional entity."); *Id.* 493 ("China has demonstrated that USDOC's findings of non-cooperation by an NME-wide entity – the trigger condition for application of the Use of Adverse Facts Available norm – are typically based on presumptions."); *Id.* 496 ("China first shows that in each of these 13 challenged investigations and 13 challenged reviews, USDOC found non-cooperation, based on presumptions, and thus, consistent with the Use of Adverse Facts Available norm, triggered recourse to facts available….").

582 China's First Written Submission para. 646 (emphasis in original). *See* also *id.* paras. 458-462, 480-491, and 645-660, and Table AFA2 in Annex 10 and Table AFA3 in Annex 11.

583 *Id.* paras. 475-479 and 661-666.

584 China's panel request, paras. 20(b) and (c).

585 China's First Written Submission, para. 436-438

cooperation of one or more companies within the China-government entity, and USDOC's alleged failure to request necessary information before resorting to facts available, are as such inconsistent with Article 6.8 and Annex II, the Panel should reject these claims because they lack a basis in the Panel Request.

500. As the Appellate Body has observed, "[a] defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defense," as are potential third-parties.[586] To allow China to expand its arguments with respect to USDOC's decision to apply facts available to the China-government entity request from an as applied claim to an as such claim would defeat the purpose of the Article 6.2 protections to ensure procedural fairness. For this reason, the panel should find that these "as such" claims are beyond its terms of reference in accordance with Articles 6.2 and 7.1 of the DSU.

501. Furthermore, by its very description of these alleged practices, China fails to demonstrate a norm or rule of general and prospective application that may be challenged on an as such basis. For instance, China argues that "USDOC selects adverse facts from the universe of secondary source information on the basis of the 'procedural circumstance' of non-cooperation alone – a circumstance that is, moreover, frequently based on *presumption* rather than fact."[587] However, by arguing that determinations of non-cooperation are "frequently" based on presumption rather than fact, China concedes that there are instances in which China agrees that USDOC's findings of non-cooperation of the China-government entity are supported by the factual record.[588] In arguing that USDOC fails to request the necessary information before resorting to facts available, China also states that USDOC "typically" includes two categories of companies in the China-government entity.[589] Thus, China's own characterization of the possible instances which lead USDOC to find non-cooperation of the China-government entity does not demonstrate any rigid application, but rather, demonstrates that a finding of non-cooperation is based on the facts and circumstances at hand. This is further demonstrated below in Section D.1 where we explain that USDOC's decision to apply facts available to the China-government entity is based on the facts and circumstances in each proceeding, and such findings are consistent with Article 6.8 and Annex II. In sum, China has not demonstrated that there is a rule which always leads USDOC to apply facts available to the China-government entity.

502. In addition, because China has failed to show that USDOC's decision to apply facts available is a norm or rule of general and prospective application, the Panel should disregard China's numerous arguments regarding USDOC's alleged systematic use of "presumptions rather than fact" in reaching a decision to apply facts available to the China-government entity.[590] Thus, China's sample of USDOC's NME proceedings (discussed in Annex 9) and related tables should be disregarded for this reason as well. For instance, China provides Tables

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[586] *Thailand – Steel (AB)*, para. 88.

[587] *Id.* para. 646 (emphasis in original). *See* also *Id.* paras. 458-462, 480-491, and 645-660, and Table AFA2 in Annex 10 and Table AFA3 in Annex 11.

[588] We address this argument in further detail in Section D.1 below.

[589] China's First Written Submission, para. 661. *See* also *Id.* paras. 475-479 and 661-666. This argument is addressed below in Section D.1.

[590] *See id.* paras. 458-462, 480-491, and 645-660, and Table AFA2 in Annex 10 and Table AFA3 in Annex 11.

AFA2 and AFA3 in Annexes 10 and 11, which purportedly show that USDOC relies on certain presumptions in making its determination to apply facts available to the NME-government entity in investigations and reviews. However, as established above, USDOC's decision to apply facts available based on a finding of non-cooperation of the China-government entity is not within the scope of China's as such claims. Likewise, the Panel should find that any as such arguments regarding USDOC's alleged failure to request necessary information before it resorts to facts available must fail because these are not within the scope of China's as such claims.[591]

D. China Has Not Established Its As-Applied Claims Because USDOC's Use of Facts Available For The PRC Entity And USDOC's Use of Facts Available In Assigning Rates To The China-Government Entity Is Consistent With Article 6.8 and Annex II In 19 Of The Challenged Determinations

503. China argues that USDOC's application of facts available and its selection of facts in assigning a rate to the China-government entity is inconsistent with Article 6.8 and Annex II in the 26 challenged determinations at issue. The United States first addresses China's arguments with respect to USDOC's application of facts available. In particular, the United States addresses China's argument that in order to apply a facts available rate to the China-government entity, USDOC must first request information pertaining to the calculation of a dumping margin from each producer/exporter within the China-government entity. China also argues that USDOC's determination to apply facts available to the China-government entity was "frequently" based on presumptions, rather than facts. As demonstrated below, China's claims with respect to 19 of the challenged determination are without merit, and USDOC's determinations in these proceedings are consistent with Article 6.8 and Annex II.

504. Second, we demonstrate that with respect to 7 reviews out of the group of 26 determinations which China challenges, USDOC did not apply facts available to the China-government entity, but merely pulled-forward the rate that was previously applied to the China-government entity. Because there was no finding of facts available, China has not demonstrated that it can challenge these 7 determinations as inconsistent with Article 6.8 and Annex II.

505. Lastly, the United States addresses China's allegation that USDOC's use of facts available was inconsistent with Article 6.8 and Annex II of the AD Agreement "as applied" in 19 challenged determinations.[592] An examination of USDOC's analysis in these determinations, demonstrates that each determination is consistent with Article 6.8 and Annex II.

1. USDOC's Determinations in the 26 Challenged Determinations to Apply Facts Available To The China-government Entity Were Consistent With Article 6.8 And Annex II In 19 Of The Challenged Determinations

506. China argues that in each of the 26 challenged determinations, USDOC determined a rate for the China-government entity without requesting or giving notice to each company within the China-government entity of all the information that would allow USDOC to calculate a margin

[591] *See id.* paras. 475-479 and 661-666.

[592] China's First Written Submission, para. 674.

of dumping.[593] We demonstrate below that based on a correct interpretation of Article 6.8 and Annex II, and based on the facts of each proceeding in which USDOC applied facts available, USDOC notified companies within the China-government entity of the necessary information required, and appropriately determined that a failure to respond to this request for information warranted the use of facts available for the China-government entity. China also argues that USDOC's application of facts available to the China-government entity is frequently based on "presumptions" rather than facts.[594] We demonstrate below that, contrary to China's arguments, where USDOC applied facts available to the China-government entity this determination was adequately supported by the facts of the proceeding.

507. As an initial matter, we recall a few key points from Section B.2 which demonstrate that China's claims rest on faulty legal interpretations of Article 6.8 and Annex II.

508. First, as demonstrated in Section XX, USDOC, consistent with the AD Agreement, may treat the export activity of multiple companies within China as the pricing behavior of a single entity, *i.e* the China-government entity, and therefore is permitted to calculate a single dumping margin for the China-government entity. Otherwise, the China-government entity could potentially shift its exports through the company within the China-government entity that is assigned the lowest rate. This possibility would create a perverse incentive for companies within the China-government entity to not cooperate, and would render the provisions of Article 6.8 and Annex II of the AD Agreement meaningless.

509. Second, in determining the rate to apply to the China-government entity, USDOC does not consider the information provided by just one company within the China-government entity, but rather, it must consider the information provided by all companies within the China-government entity subject to the particular investigation or review at issue. Likewise, if certain companies within the China-government entity do not provide requested information, USDOC must determine what this means for the China-government entity. Nothing in Article 6.8 prohibits this determination.

510. Third, Article 6.8 allows USDOC to resort to facts available if "any interested party" does not respond to a request for "necessary information" or otherwise significantly impedes the proceeding. Annex II also provides that the investigating authority must notify the interested parties of the specific information required. As discussed above, these provisions do not specify that facts available may be applied only to those parties that were issued and failed to respond to a dumping questionnaire. Thus, USDOC may appropriately find that a failure to respond to an initial request for information—before USDOC issues a dumping questionnaire—which is a necessary first step in USDOC's determination may result in the application of facts available. The application of facts available in such an instance is permissible so long as the investigating authority had notified the interested parties of the information required, and specified in detail the information required.

511. Thus, as discussed in further detail below, where a company within the China-government entity has been notified of and fails to respond to an initial request for quantity and

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[593] *See* generally *id.* paras. 413-417 and 625-637 and Table NME1 in Annex 3.

[594] *See generally id.* paras. 480-491, 497-502, 670-673, and 679-682, and Table NME4 in Annex 6.

value information, the investigating authority may find that that company, and by extension, the China-government entity, failed to respond to a request for necessary information and otherwise significantly impeded the proceeding. Alternatively, where a company within the China-government entity has been notified of and failed to provide requested information pertaining to the actual calculation of a dumping margin, the investigating authority may find that that company, and by extension, the China-government entity, failed to respond to a request for necessary information and also may have significantly impeded the proceeding. In addition, a failure of the government to respond to a request for information may lead the investigating authority to find that the China-government entity has failed to cooperate, and to rely on facts available in assigning a rate to the China-government entity.

512. Fourth, China's reliance on *EC – Fasteners* for its argument that USDOC must request information pertaining to the calculation of a dumping margin from all members of the China-government entity[595] is misplaced. The Appellate Body's conclusions, which were based in part on the European Union's distinctions between significant and non-significant cooperation of the members of the China-government entity, is not applicable because USDOC does not have such distinctions. For instance, USDOC may find that there are *no* cooperative members of the China-government entity. In such instances, nothing in the Appellate Body's statement precludes the use of facts available to determine a rate for the China-government entity. Moreover, in *EC – Fasteners* the Appellate Body did not foreclose the possibility that an investigating authority may need to rely on facts available consistent with Article 6.8 if it did not have the necessary information to calculate a dumping margin for the China-government entity because of the non-cooperation of *all* or nearly *all* companies within the China-government entity.[596]

513. Thus, under a proper interpretation of Article 6.8 and Annex II, we demonstrate that USDOC's application of facts available to the China-government entity in all 13 investigations and in 6 reviews is consistent with Article 6.8 and Annex II. As an initial matter, we note that in each of these proceedings, USDOC's decision to apply facts available to the China-government entity was based on the failure of one or more companies within the China-government entity to 1) respond to an initial request for quantity and value information, and/or 2) respond to a request for information pertaining to the calculation of a dumping margin, and/or 3) in some of these proceedings, the decision to apply facts available to the China-government entity was also based on the failure of the government to respond to a request for information. In addition, in some of

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595 China's First Written Submission, para. 553 ("For instance, in order to calculate a margin of dumping for an individual producer/exporter, an authority would require, amongst other things, all of the detailed information required to determine normal value and export price for that producer/exporter. This includes data pertaining to all of the export sales realized by that producer/exporter. If the authority collapses more than one individual exporter/producer into a single group, then to calculate a margin for that group, the authority requires all of this information from the group as a whole, since, as clarified by the Appellate Body 'only a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for {a} single entity that is composed of several legally distinct exporters'". (quoting Appellate Body Report, *EC – Fasteners*, para. 384)).

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

these cases USDOC determined that the failure to provide requested information significantly impeded the proceeding such that resort to facts available in determining the dumping margin for the China-government entity was appropriate.

514. For each of these three scenarios, we first demonstrate that, contrary to China's argument,[597] USDOC properly notified companies within the China-government entity of the necessary information required before resorting to facts available. Second, we demonstrate that, consistent with Article 6.8 and Annex II, in each of these proceedings USDOC appropriately determined that a company within the China-government entity, and by extension, the China-government entity, failed to respond to a request for necessary information and, in some cases, significantly impeded the proceeding. In other words, we demonstrate that, contrary to China's arguments, USDOC's use of facts available for the China-government entity was not based on the "procedural circumstances of non-cooperation" or mere presumptions,[598] but rather, appropriately took into account the factual circumstances of each proceeding. Moreover, we demonstrate that, in light of this non-cooperation of the entity, USDOC was not required to request specific information regarding the calculation of a dumping margin from each company within the China-government entity.[599]

a. *USDOC's Applications of Facts Available To The PRC Entity Because Certain Members of the Entity Failed To Respond To A Request For Quantity And Value Information Was Consistent With Article 6.8 and Annex II*

515. In 12 investigations (Aluminum Extrusions OI, Coated Paper OI, OCTG OI, Ribbons OI, Solar OI, Steel Cylinders OI, Tires OI, Wood Flooring OI, Diamond Sawblades OI, Shrimp OI, Furniture OI, and Retail Bags OI) and in 1 review (Ribbons AR3), USDOC's determinations to apply facts available to the China-government entity were based (in part or in full) on the failure of certain companies within the China-government entity to respond to an initial request for quantity and value information, despite having notice of the request for this necessary information. In light of this initial failure to cooperate, as demonstrated below, USDOC was not required to send to all companies within the China-government entity a request for information pertaining to the calculation of a dumping margin. Moreover, the determinations to apply facts available to the China-government entity were adequately supported by the facts on the record, and was not based on the "procedural circumstances" of non-cooperation, or mere presumptions.

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[597] *See* China's First Written Submission, paras. 413-417 and 625-637.

[598] Because we demonstrate below that Commerce's determination to apply facts available to the China-government entity was supported by the facts and circumstances of each proceeding, the Panel should disregard in its entirety Table NME4 in Annex 6 of China's First Written Submission in which China alleges that Commerce relied on a series of "presumptions", rather than facts, in reaching these determinations. For the same reason, the Panel should also disregard China's characterization of these "presumptions" in paragraphs 480-491, 497-502, 670-673, and 679-682 of its first written submission.

[599] Because we demonstrate that in each proceeding Commerce was not required to request the specific information related to the calculation of dumping from each company within the China-government entity, the Panel should disregard Table NME1 in Annex 3 of China's First Written Submission.

516. In 8 investigations (Aluminum Extrusions OI, Coated Paper OI, OCTG OI, Ribbons OI, Solar OI, Steel Cylinders OI, Tires OI, and Wood Flooring OI), USDOC notified parties in the Federal Register initiation notice of the process through which it would select companies for individual examination (*i.e.*, mandatory respondents), also known as respondent selection.[600] USDOC indicated that it intended to request quantity and value information from known exporters and producers identified in the application from the domestic industry, and, from this information, USDOC would then select companies for individual examination.[601] USDOC also notified parties that to receive consideration for separate-rate status, they must provide a response to the quantity and value questionnaire and the separate-rate application by the applicable deadlines.[602] The initiation notice also notified parties that the quantity and value questionnaire and the separate rate application, along with the filing instructions, would be available on USDOC's website.[603] USDOC also placed a letter on the record of its proceeding indicating its request for quantity and value information, which further instructed parties of the consequences of not providing this information.[604]

517. In these 8 investigations, USDOC issued a request for quantity and value information to those companies identified in the application, posted the quantity and value questionnaire on the website, and received a varying degree of responses.[605] As noted above, USDOC stated in its initiation notice for these investigations that parties that did not respond to the quantity and value questionnaire would not be in a position to demonstrate their independence from the China-

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600 Aluminum Extrusions OI, Initiation, 75 Fed. Reg. at 22112-13 (Exhibit CHN-185); Coated Paper OI, Initiation, 74 Fed. Reg. at 53714-15 (Exhibit CHN-184); OCTG OI, Initiation, 74 Fed. Reg. at 20676 (Exhibit CHN-182); Ribbons OI, Initiation, 74 Fed. Reg. at 39296-97 (Exhibit CHN-178); Solar OI, Initiation, 76 Fed. Reg. at 70964 (Exhibit CHN-181); Steel Cylinders OI, Initiation, 76 Fed. Reg. at 33216-17 (Exhibit CHN-180); Tires OI, Initiation, 72 Fed. Reg. at 43594-95 (Exhibit CHN-183); Wood Flooring OI, Initiation, 75 Fed. Reg. at 70717-18 (Exhibit CHN-179).

601 *See id.*

602 *See id.*

603 *See id.*

604 *See* Coated Paper OI, Letter to Interested Parties at 1 (Oct. 14, 2009) (Exhibit USA-62) ("If you fail to respond or fail to provide the requested quantity and value information, please be aware that the Department may find that you failed to cooperate by not acting to the best of your ability to comply with the request for information, and may use an inference that is adverse to your interests in selecting from the facts otherwise available, in accordance with section 776(b) of the Tariff Act of 1930, as amended."); OCTG OI, Letter to Interested Parties at 1 (April 30, 2009) (Exhibit USA-63); Ribbons OI, Memorandum to File with Letter to Interested Parties at 3 (July 30, 2009) (Exhibit USA-64); Steel Cylinders OI, Letter to Interested Parties at 1 (June 1, 2011) (Exhibit USA-65); Tires OI, Letter to Interested Parties at 1 (July 30, 2007) (Exhibit USA-66) ("[T]he Department will not give consideration to any separate rate-status application made by parties that failed to respond to this questionnaire within the established deadline."); Wood Flooring OI, Letter to Interested Parties at 1 (November 12, 2010) (Exhibit USA-67); Solar OI, Memo To File at Attachment 1 (December 8, 2011) (Exhibit USA-68); Aluminum Extrusions OI, Letter to Interested Parties at 1 (April 27, 2010) (Exhibit USA-69).

605 Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111); Coated Paper OI, Preliminary Determination, 75 Fed. Reg. at 24900 (Exhibit CHN-63); OCTG OI, Preliminary Determination, 74 Fed. Reg. at 59124 (Exhibit CHN-62); Ribbons OI, Preliminary Determination, 75 Fed. Reg. 7244-45, 7250 (Exhibit CHN-170); Solar OI, Preliminary Determination, 77 Fed. Reg. at 31309, 31317 (Exhibit CHN-241); Steel Cylinders OI, Preliminary Determination, 76 Fed. Reg. at 77965, 77970 (Exhibit CHN-65); Tires OI, Preliminary Determination, 73 Fed. Reg. at 9278-79, 9285 (Exhibit CHN-122); Wood Flooring OI, Preliminary Determination, 76 Fed. Reg. at 30661-62 (Exhibit CHN-158). *See* also supra note 603.

government entity.[606] Thus, USDOC determined that those companies that did not respond to a direct request for quantity and value information were not only ineligible to be selected as a mandatory respondent, but also were no longer in a position to demonstrate their independence from the China-government entity.[607]

- For instance, in Aluminum Extrusions OI, USDOC issued a request for quantity and value information to 130 potential Chinese exporters or producers of subject merchandise and received 45 timely responses, which provided information for only 49 producers/exporters.[608] Because certain companies failed to respond to this initial request for information, USDOC determined that these companies were part of the China-government entity.[609]

518. In the remaining 4 investigations (Diamond Sawblades OI, Shrimp OI, Furniture OI, and Retail Bags OI), USDOC published a notice of initiation of the investigation in the Federal Register,[610] and it notified interested parties of its intent to select mandatory respondents through a direct request for quantity and value information.[611] Through this direct request, USDOC also notified parties of the consequences of not providing this information.[612] USDOC also received a varying degree of responses.[613] USDOC determined that those companies that failed to respond to a direct request for quantity and value information were not only ineligible to be

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[606] *See* supra note 603.

[607] *See* supra note 608.

[608] Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111).

[609] *Id.*

[610] Diamond Sawblades OI, Initiation, 70 Fed. Reg. at 35625 (Exhibit CHN-186); Shrimp OI, Initiation, 69 Fed. Reg. at 3876 (Exhibit CHN-187); Furniture OI, Initiation, 68 Fed. Reg. at 70228 (Exhibit CHN-189); Retail Bags OI, Initiation, 68 Fed. Reg. at 42002 (Exhibit CHN-188).

[611] *See* Diamond Sawblades OI, Sample Letter to Interested Parties (June 21, 2005) (Exhibit USA-70); Shrimp OI, Letter to Interested Parties (January 29, 2004) (Exhibit USA-71); Furniture OI, Letter to Interested Parties (December 30, 2003) (Exhibit USA-72); Retail Bags OI, Letter to Interested Parties (July 14, 2003) (Exhibit USA-73).

[612] *See* Diamond Sawblades OI, Sample Letter to Interested Parties at 2 (June 21, 2005) (Exhibit USA-70) ("[T]he Department will not give consideration to any separate rate-status application made by parties that were issued a Q&V questionnaire by the Department but failed to respond to this questionnaire within the established deadline."); Shrimp OI, Letter to Interested Parties at 1 (January 29, 2004) (Exhibit USA-74) ("[F]ailure to provide a timely, complete, and accurate responses to this questionnaire may result in our proceeding with this investigation on the basis of facts otherwise available, including adverse facts available."); Furniture OI, Letter to Interested Parties at 1 (December 30, 2003) ("Please be advised that receipt of this letter does not indicate that you will be chosen as a mandatory respondent or guaranteed separate rates status") (Exhibit US-72); Retail Bags OI, Letter to Interested Parties at 2 (July 14, 2003) (Exhibit USA-73) ("[A]ny undue delay or lack of response will result in our proceeding with our determination based on the facts available.").

[613] Diamond Sawblades OI, Preliminary Determination, 70 Fed. Reg. at 77121-22, 77128 (Exhibit CHN-135); Shrimp OI Preliminary Determination, 69 Fed. Reg. at 42655 (Exhibit CHN-215); Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35313, 35320-21 (Exhibit CHN-283); Retail Bags OI, Preliminary Determination, 69 Fed. Reg. at 3545, 3548 (Exhibit CHN-267).

selected as a mandatory respondent, but also were no longer in a position to demonstrate their independence from the China-government entity.[614]

- For example, in Diamond Sawblades OI, USDOC issued a request for quantity and value information to 23 potential Chinese exporters or producers of subject merchandise listed in the application.[615] USDOC also sent a request to MOFCOM and the Bureau of Fair Trade for Imports & Exports asking the government to transmit USDOC's request for information to all Chinese companies that manufacture and export subject merchandise to the United States.[616] USDOC received timely responses from 25 interested parties, 17 of whom had not been issued a quantity and value questionnaire.[617] 13 companies to which USDOC sent its request failed to respond, as did MOFCOM and Bureau of Fair Trade for Imports & Exports.[618] In addition, USDOC had information that indicated there were more exporters than had responded to the quantity and value questionnaire. Because certain companies failed to respond to this initial request for information, USDOC determined that these companies were part of the China-government entity.[619]

519. In one review, Ribbons AR3, USDOC notified interested parties of its intent to select mandatory respondents through a direct request for quantity and value information. USDOC issued a request for quantity and value information to 15 companies for which a review had been requested and one of those companies (Bestpak Gifts & Crafts Co., Ltd.) did not respond.[620] Further, that same company did not file a separate rate certification demonstrating its independence from the China-government entity.[621] Thus, USDOC determined that company was part of the China-government entity.[622]

520. As demonstrated, in these 12 investigations and 1 review, USDOC properly gave notice to companies within the China-government entity of the necessary information required, *i.e.*, provided notice of its request for quantity and value information and the consequences of not providing this information, consistent with Article 6.8 and Annex II.[623] In each of these 12 investigations and 1 review a company within the China-government entity had been notified of and failed to respond to an initial request for quantity and value information.[624] Therefore,

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[614] *See supra* note 569.

[615] Diamond Sawblades OI, Preliminary Determination, 70 Fed. Reg. at 77121 (Exhibit CHN-135).

[616] *Id.* at 77122.

[617] *Id.* at 77,122 and 77,128.

[618] *Id.*

[619] *Id.*

[620] *See* Ribbons AR3, Preliminary Results, Preliminary Decision Memorandum at 6-9 (Exhibit CHN-156).

[621] *Id.*

[622] *Id.*

[623] *See* notes 600-607, 610-614, 620-622 and accompanying text.

[624] *See id.*

USDOC appropriately determined that the company, and by extension, the China-government entity, had failed to respond to a request for necessary information[625] and, in some of these proceedings, had significantly impeded the progress of the proceeding.[626] In some of these proceedings, the determination to apply facts available to the China-government entity was also based in part on the failure of a mandatory respondent to respond to a request for information,[627] and/or based on the failure of the government to respond to a request for information.[628] These instances will be discussed in further detail in the next two sections.

[625] Diamond Sawblades OI, Final Determination, 71 Fed. Reg. at 29308 (Exhibit CHN-45); Retail Bags OI, Preliminary Determination, 69 Fed. Reg. at 3548 (Exhibit CHN-267), unchanged in Retail Bags OI, Final Determination, 69 Fed. Reg. at 34127 (Exhibit CHN-53); Shrimp OI, Preliminary Determination, 69 Fed. Reg. 42662 (Exhibit CHN-215), unchanged in Shrimp OI, Final Determination, 69 Fed. Reg. at 70997 (Exhibit CHN-37); Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463); Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18529 (Exhibit CHN-32); Coated Paper OI, Preliminary Determination, 75 Fed. Reg. at 24900 (Exhibit CHN-63), unchanged in Coated Paper OI, Final Determination, 75 Fed. Reg. at 59220-21 (Exhibit CHN-12); OCTG OI, Preliminary Determination, 74 Fed. Reg. at 59124 (Exhibit CHN-62), amended in OCTG OI, Final Determination, 74 Fed. Reg. at 20339 (Exhibit CHN-13); Ribbons OI, Preliminary Determination, 75 Fed. Reg. 7244-45, 7250 (Exhibit CHN-170), unchanged in Ribbons OI, Final Determination, 75 Fed. Reg. at 41810 (Exhibit CHN-33); Solar OI, Preliminary Determination, 77 Fed. Reg. at 31309, 31317 (Exhibit CHN-241), unchanged in Solar OI, Final Determination, 77 Fed. Reg. at 63794 (Exhibit CHN-44); Steel Cylinders OI, Preliminary Determination, 76 Fed. Reg. at 77965, 77970 (Exhibit CHN-65), unchanged in Steel Cylinders OI, Final Determination, 77 Fed. Reg. at 26741 (Exhibit CHN-14); Tires OI, Preliminary Determination, 73 Fed. Reg. at 9278-79, 9285 (Exhibit CHN-122), unchanged in Tires OI, Final Determination, 73 Fed. Reg. at 40488 (Exhibit CHN-41); Wood Flooring OI, Preliminary Determination, 76 Fed. Reg. at 30661-62 (Exhibit CHN-158), unchanged in Wood Flooring OI, Final Determination, 76 Fed. Reg. at 64322 (Exhibit CHN-49); Ribbons AR3, Preliminary Results, Preliminary Decision Memorandum at 6-9 (Exhibit CHN-156), unchanged in Ribbons AR3, Final Results, 79 Fed. Reg. at 61289 (Exhibit CHN-52).

[626] Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463); Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18529 (Exhibit CHN-32); Coated Paper OI, Preliminary Determination, 75 Fed. Reg. at 24900 (Exhibit CHN-63), unchanged in Coated Paper OI, Final Determination, 75 Fed. Reg. at 59220-21 (Exhibit CHN-12); OCTG OI, Preliminary Determination, 74 Fed. Reg. at 59124 (Exhibit CHN-62), amended in OCTG OI, Final Determination, 74 Fed. Reg. at 20339 (Exhibit CHN-13); Tires OI, Preliminary Determination, 73 Fed. Reg. at 9278-79, 9285 (Exhibit CHN-122), unchanged in Tires OI, Final Determination, 73 Fed. Reg. at 40488 (Exhibit CHN-41).

[627] Diamond Sawblades OI, Final Determination, 71 Fed. Reg. at 29308 (Exhibit CHN-45); Retail Bags OI, Preliminary Determination, 69 Fed. Reg. at 3548 (Exhibit CHN-267), unchanged in Retail Bags OI, Final Determination, 69 Fed. Reg. at 34127 (Exhibit CHN-53); Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463); Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18529 (Exhibit CHN-32); Coated Paper OI, Preliminary Determination, 75 Fed. Reg. at 24900 (Exhibit CHN-63), unchanged in Coated Paper OI, Final Determination, 75 Fed. Reg. at 59220-21 (Exhibit CHN-12); OCTG OI, Preliminary Determination, 74 Fed. Reg. at 59124 (Exhibit CHN-62), amended in OCTG OI, Final Determination, 74 Fed. Reg. at 20339 (Exhibit CHN-13); Ribbons OI, Preliminary Determination, 75 Fed. Reg. 7244-45, 7250 (Exhibit CHN-170), unchanged in Ribbons OI, Final Determination, 75 Fed. Reg. at 41810 (Exhibit CHN-33).

[628] Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91

521. Contrary to China's arguments, these determinations to apply facts available to the China-government entity were based on the factual circumstances of each proceeding, and were not based on the "procedural circumstances of non-cooperation" or mere presumptions. Nor was USDOC required to request from each company within the China-government entity information related to the calculation of a dumping margin. As established above, because the China-government entity must receive the same rate, USDOC considered the non-cooperation of the companies within the China-government entity in determining a rate for the China-government entity.[629] As discussed above, this request for initial quantity and value information was a necessary first step in USDOC's proceeding, and without this information it could not make an informed decision regarding its selection of mandatory respondents. Moreover, the AD Agreement does not require USDOC to request new information after a party has already demonstrated a failure to provide any of the requested information. Otherwise, parties would be free to select what questionnaires they will and will not respond to, and thereby potentially manipulate USDOC's proceeding. Article 6.8 does not require USDOC to continue to request from that producer/exporter within the China-government entity, or the China-government entity, information, including information related to the calculation of a dumping margin. The company, and, by extension, the China-government entity, has already demonstrated a failure to cooperate by failing to respond to an initial request for necessary information. Thus, consistent with Article 6.8 and Annex II, USDOC appropriately determined that the China-government entity had failed to cooperate at this stage of the proceeding, and resorted to facts available in determining a dumping margin for the China-government entity.

522. In addition, in each of the 12 investigations, USDOC had information demonstrating that there were more exporters in existence that had not responded to its request for quantity and value information.[630] For instance, in Aluminum Extrusions OI, USDOC issued a request for quantity and value information to 130 potential Chinese exporters or producers of subject merchandise and received 45 timely responses, which provided information for only 49 producers/exporters.[631] In another example, Shrimp OI, USDOC issued a request for quantity and value information from the 9 potential Chinese exporters or producers listed in the application, and also sent a letter to the Commercial Secretary of the People's Republic of China requesting its assistance in transmitting the request for quantity and value information to all known producers and exporters.[632] USDOC received information from 57 Chinese exporters, however, record evidence demonstrated that there were other companies in existence that failed to respond to USDOC's request for information.[633]

523. In such instances, Article 6.8 does not require USDOC to continue to request from an uncooperative company within the China-government entity, or the China-government entity,

(Exhibit CHN-463); Shrimp OI, Preliminary Determination, 69 Fed. Reg. 42662 (Exhibit CHN-215), unchanged in Shrimp OI, Final Determination, 69 Fed. Reg. at 70997 (Exhibit CHN-37).

[629] *See* supra notes 625 and 626 and accompanying text.

[630] *See* supra notes 600-607 and 610-614 and accompanying text.

[631] Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111).

[632] Shrimp OI, Preliminary Determination, 69 Fed. Reg. at 42655 (Exhibit CHN-215).

[633] *Id.*

information related to the calculation of a dumping margin; the company within the China-government entity, and, by extension, the China-government entity, has already demonstrated a failure to cooperate by failing to respond to an initial request for necessary information. Thus, consistent with Article 6.8 and Annex II, USDOC may appropriately determine that the China-government entity has failed to cooperate at this stage of the proceeding, and may resort to facts available in determining a dumping margin for the China-government entity.

b. *USDOC's Applications of Facts Available To The China-Government Entity Because Certain Mandatory Respondents Failed To Respond To A Request For Information Were Consistent With Article 6.8 and Annex II*

524. In 8 investigations (Aluminum Extrusions OI, Diamond Sawblades OI, Coated Paper OI, Furniture OI, OCTG OI, PET Film OI, Ribbons OI, and Retail Bags OI) and in 5 reviews (Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, and Shrimp AR8), USDOC's determinations to apply facts available to the China-government entity were based (in part or in full) on the failure of certain members of the China-government entity that were selected as mandatory respondents to respond to a request for information, despite having notice of the request for this necessary information. In light of this failure to cooperate, as demonstrated below, USDOC was not required to send to all companies within the China-government entity a request for information pertaining to the calculation of a dumping margin. Moreover, the determination to apply facts available to the China-government entity was adequately supported by the facts on the record, and was not based on the "procedural circumstances" of non-cooperation, or mere presumptions.

525. In 7 of these 8 investigations (Aluminum Extrusions OI, Diamond Sawblades OI, Coated Paper OI, Furniture OI, OCTG OI, Ribbons OI, and Retail Bags OI), as discussed above, USDOC found the China-government entity to be non-cooperative because of the failure of certain of its members to respond to an initial request for quantity and value information.[634] In these 7 investigations, USDOC also found that a mandatory respondent or mandatory respondents had failed to cooperate in some manner (for instance, by failing to respond to a dumping questionnaire).[635] In each of these investigations, USDOC further determined that the

[634] *See* Diamond Sawblades OI, Final Determination, 71 Fed. Reg. at 29308 (Exhibit CHN-45); Retail Bags OI, Preliminary Determination, 69 Fed. Reg. at 3548 (Exhibit CHN-267), unchanged in Retail Bags OI, Final Determination, 69 Fed. Reg. at 34127 (Exhibit CHN-53); Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463); Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18529 (Exhibit CHN-32); Coated Paper OI, Preliminary Determination, 75 Fed. Reg. at 24900 (Exhibit CHN-63), unchanged in Coated Paper OI, Final Determination, 75 Fed. Reg. at 59220-21 (Exhibit CHN-12); OCTG OI, Preliminary Determination, 74 Fed. Reg. at 59124 (Exhibit CHN-62), amended in OCTG OI, Final Determination, 74 Fed. Reg. at 20339 (Exhibit CHN-13); Ribbons OI, Preliminary Determination, 75 Fed. Reg. 7244-45, 7250 (Exhibit CHN-170), unchanged in Ribbons OI, Final Determination, 75 Fed. Reg. at 41810 (Exhibit CHN-33).

[635] *See supra* note 634.

mandatory respondent had failed to demonstrate that it was independent from the China-government entity.[636]

- For instance, in Aluminum Extrusions OI, USDOC selected Zhaoqing Asia Aluminum Factory Co. Ltd. (Zhaoqing Asia) and one other company to individually investigate and sent the dumping questionnaire to these companies.[637] Despite initially cooperating in the investigation, Zhaoqing Asia subsequently informed USDOC that it would no longer participate.[638] Therefore, USDOC was unable to verify Zhaoqing Asia's information on its independence from the China-government entity.[639] Without verification, USDOC could not rely on Zhaoqing Asia's information and concluded that Zhaoqing Asia failed to demonstrate its independence from the China-government entity.[640] Thus, USDOC included it in the China-government entity for purposes of the investigation.[641]

- In another example, Diamond Sawblades OI, USDOC chose Saint Gobain Abrasives (Shanghai) Co., Ltd. (Saint Gobain) among others, to individually investigate and sent it the dumping questionnaire.[642] Saint Gobain failed to respond to USDOC's questionnaire at all and USDOC did not have the necessary information to calculate a dumping margin for Saint Gobain or to determine its independence from the China-government entity. To make its determination, USDOC resorted to the facts available on the record and found that Saint Gobain failed to demonstrate its independence from the China-government entity.[643]

526. In the remaining 1 investigation, PET Film OI, USDOC selected respondent companies for individual examination based on U.S. import data from U.S. Customs and Border Protection.[644] Based on the import data, USDOC selected Jiangyin Jinzhongda New Material (JJ New Material) as one of the respondents to be individually examined.[645] JJ New Material responded that it would not participate in the investigation or respond to USDOC's antidumping

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[636] *See* supra note 634.

[637] *See* Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69406-10 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18529 (Exhibit CHN-32).

[638] *Id.*

[639] *Id.*

[640] *Id.*

[641] *Id.*

[642] Diamond Sawblades OI, Final Determination, 71 Fed. Reg. at 29308 (Exhibit CHN-45).

[643] *Id.*

[644] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[645] *Id.* (Exhibit CHN-112), *Id.* (Exhibit CHN-56).

questionnaire.[646] JJ New Material submitted no information to USDOC during the investigation other than an email explaining that it would not participate.[647] Therefore, USDOC did not have the necessary information to calculate a dumping margin for JJ New Material or to determine its independence from the China-government entity.[648]

527. In 5 reviews (Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, and Shrimp AR8), USDOC found that a mandatory respondent or mandatory respondents had failed to cooperate in some manner.[649] In each of these reviews, USDOC further determined that the mandatory respondent had failed to demonstrate that it was independent from the China-government entity.[650]

- For instance, in Aluminum Extrusions AR1, USDOC selected for individual examination and Guang Ya Aluminum Industrial Co., Ltd. (Guang Ya); Foshan Guangcheng Aluminum Co., Ltd.; Guangdong Zhongya Aluminum Co., Ltd. (Zhongya); and Foshan Nanhai Xinya (Xinya), collectively Guang Ya Group/Zhongya/Xinya. Two of the three members of this Guang Ya Group/Zhongya/Xinya entity failed to provide any information.[651] Although the third member, Zhongya provided some responses,[652] USDOC determined that the record lacked necessary information to determine the company's dumping margin and its independence from the China-government entity.[653]

528. Thus, in these 8 investigations and 5 reviews, USDOC determined that the failure of a mandatory respondent or mandatory respondents to provide necessary information, despite having notice of the information required, and the failure of these companies to demonstrate their independence from the China-government entity, demonstrated that the China-government entity

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[646] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[647] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[648] PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[649] Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 3, 14 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 97, 99-100 (Exhibit CHN-35); Aluminum Extrusions AR2, Preliminary Results, Preliminary Decision Memorandum at 3-4, 14-16 (Exhibit CHN-205), unchanged in Aluminum Extrusions AR2, Final Results, 79 Fed. Reg.at 78786 (Exhibit CHN-36); Furniture AR7, Preliminary Results, Preliminary Decision Memorandum at 2-3, 12-13 (Exhibit CHN-298), unchanged in Furniture AR7, Final Results, 78 Fed. Reg. at 35320 (Exhibit CHN-59); Shrimp AR7, Preliminary Results, Preliminary Decision Memorandum at 3, 7 (Exhibit CHN-167), unchanged in Shrimp AR7, Final Results, 78 Fed. Reg. at 56210 (Exhibit CHN-38); Shrimp AR8, Preliminary Results, Preliminary Decision Memorandum at 2, 6-7 (Exhibit CHN-120), unchanged in Shrimp AR8, Final Results, 79 Fed. Reg. at 57872 (Exhibit CHN-39).

[650] *See* supra note 649.

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

[652] *Id.*

[653] *Id.* at 14.

failed to respond to a request for necessary information and significantly impeded the proceeding.[654] In these circumstances, USDOC appropriately relied on the facts available in determining a dumping margin for the China-government entity.[655] Moreover, as discussed above, in 7 of these 8 investigations USDOC had also determined that the China-government entity had failed to respond to a request for initial quantity and value information, which warranted the use of facts available.[656]

529. Contrary to China's arguments, this determination to apply facts available to the China-government entity was based on the factual circumstances of each proceeding, and was not based on the "procedural circumstances of non-cooperation" or mere presumptions. Nor was USDOC required to request from each remaining company within the China-government entity information related to the calculation of a dumping margin. As demonstrated above, in determining a single rate for the China-government entity, USDOC must take into account the non-cooperation of the members of the China-government entity. Thus, where a company within the China-government entity fails to provide requested information specifically related to the calculation of a dumping margin, the investigating authority has been left without information that would enable it to determine a dumping margin for the China-government entity. Moreover, as discussed above, in 7 of the investigations members of the China-government entity also failed to provide requested information pertaining to quantity and value.[657] In such instances, Article 6.8 does not require the investigating authority to disregard this failure to cooperate by continuing to request information from other members of the China-government entity, or the China-government entity. Consistent with Article 6.8 and Annex II, the investigating authority may appropriately determine that the China-government entity has failed to cooperate, and may resort to facts available in determining a dumping margin for the China-government entity.

530. China points to two challenged determinations (Diamond Sawblades OI and Diamond Sawblades AR3), in which a mandatory respondent that provided information pertaining to the calculation of a dumping margin failed to demonstrate that it was independent from the China-government entity.[658] China argues that in these cases, there was no "gap" in information, and USDOC should have relied on the information provided by this mandatory respondent to calculate a dumping margin for the China-government entity.[659] However, in Diamond Sawblades OI, 13 members of the China-government entity did not respond to a request for quantity and value information.[660] In addition, 1 mandatory respondent also did not provide

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[654] *See* supra note 634, 644-648, 649 and accompanying text.

[655] *See* supra note 634, 644-648, 649 and accompanying text.

[656] *See* supra note 634 and accompanying text.

[657] *See* supra note 634 and accompanying text.

[658] *See* Diamond Sawblades OI and Diamond Sawblades AR3. These are the only examples China points to where a "fully cooperative company", according to China, was included in the China-government entity. *See*, e.g. China's First Written Submission, para. 416. However, China does not point to any other example in the challenged determinations at issue in which a "fully cooperative company" was included in the China-government entity.

[659] *See* China's First Written Submission, para. 628.

[660] Diamond Sawblades OI, Preliminary Determination, 70 Fed. Reg. at 77121-22, 77128 (Exhibit CHN-135).

requested information pertaining to a calculation of a dumping margin.[661] Thus, with the exception of a single mandatory respondent, USDOC properly determined that the China-government entity had failed to cooperate and otherwise had significantly impeded the investigations.[662] Contrary to China's argument, USDOC was not required to disregard the non-cooperativeness of the China-government entity and rely only on the information provided from one mandatory respondent. With respect to Diamond Sawblades AR3, as discussed below in Section D.2, this was not a determination in which USDOC relied on facts available to determine a dumping margin for the China-government entity.

531. Therefore, where certain companies within the China-government entity have failed to cooperate, Article 6.8 does not require USDOC to continue to request from these uncooperative members, or the China-government entity, information related to the calculation of a dumping margin. Under such circumstances, consistent with Article 6.8 and Annex II, USDOC may appropriately determine that the China-government entity has failed to cooperate, and may resort to facts available in determining a dumping margin for the China-government entity.

c. *USDOC's Decisions to Apply Facts Available To The China-Government Entity Because The Government Did Not Respond To A Request For Information Were Consistent With Article 6.8 and Annex II*

532. In two investigations, Furniture OI and Shrimp OI, USDOC requested, but did not receive, information from the Government of China.[663] For instance, in Furniture OI, USDOC sent a dumping questionnaire to MOFCOM but never received a response.[664] In addition to the failure of the Government to respond, as discussed above, certain companies within the China-government entity failed to respond to an initial request for quantity and value information, and a mandatory respondent that failed to demonstrate its independence from the China-government entity also failed to cooperate.[665] Thus, in light of this non-cooperation of certain companies within the entity, and the failure of the Government to respond to a request for information pertaining to the calculation of a dumping margin, USDOC appropriately applied facts available to the China-government entity.[666] Likewise, in Shrimp OI, the failure of certain companies to respond to a request for quantity and value information, in addition to the Government's failure

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[661] *Id.*

[662] *Id.*, unchanged in Diamond Sawblades OI, Final Determination, 71 Fed. Reg. at 29308 (Exhibit CHN-45).

[663] Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35313, 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463); Shrimp OI, Preliminary Determination, 69 Fed. Reg. 42661-62 (Exhibit CHN-215), unchanged in Shrimp OI, Final Determination, 69 Fed. Reg. at 70997 (Exhibit CHN-37).

[664] Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35313, 35321 (Exhibit CHN-283).

[665] *Id.* at 35320-21, amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463).

[666] Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35321 (Exhibit CHN-283) ("[I]n this case, the Government of the PRC did not respond to the Department's questionnaire, thereby necessitating the use of AFA to determine the PRC-wide rate."), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463).

to respond to a partial questionnaire, resulted in USDOC applying facts available to the China-government entity.[667]

533. Given that it is permissible to treat distinct exporters within China as operating as one single China-government entity (see Section XX), it is reasonable for USDOC to send a request for information directly to the government. Thus, a failure of the government to respond to this request for information may lead USDOC to find that the China-government entity has failed to cooperate, and to rely on facts available in assigning a rate to the China-government entity. Such a determination is consistent with Article 6.8 and Annex II.

2. China Has Failed to Make a *Prima Facie* Case With Respect To The 7 Remaining Challenged Reviews

534. China has stated that, of the 32 determinations that it challenges in this dispute, there are 6 reviews which China does not challenge pursuant to Article 6.8 and Annex II. According to China, USDOC did not determine a rate for the China-government entity in these reviews, because the China-government entity was "ultimately not subject to review"[668], and thus there was no application of facts available to the China-government entity. In the following 7 reviews USDOC also did not apply facts available to the China-government entity, but merely pulled-forward the rate that was previously applied to the China-government entity. Those companies under review that did not submit or complete a separate rate application or submit or complete a separate rate certification were found to be part of the China-government entity.[669] Because there was no finding of facts available, China has not demonstrated that it can challenge these determinations as inconsistent with Article 6.8 and Annex II:

- Diamond Sawblades AR1
- Diamond Sawblades AR2
- Diamond Sawblades AR3
- Retail Bags AR3

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667 Shrimp OI, Preliminary Determination, 69 Fed. Reg. 42661-62 (Exhibit CHN-215), unchanged in Shrimp OI, Final Determination, 69 Fed. Reg. at 70997 (Exhibit CHN-37).

668 China's First Written Submission, para. 412.

669 *See* Diamond Sawblades and Parts Thereof From the People's Republic of China, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results) (Exhibit CHN-46) (Diamond Sawblades AR1); Diamond Sawblades and Parts Thereof From the People's Republic of China, 78 Fed. Reg. 36166 (June 17, 2013) (final results) (Exhibit CHN-47) (Diamond Sawblades AR2); Diamond Sawblades and Parts Thereof From the People's Republic of China, 79 Fed. Reg. 35723 (June 24, 2014) (final results) (Exhibit CHN-48)(Diamond Sawblades AR3); Wooden Bedroom Furniture From the People's Republic of China, 78 Fed. Reg. 35245 (Sept. 2, 2014) (Exhibit CHN-60) (Furniture AR8); Polyethylene Retail Carrier Bags from the People's Republic of China, 74 Fed. Reg. 6857(Feb. 11, 2009) (final results) (Exhibit CHN-54) (Retail Bags AR3); Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China, 78 Fed. Reg. 10130 (Feb. 13, 2013) (final results) (Exhibit CHN-51) (Ribbons AR1); Multilayered Wood Flooring From the People's Republic of China, 79 Fed. Reg. 26712 (May 9, 2014) (final results) (Exhibit CHN-50) (Wood Flooring AR1).

- Flooring AR1
- Furniture AR8
- Ribbons AR1

535. Thus, China's argument that "[i]n the 13 challenged reviews in which USDOC determined a rate for the PRC-wide entity, USDOC based the dumping rate assigned to the PRC-wide entity entirely on facts available,"[670] is incorrect with respect to these 7 reviews.[671] In addition, China acknowledges that in these 7 reviews USDOC "did not expressly state that it was using facts available," and "[i]nstead, it re-applied in each review, a rate that had been determined using facts available in a prior segment of the relevant proceeding."[672] China points to *US – Shrimp (Viet Nam) I*, in which the panel found that, although USDOC made no facts available finding, it still applied a rate that was calculated on the basis of facts available.[673] However, the panel in *US – Shrimp (Viet Nam) II* rejected this approach:

> We note that the panel in *US – Shrimp (Viet Nam)* was faced with a similar issue and reached a different conclusion…. We respectfully disagree with the reasoning of the panel in *US – Shrimp (Viet Nam)*. As explained above, in our view, the application of Article 6.8 is triggered by an investigating authority resorting to "facts available" in the making of a determination. Given our view that, in the administrative reviews at issue, the USDOC did not make a determination within the meaning of Article 6.8, we are unable to find that the USDOC made a determination on the basis of facts available in the three administrative reviews at issue.[674]

536. Like the reviews at issue in *US – Shrimp (Viet Nam) II*, in these 7 reviews USDOC did not make a finding of non-cooperation with respect to the China-government entity. Thus, USDOC did not apply an Article 6.8 rate. Instead, USDOC applied a rate to the China-government entity that had been established in a prior proceeding. China also relies on the Appellate Body's finding in *US – Corrosion-Resistant Steel Sunset Review*,[675] however, that case is not applicable to this situation. There, the Appellate Body was reviewing whether a rate that had been deemed inconsistent with Article 2.4 of the AD Agreement could nonetheless be relied upon for purposes of a sunset review determination.[676] This different factual and legal context, *i.e.*, use of rates in sunset reviews within the meaning of Article 2.4, does not apply to the instant

[670] China's First Written Submission, para. 630.

[671] Likewise, China's description of these cases as applying a "presumption" of non-cooperation is inaccurate because Commerce did not make a finding of non-cooperation. *See Id.* paras. 488-491.

[672] *Id.* para. 632.

[673] *See id*. para. 635.

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

[675] China's First Written Submission, para. 636.

[676] *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 127-128.

situation in which USDOC applied to the China-government entity a rate that had previously been determined. In any event, even if the Appellate Body's findings are applicable to this case, as demonstrated above, the underlying rates at issue were properly determined in accordance with Article 6.8 and Annex II in a prior segment, and USDOC applied that prevailing rate in a subsequent review. There is no prohibition on applying these rates in future reviews. For this reason, China has failed to demonstrate that it may challenge these 7 reviews as inconsistent with Article 6.8 and Annex II.

3. USDOC's Use of Facts Available "As Applied" To the China-government Entity Is Consistent with Article 6.8 and Annex II of the AD Agreement

537. In this section, the United States addresses China's allegation that USDOC's use of facts available was inconsistent with Article 6.8 and Annex II of the AD Agreement "as applied" in twenty-six (26) challenged determinations.[677] An examination of USDOC's analysis in these determinations, demonstrates that each determination is consistent with Article 6.8 and Annex II.

538. China has challenged the antidumping duty rate that USDOC applied in thirteen (13) antidumping duty investigations and thirteen (13) administrative reviews.[678] As we demonstrate below, USDOC undertook a corroborative assessment and considered the information on the record to determine the best available information, consistent with Article 6.8 and Annex II of the AD Agreement.

539. As an initial matter, in seven (7) of the challenged determinations, as demonstrated above in Section VII.D.2, USDOC did not make a determination based on "facts available".[679] Rather, in these particular determinations, USDOC assessed duties at the cash deposit rate and thus, the duty rate previously established from a previous period of investigation or review continued to apply. USDOC's final duty assessments for the China-government entity, therefore, were not based on a finding of non-cooperation and "facts available". Therefore, China's challenge to these determinations under Article 6.8 and Annex II of the AD Agreement should be rejected.

540. For the remaining nineteen (19) challenged determinations, USDOC applied facts available, using one of the following, depending on the information available: (1) a rate from the

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[677] China's First Written Submission, para. 674.

[678] China's First Written Submission, para. 673.

[679] *See Diamond Sawblades and Parts Thereof From the People's Republic of China*, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results) (Exhibit CHN-46) (Diamond Sawblades AR1); *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 78 Fed. Reg. 36166 (June 17, 2013) (final results) (Exhibit CHN-47) (Diamond Sawblades AR2); *Diamond Sawblades and Parts Thereof From the People's Republic of China*, 79 Fed. Reg. 35723 (June 24, 2014) (final results) (Exhibit CHN-48)(Diamond Sawblades AR3); Wooden Bedroom Furniture From the People's Republic of China, 78 Fed. Reg. 35245 (Sept. 2, 2014) (Exhibit CHN-60) (Furniture AR8); *Polyethylene Retail Carrier Bags from the People's Republic of China*, 74 Fed. Reg. 6857(Feb. 11, 2009) (final results) (Exhibit CHN-54) (Retail Bags AR3); *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 78 Fed. Reg. 10130 (Feb. 13, 2013) (final results) (Exhibit CHN-51) (Ribbons AR1); *Multilayered Wood Flooring From the People's Republic of China*, 79 Fed. Reg. 26712 (May 9, 2014) (final results) (Exhibit CHN-50) (Wood Flooring AR1).

domestic industry's application[680]; (2) a rate calculated for a cooperative respondent in a previous period of review[681]; or (3) a rate calculated from a cooperative respondent's transactional information in the current period of investigation.[682] Each determination met the requirements under Article 6.8 and Annex II: each had a factual foundation; no substantiated fact contradicted the information selected; and nothing indicated the information selected was an unreasonable replacement for the missing information, *i.e*., there was no better information available on the record under the particular circumstances.

541. For example, in the *Aluminum Extrusions OI*, USDOC requested pricing and normal value data from two parties, Zhaoqing Asia Aluminum Factory Co., Ltd. and the Guang Ya Group. Both parties refused to provide any requested information.[683] Thus, no information pertaining to these parties was available on the record, which precluded USDOC from examining information pertaining to the pricing behavior of these parties. USDOC began by re-examining the rates from the application and the information supporting the calculations in the application.[684] In particular, USDOC examined information from various independent sources provided in the application or in supplements to the application, such as Global Trade Atlas data

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680 *See Aluminum Extrusions From the People's Republic of China*, 76 Fed. Reg. 18,524 (Apr. 4, 2011) (final deter.) (Exhibit CHN-32) (Aluminum Extrusions OI); *Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 96 (Jan. 2, 2014) (final results) (Exhibit CHN-35) (Aluminum Extrusions AR1); *Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 78,784 (Dec. 31, 2014) (final results) (Exhibit CHN-36) (Aluminum Extrusions AR2); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 Fed. Reg. 59217 (Sept. 27, 2010) (final deter.) (Exhibit CHN-12) (Coated Paper OI); *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (final deter.) (Exhibit CHN-45) (Diamond Sawblades OI); *Wooden Bedroom Furniture From the People's Republic of China*, 69 Fed. Reg. 67313 (November 17, 2004) (final deter.) (Exhibit CHN-58) (Furniture OI); *Certain Oil Country Tubular Goods from the People's Republic of China*, 75 Fed. Reg. 20,335 (Apr. 19, 2010) (final deter.) (Exhibit CHN-13) (OCTG OI); Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, 73 Fed. Reg. 55,039 (Sept. 24, 2008) (final deter.) (Exhibit CHN-56) (PET Film OI); *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41808 (July 19, 2010) (final deter.) (Exhibit CHN-33) (Ribbons OI); *Narrow Woven Ribbon With Woven Selvedge From the People's Republic of China*, 79 Fed. Reg. 61288 (10 October 2014) (final results) (Exhibit CHN-52) (Ribbons AR3); *Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 Fed. Reg. 34125 (June 18, 2004) (final deter.) (Exhibit CHN-53) (Retail Bags OI); *Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70997 (Dec. 8, 2004 (final deter.) (Exhibit CHN-37) (Shrimp OI); *Certain Frozen Warmwater Shrimp From the People's Republic of China*, 78 Fed. Reg. 56,209 (Sept. 12, 2013) (final results) (Exhibit CHN-38) (Shrimp AR7); *Certain Frozen Warmwater Shrimp From the People's Republic of China*, 79 Fed. Reg. 57,872 (Sept. 26, 2014) (final results) (Exhibit CHN-39) (Shrimp AR8); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 77 Fed. Reg. 63,791 (Oct. 17, 2012) (final deter.) (Exhibit CHN-44) (Solar OI); and *Certain New Pneumatic Off–The-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40485 (July 15, 2008) (final deter.) (Exhibit CHN-41) (Tires OI).

681 *See Wooden Bedroom Furniture From the People's Republic of China*, 78 Fed. Reg. 35249 (12 June 2013) (final results) (Exhibit CHN-59) (Furniture AR7).

682 *See High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 26739 (May 7, 2012) (final deter.) (Exhibit CHN-14) (Steel Cylinders OI); *Multilayered Wood Flooring From the People's Republic of China*, 76 Fed. Reg. 64318, 64,322 (18 October 2011) (final deter.) (Exhibit CHN-49) (Wood Flooring OI).

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

684 *Id.* (Exhibit CHN-111).

and the domestic industry's experience with selling and producing the subject merchandise.[685] USDOC determined that the information in the application supported the calculation of the alleged rate, including the export price and normal value calculations.[686] USDOC, therefore, determined that the application rate had probative value. This example illustrates that limited facts and circumstances limit the extent of the evaluation. In the end, the determination rested on a factual foundation. In addition, no parties commented on the relevance or probative value of the application rate.[687] No substantiated fact on the record contradicted the application rate, and nothing indicated that there was better information on the record.

542. USDOC performed similar analyses in *PET Film OI* and *Ribbons AR3*.[688] In each of these determinations, USDOC's analysis was limited to the extent of the limited facts available on the record before the investigating authority.

543. Similarly, in *Furniture AR7*, USDOC requested that two parties provide pricing and normal value data: Shanghai Maoji Imp. and Exp. Co., Ltd. and Dongguan Huansheng Furniture Co., Ltd. Both parties refused to provide the requested information.[689] Again, USDOC was precluded from examining evidence pertaining to these companies' experiences. However, because this was the seventh administrative review of the antidumping duty order, USDOC could, and did, consider information from previous periods of review.[690] USDOC examined the available rates to use as a proxy for the missing information, and in this case selected a calculated weighted-average dumping margin for a cooperating party from a previous period of review.

544. USDOC examined information from the most recent period of review in which a party cooperated, including cooperating respondents' transactional information. USDOC compared cooperating parties' transactional information from a recent period of review with a calculated weighted-average margin and based on the comparison found that the calculated weighted-average dumping margin had probative value.[691] This rate had a factual foundation: specifically the prior experience of a cooperating respondent. No substantiated facts contradicted the rate as USDOC found that there was no evidence on the record of the seventh review that called into

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

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

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

[688] *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 73 Fed. Reg. 55,039 (Sept. 24, 2008) (final deter.) (Exhibit CHN-56) (PET Film OI); *Narrow Woven Ribbon With Woven Selvedge From the People's Republic of China*, 79 Fed. Reg. 61288 (10 October 2014) (final results) (Exhibit CHN-52) (Ribbons AR3).

[689] *See Wooden Bedroom Furniture from the People's Republic of China*, 78 Fed. Reg. 8493 (Feb. 6, 2013) (prelim. results) (Exhibit CHN-469).

[690] *Id.* (Exhibit CHN-469).

[691] Christian Marsh, *Wooden Bedroom Furniture from the People's Republic of China: Issues and Decision Memorandum for the Final Results of Review*, Memorandum to Paul Piquado, Assistant Secretary for Import Administration (June 5, 2013) (Exhibit CHN-151), p. 10.

question the relevance or reliability of the previously calculated margin.[692] Nor was there any information that indicated that this rate was not the best information available.

545. Similarly, in *Shrimp AR7* and *Shrimp AR8,* to make its facts available determinations, USDOC examined information concerning cooperative respondents' market activities in previous periods of review.[693] Again, although USDOC's evaluation was limited because of the parties' non-cooperation, USDOC's analysis was reasoned and consistent with the standard.

546. China asserts that USDOC was required 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.[694] However, USDOC's evaluation included all available information on the record; the extent of the evaluation, however, depended on the facts in each case. Thus, in cases where the record had little information due to non-cooperation, USDOC's evaluation became limited, as detailed above.

547. By contrast, in cases with more extensive factual information on the record, USDOC broadened its evaluation. Thus, where a party cooperated during the period of investigation or review, USDOC used the available information to examine the reliability and relevance of the information selected as facts available. USDOC used this type of information and analysis in twelve (12) of the challenged determinations.[695] For example, in the *Ribbons OI*, the cooperating party, Yama, provided a full response, as requested. USDOC examined model-specific data that was used in calculating Yama's dumping margin. USDOC examined [[* * *]] models within the range of the rate in the application, and found that [[* * *]] models had rates that were higher than the rate contained in the application. USDOC also considered the total sales quantity

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[692] Christian Marsh, *Wooden Bedroom Furniture from the People's Republic of China: Issues and Decision Memorandum for the Final Results of Review*, Memorandum to Paul Piquado, Assistant Secretary for Import Administration (June 5, 2013) (Exhibit CHN-151), p. 10.

[693] *See Certain Frozen Warmwater Shrimp From the People's Republic of China*, 78 Fed. Reg. 56,209 (Sept. 12, 2013) (final results) (Exhibit CHN-38) (Shrimp AR7); *Certain Frozen Warmwater Shrimp From the People's Republic of China*, 79 Fed. Reg. 57,872 (Sept. 26, 2014) (final results) (Exhibit CHN-39) (Shrimp AR8).

[694] China's First Written Submission para. 687.

[695] *See Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 96 (Jan. 2, 2014) (final results) (Exhibit CHN-35) (Aluminum Extrusions AR1); *Aluminum Extrusions From the People's Republic of China*, 79 Fed. Reg. 78,784 (Dec. 31, 2014) (final results) (Exhibit CHN-36) (Aluminum Extrusions AR2); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 Fed. Reg. 59217 (Sept. 27, 2010) (final deter.) (Exhibit CHN-12) (Coated Paper OI); *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (final deter.) (Exhibit CHN-45) (Diamond Sawblades OI), *Wooden Bedroom Furniture From the People's Republic of China*, 69 Fed. Reg. 67313 (November 17, 2004) (final deter.) (Exhibit CHN-58) (Furniture OI); *Certain Oil Country Tubular Goods from the People's Republic of China*, 75 Fed. Reg. 20,335 (Apr. 19, 2010) (final deter.) (Exhibit CHN-13) (OCTG OI); *Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 Fed. Reg. 34125 (June 18, 2004) (final deter.) (Exhibit CHN-53) (Retail Bags OI); *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41808 (July 19, 2010) (final deter.) (Exhibit CHN-33) (Ribbons OI); *Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70997 (Dec. 8, 2004 (final deter.) (Exhibit CHN-37) (Shrimp OI); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 77 Fed. Reg. 63,791 (Oct. 17, 2012) (final deter.) (Exhibit CHN-44) (Solar OI); *Certain New Pneumatic Off–The-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40485 (July 15, 2008) (final deter.) (Exhibit CHN-41) (Tires OI).

represented by the [[* * *]] models, finding they represented [[* * *]] percent of Yama's total sales during the period being investigated.

548. In the *Diamond Sawblades OI*, USDOC was able to examine information from several cooperating parties who provided price and normal value data. There, USDOC determined that [[* * *] of the respondents had transactional information that supported the application rate. Specifically, [[* * *]] had transactional information which was as high, or higher, than the application rate. As previously discussed, USDOC looked at the percentage of each cooperating party's sales as a percentage of that party's total sales, finding [[* * *]] percent for [[* * *]]; [[* * *]] percent for [[* * *]]; and [[* * *]] percent of [[* * *]] had sales above the application rate.

549. China claims that USDOC failed to "use appropriate comparators to 'corroborate' the information selected as adverse facts available" by examining transactional and model-specific information of cooperating respondent companies.[696] However, these data are facts on the record that constitute actual pricing behavior in the market during the same period of time. Thus, in the *Ribbons OI*, a cooperating respondent's [[* * *]] model-specific data, in which rates were higher than the application rate, demonstrates that actual prices of actors in the market are similar to or the same as that reflected in the application. In the *Diamond Sawblades OI*, [[* * *]] cooperating parties' data showed that they sold the product in the market at rates higher than the application rate. In both cases, USDOC's determinations had a factual foundation and no substantiated facts contradicted the information selected. Both cases show that USDOC does not select the most "adverse information". Last, there was nothing on the record indicating that the information selected was an unreasonable replacement for the missing information.

550. Contrary to China's assertions, USDOC does not simply "seek[] out, as confirmation, another secondary source that [is] equally or more adverse to the source it [] already selected".[697] USDOC examines the record, including information from cooperating parties, to determine whether the information in the application has probative value for purposes of the particular product and the current period. If USDOC's evaluation, using the available information, indicates the particular dumping rate or rates does not have probative value, USDOC rejects for use as "facts available".

551. In the *Steel Cylinders OI*, for example, USDOC determined that the application rate did not have probative value and instead used as facts available a rate based on a cooperating party's transactional information. In that case, Beijing Tianhai Industry Co., Ltd. (BTIC) fully cooperated with USDOC's investigation.[698] To determine which facts available to apply to the non-cooperative China-government entity, USDOC examined BTIC's transactional information, as well as information in the application. After evaluating the information, USDOC determined the application rate lacked probative value, and instead selected BTIC's transactional information as facts available.[699] In examining BTIC's transactional information, USDOC found

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[696] China's First Written Submission, para. 688.

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

[698] *See Steel Cylinders Preliminary Determination*, 77 Fed. Reg. at 77971. (Exhibit CHN-65).

[699] *Id.* (Exhibit CHN-65).

that the rate was not unusual in terms of quantities and was not aberrational. USDOC found that "there are significant numbers of sales with quantities similar to that in the underlying transaction."[700] Further, USDOC found that the individually investigated respondent had "a number" of other rates based on transactional information that were "very close" to the selected rate.[701] USDOC also stated that the rate "represents an actual rate at which a cooperating respondent sold the subject merchandise during the {period of investigation}".[702] Again, USDOC's determination had a factual foundation because it was based on information from a cooperating party in the period of investigation. No substantiated facts contradicted the information selected and nothing on the record indicated that the information was an unreasonable replacement for the missing information.

552. USDOC made a similar determination in the *Wood Flooring OI*, finding that the application rate did not have probative value, and using as facts available instead, a rate based upon on transactional information obtained from a cooperating respondent.[703] In the *Wood Flooring OI*, three respondents cooperated by providing the data requested. USDOC examined their transactional information, as well as the application.[704] Again, instead of "systematically" choosing the highest rate available, USDOC scrutinized all of the information on the record and, in fact, did not choose the high rate, which in this case was contained in the application rate. Instead, USDOC used as facts available a rate based upon transactional information from one of the cooperating parties.[705] Similar to the *Steel Cylinders OI*, USDOC rejected the rate from the application when record evidence did not support it. Again, USDOC's determination had a factual foundation because it was based on information from a cooperating party in the period of investigation. No substantiated facts contradicted the information selected and nothing on the record indicated that the information was an unreasonable replacement for the missing information.

553. China attempts to impugn USDOC's selection of facts available with two arguments. First, China contends that USDOC failed to "undertake an evaluative, comparative assessment, aimed at determining what facts available would be the *best* information to use to determine the rate".[706] China asserts that USDOC was required 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".[707] However, as explained in Section VII, the type of comparative examination China seeks would turn the obligation to check the reliability of the selected facts available into an evidentiary proceeding in which investigating authorities must prove or otherwise support with the weight of evidence the information selected as facts available.

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[700] *Id.* (Exhibit CHN-65).

[701] *Id.* (Exhibit CHN-65).

[702] *Id.* (Exhibit CHN-65).

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

[704] *Id.* (Exhibit CHN-49).

[705] *Id.* (Exhibit CHN-49).

[706] China's First Written Submission, para. 685.

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

554. Second, China also claims that USDOC failed to "use appropriate comparators to 'corroborate' the information selected as adverse facts available" by examining transaction- and model-specific rates of cooperating respondent companies.[708] China appears to argue that this information is unreliable because it is not a "margin of dumping." However, as explained above, the status of the information does not prohibit its use. The purpose of Annex II(7) is to allow authorities to use information from secondary sources provided it checks the reliability of such information using independent information, to the extent practicable. Transactional information constitutes the actual pricing behavior of exporters of the product under investigation during the time period in question and thus is the type of information contemplated by Annex II(7).

555. Based on the foregoing, the United States requests that the Panel find that China has failed to establish that USDOC's selection and application of facts available to the China-government entity in the 26 challenged determinations is not inconsistent with Article 6.8 of the AD Agreement.

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

556. China argues that USDOC acted inconsistently with Article 6.1 of the AD Agreement by failing to give to the China-government entity appropriate notice of the information required and ample opportunity to present relevant evidence. As we demonstrate below, China's claim suffers from a fundamental misunderstanding of the requirements of this provision. Moreover, as demonstrated below, USDOC acted consistently with Article 6.1 with respect to the China-government entity.

A. Article 6.1 Of The AD Agreement Is Not Limited To Only Certain Types Of Information

557. China's arguments with respect to Article 6.1 of the AD Agreement are based on an incorrect legal interpretation of this provision.

558. Article 6.1 provides:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

559. The first requirement of this provision is that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require…." As an initial matter, we note the distinction between the *substantive* issue of which information an investigating requires for a specific determination (which can be covered, for instance, under Article 2.4 of the AD Agreement), and the *procedural* issue of whether an investigating authority has appropriately notified parties of the information required, after it has determined that it requires such information for its determination. Article 6.1, per the text of the provision itself, is

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[708] China's First Written Submission, para. 688.

concerned with this second, procedural issue, proper notice of the information required, not the first, substantive issue of the information being sought. Specifically, the provision addresses the notice concerning the information *which the authorities require, i.e.*, is requesting.[709] This is the only characterization of the type of information for which notice must be given. With this in mind, we demonstrate below that China's arguments conflate these two separate and distinct issues.

560. For instance, China argues that Article 6.1 is meant to "refer[] to information that is *necessary* for the purpose of enabling the authority to make the numerous determinations that must be made in the course of an anti-dumping proceeding."[710] China finds support for this interpretation in Article 6.8 (which refers to "necessary information") and the accompanying Annex II to Article 6.8 (which refers to "information required").[711] China also points to language in Article 2.4 of the AD Agreement which refers to "what information is *necessary* to ensure a fair comparison".[712] According to China, "[i]f the authorities are to determine an individual margin of dumping for a producer/exporter, they must give notice of *all necessary information* from the producer/exporter."[713] In China's view, this means that:

> If legally distinct producers/exporters are to be treated as a single entity for purposes of determining an individual margin of dumping under Article 6.10, an authority does not comply with Article 6.1 simply by requesting necessary information from one of the distinct producers/exporters that make up the fictional entity. Rather, it must make clear that the information sought includes information from all of the distinct producers/exporters. Accordingly, the authority must seek the information from each of the distinct producers/exporters.[714]

561. China's argument suffers from several flaws. First, the text of Article 6.1 does not dictate the type of information an investigating authority must seek to make a particular determination. As established above, the substantive issue of whether an investigating authority is seeking the correct information for a particular determination is not addressed by the procedural scope of Article 6.1, but may be appropriately covered by a different substantive provision of the AD Agreement, such as Article 2.4. Thus, to the extent China argues that Article 6.1 required USDOC to notify all companies within the China-government entity of the information needed to calculate a dumping margin without considering the particular circumstances of each case is unsupported and starts with an improper conclusion. Moreover, Article 6.1 makes clear that *the*

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[709] *See Argentina – Ceramic Tiles*, para. 6.54 ("Article 6.1 of the AD Agreement thus requires that interested parties be given notice of the information which the authorities require. In our view, it follows that, independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.")

[710] China's First Written Submission, para. 522 (emphasis in original).

[711] *Id.* para. 523.

[712] *Id.* (emphasis in original).

[713] *Id.* para. 524 (emphasis in original).

[714] *Id.* para. 525.

investigating authority is the one who decides which information it requires, along with the relevant time in the proceeding in which such information is required. Article 6.1 does not apply if the investigating authority does not require certain information, or is not asking for such information at that point in the proceeding. Thus, even assuming, *arguendo*, that the investigating authority is seeking the wrong information in determining a dumping margin for the NME-government entity, Article 6.1 is concerned with whether the investigating authority gave notice of the information that it has determined that it requires and is actually seeking from parties.

562. Second, setting aside China's misconception of the scope of Article 6.1, China provides no support for its argument that the purportedly broad language – "information which the authorities require" – is meant to refer to the same type of information referenced in Article 6.8 ("necessary information") and Article 2.4 (information for the calculation of a dumping margin). China points to no panel or Appellate Body report that would support such a narrowing of this phrase to only that information which is necessary for the calculation of a dumping margin. Moreover, the difference in language between Article 6.1 and Articles 6.8 and 9.4 (*i.e.*, information which is "required" as opposed to information which is "necessary") must be given meaning (where appropriate), and does not necessarily implicate the same type of information (although it could in some instances, as discussed below).

563. Third, China appears to acknowledge that "information required" can mean different things with respect to different interested parties or in different circumstances.[715] However, China still argues that Article 6.1 requires USDOC to have notified each company within the China-government entity of the information necessary to calculate a dumping margin. Such an interpretation fails to appreciate the realities of the proceedings and the different circumstances of different interested parties. For instance, Article 6.1 does not apply with respect to information to calculate a dumping margin where a party has already demonstrated that it will not participate in the proceeding. In addition, while China initially recognizes that "numerous determinations must be made in the course of an anti-dumping proceeding,"[716] its subsequent conclusion that the information required under Article 6.1 only pertains to the very specific information in a dumping questionnaire ignores this reality. These "numerous determinations" require interested parties to provide a wide range of information at all stages of the proceeding, and are not just limited to the actual calculation of a dumping margin.

564. Therefore, a proper interpretation of Article 6.1 should take into account that "[i]nvestigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination."[717] Under China's strained interpretation, China argues that the investigating authority's request for information that is not specifically related to the ultimate determination would not fall within the purview of Article 6.1. However, this disregards the information required for all of the numerous determinations the investigating authority must make in a proceeding *before* it seeks

[715] *Id.* para. 525 fn. 600 ("[I]nformation necessary to calculate an individual margin of dumping will not be 'required' for non-sampled producers/exporters.")

[716] *Id.* para. 522.

[717] *US – Hot-Rolled Steel (Japan) (AB)*, para. 73.

information related to the determination of a dumping margin. For instance, this would disregard the process for respondent selection in which an investigating authority may request initial quantity and value information from numerous interested parties to aid in its initial determination of selecting mandatory respondents for individual examination.

565. Moving on to the second requirement of Article 6.1, the requirement to provide parties "ample opportunity" to present written evidence, in *US – OCTG Sunset Reviews*, the Appellate Body acknowledged that this language "suggest[s] that there should be liberal opportunities for respondents to defend their interests."[718] However, the Appellate Body went on to recognize that this provision "do[es] 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."[719] Moreover, "[s]uch an approach would 'prevent the authorities of a Member from proceeding expeditiously' in their reviews,"[720] and "would also affect the rights of other interested parties."[721] In sum,

> {T}he "ample" and "full" opportunities guaranteed by Articles 6.1 and 6.2, respectively, cannot extend indefinitely and must, at some point, legitimately cease to exist. This point must be determined by reference to the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews. Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to "control the conduct" of its inquiry and to "carry out the multiple steps" required to reach a timely completion of the sunset review, a respondent will have reached the limit of the "ample" and "full" opportunities provided for in Articles 6.1 and 6.2 of the Anti-Dumping Agreement.[722]

566. Article 6.1 must also be read in conjunction with Article 6.8 and Annex II of the AD Agreement. For instance, in the context of reviewing the requirements of Article 6.1.1 and Article 6.8 and Annex II, the Appellate Body in *US – Hot-Rolled Steel (Japan)* noted these provisions "must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account."[723] Thus, where the investigating authority has properly determined that a party has failed to respond to a request for information or otherwise significantly impeded the proceeding, despite having notice of the request and the consequences of not cooperating, Articles 6.8 and 6.1 together do

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[718] *US – OCTG Sunset Reviews (Argentina) (AB)*, para. 241.

[719] *Id.* (internal quotations and footnotes omitted).

[720] *Id.* (internal footnotes omitted).

[721] *Id.*

[722] *Id.* para. 242 (internal footnotes omitted) (quoting Appellate Body Report, *US – Hot-Rolled Steel (Japan)*, para. 73).

[723] *US – Hot-Rolled Steel (Japan) (AB)*, para. 86.

not require the investigating authority to continue to allow that party opportunities to provide information.

567. Lastly, China argues that providing parties with an "ample" opportunity to present evidence will be denied "if interested parties are not made aware of the information that the investigating authority requires to undertake its task."[724] However, as described above, this substantive determination of which information is necessary for a specific determination is not addressed by Article 6.1. Moreover China relies on *EC – Fasteners* for its arguments,[725] however, that case is not on point in this instance given that it does not address the requirements of Article 6.1. In examining the EC's actions in light of Articles 6.10 and 9.2, the Appellate Body reviewed the EC's regulation which outlined the procedure and methodology for determining a dumping margin for the NME-government entity, in which the investigating authority appeared to have access to the export prices of the individual members of the entity that had cooperated in the proceeding.[726] In that context, the Appellate Body held:

> Articles 6.10 and 9.2 of the Anti-Dumping Agreement would nonetheless require the determination of an individual dumping margin for the single entity, which should be based on the average export prices of each individual exporter, and the imposition of a corresponding single anti-dumping duty.[727]

568. Moreover, where the investigating authority at issue had access to export prices of individual companies, under such circumstances, the Appellate Body held:

> [O]nly a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for the single entity that is composed of several legally distinct exporters.[728]

569. But the Appellate Body's conclusions related to the substantive issue of what information should be used in calculating a dumping margin for the NME-government entity for purposes of Article 6.10 and 9.2. Article 6.1, which relates to the procedural issue of whether an investigating authority properly notified parties of the information required, was not addressed by the Appellate Body. China relies on the Appellate Body's findings to conflate these two issues. Thus, *EC – Fasteners* cannot be read to dictate which information an investigating authority must require under Article 6.1. In addition, as established above, nothing in Article 6.1 itself dictates the information the investigating authority requires; it merely provides that the

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[724] China's First Written Submission, para. 534.

[725] *Id.*, paras. 526 and 538.

[726] *EC – Fasteners (AB)*, para. 280, 383-384.

[727] *Id.* para. 383.

[728] *Id.* para. 384.

investigating authority, once it has determined the content of information which it requires at that particular point in the proceeding, notify parties that it requires such information.

570. Thus China's argument that an investigating authority must request the specific information necessary for the calculation of a dumping margin from all companies within the NME-government entity is not only unsupported by the text of Article 6.1, but also ignores the realities of an antidumping proceeding and the different circumstances of all interested parties.

B. USDOC Acted Consistently With Article 6.1 In The 26 Challenged Determinations

571. China argues that in each of the 26 challenged determinations, USDOC failed to notify each company within the China-government entity of the information required to determine an individually-investigated rate for the China-government entity because USDOC did not send a dumping questionnaire to each company within the China-government entity.[729] Because China's arguments are based on its faulty legal interpretation of the requirements of Article 6.1, the Panel should reject its claims. Moreover, as demonstrated below, in each of the 26 challenged proceedings, USDOC 1) properly notified all companies within the China-government entity of the information which USDOC required, and 2) permitted companies within the China-government entity ample opportunity to present in writing all evidence which they considered relevant.

1. USDOC Acted Consistently With Article 6.1 In Each Of The 13 Challenged Investigations

572. China's arguments that USDOC failed to request from each company within the China-government entity information required to determine a dumping margin for the China-government entity are based on an incorrect reading of the requirements of Article 6.1 and are not supported by the record of each investigation. We address three types of investigations: 1) Those investigations in which USDOC issued a request for quantity and value information to companies within the China-government entity, 2) those investigations in which USDOC issued a dumping questionnaire to one or more companies within the China-government entity, and 3) those investigations in which USDOC issued a request for information to the Government. We demonstrate that in each of these three types of investigations, USDOC acted consistently with Article 6.1 in notifying companies within the China-government entity of the information which it required, and provided ample opportunities for companies within the China-government entity to provide relevant evidence.

573. First, in 12 of the 13 investigations (Aluminum Extrusions OI, Coated Paper OI, OCTG OI, Ribbons OI, Solar OI, Steel Cylinders OI, Tires OI, Wood Flooring OI, Diamond Sawblades OI, Shrimp OI, Furniture OI, and Retail Bags OI), USDOC notified companies within the China-government entity of its request for quantity and value information. For instance, in 8 of these 12 investigations (Aluminum Extrusions OI, Coated Paper OI, OCTG OI, Ribbons OI, Solar OI, Steel Cylinders OI, Tires OI, and Wood Flooring OI), USDOC notified parties in the Federal Register initiation notice of the process through which it would select companies for individual

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[729] *See* China's First Written Submission, paras. 605-624.

examination (i.e. mandatory respondents), also known as respondent selection.[730] USDOC issued a request for quantity and value information to those companies identified in the application and posted the quantity and value questionnaire on the website for those parties that did not receive a direct request for information.[731] In addition, USDOC stated in its initiation notice for these investigations that parties that did not respond to the quantity and value questionnaire would not be in a position to demonstrate their independence from the China-government entity.[732] USDOC received a varying degree of responses.[733] Thus, USDOC determined that those companies that did not respond to this initial request for information were not in a position to receive further requests for information.[734] As noted above, Articles 6.8 and 6.1 together do not require USDOC to continue to allow a party opportunities to provide further information after the party has not complied with an initial request for information.

574. In the remaining 4 investigations (Diamond Sawblades OI, Shrimp OI, Furniture OI, and Retail Bags OI), USDOC published a notice of initiation of the investigation in the Federal Register, and notified interested parties of its intent to select mandatory respondents through a direct request for quantity and value information.[735] USDOC also placed a letter on the record of its proceeding indicating its request for quantity and value information, which further instructed parties of the consequences of not providing this information.[736] USDOC also received a varying degree of responses.[737] As noted above, USDOC determined that because certain companies failed to respond to this initial request for information, they were not entitled to receive further requests for information.[738] This determination was consistent with Article 6.1.

575. China does not argue that USDOC failed to notify companies within the China-government entity of this specific information, i.e. a request for quantity and value information.[739] Instead, China alleges that a request for initial quantity and value information from a company within the China-government entity is an insufficient request for information

[730] *See* supra note 600. We note that China states that Commerce notified parties of its request for quantity and value information in the initiation notice of Diamond Sawblades OI. *See* China's First Written Submission, para. 607 fn. 680. However, the notice clarified for parties that in the event Commerce sought quantity and value information, parties would need to submit both a timely quantity and value response and a timely separate rate application to be considered for separate rate status. So we have not included Diamond Sawblades OI in this group of 8 investigations.

[731] *See* supra note 600.

[732] *See* supra note 603.

[733] See supra note 608.

[734] *See* supra notes 608 and 610 and accompanying text.

[735] *See* supra notes 617-620 and accompanying text.

[736] *See* supra notes 617-620 and accompanying text.

[737] *See* supra notes 617-620 and accompanying text.

[738] *See* supra notes 617-620 and accompanying text.

[739] *See* China's First Written Submission, paras. 607-613.

which would allow USDOC to calculate a dumping margin for the China-government entity, and is thus inconsistent with Article 6.1.[740]

576. As an initial matter, as discussed above, the substantive issue of whether USDOC sought the correct information in calculating a dumping margin is not within the scope of Article 6.1. It is only after USDOC determines whether it needs certain information, and at what particular point in the proceeding it requests such information, do the requirements of Article 6.1 come into play. In other words, if USDOC does not require certain information, or that information is not required at that particular point of the proceeding, there is no inconsistency with Article 6.1. Thus, China has not demonstrated how a failure to issue a dumping questionnaire to each company within the China-government entity constitutes a failure to request the information which USDOC sought in the review. Moreover, the text of Article 6.1 does not dictate the type of information USDOC must seek in making a particular determination. As such, Article 6.1 does not dictate *how* USDOC must determine a dumping margin given a particular set of facts, and, therefore, likewise does not dictate what information is required for such a determination given the particular set of facts. Moreover, Article 6.1 applies equally to those determinations which must occur before USDOC is in a position to send a dumping questionnaire to a particular company or company within the China-government entity, such as its selection of mandatory respondents.

577. In any event, Article 6.1 cannot be read in isolation from Article 6.8. Specifically, while Article 6.1 helps to ensure parties can participate in investigations, Article 6.8 addresses the situation for investigating authorities when interested parties frustrate their fact finding. Thus, Article 6.8 applies when a party has not provided information in response to the opportunities afforded in Article 6.1. Thus, where USDOC has properly determined that a party has failed to respond to an initial request for information, or that a failure to respond significantly impedes the proceeding, Articles 6.8 and 6.1 together do not require USDOC to continue to allow that party yet additional opportunities to provide information. As discussed in further detail in Section VII.D.1.a, because in each of these 12 investigations a company within the China-government entity had been notified of and failed to respond to an initial request for quantity and value information, USDOC appropriately determined that the company, and by extension, the China-government entity, had failed to respond to a request for necessary information and, in some cases, had significantly impeded the progress of the proceeding. Contrary to China's argument, nothing in the text of Article 6.1 required USDOC to continue to request information from the China-government entity once the China-government entity had failed to respond to this initial request for information in these 12 investigations.

578. Second, in 8 investigations (Aluminum Extrusions OI, Diamond Sawblades OI, Coated Paper OI, Furniture OI, OCTG OI, PET Film OI, Ribbons OI, and Retail Bags OI), USDOC found that one or more mandatory respondents selected for individual examination had failed to cooperate in some manner (for instance, by failing to respond to a dumping questionnaire).[741] In

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[740] *See Id.* paras. 605-615.

[741] *See* Diamond Sawblades OI, Final Determination, 71 Fed. Reg. at 29308 (Exhibit CHN-45); Retail Bags OI, Preliminary Determination, 69 Fed. Reg. at 3548 (Exhibit CHN-267), unchanged in Retail Bags OI, Final Determination, 69 Fed. Reg. at 34127 (Exhibit CHN-53); Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58)

each of these investigations, USDOC further determined that the mandatory respondent had failed to demonstrate that it was independent from the China-government entity.[742] China appears to acknowledge that the issuance of a dumping questionnaire to these mandatory respondents satisfied Article 6.1's requirements for notice and an opportunity to provide relevant information with respect to these members of the China-government entity.[743] However, China insists that because USDOC did not issue the same dumping questionnaire to each company within the China-government entity, USDOC acted inconsistently with Article 6.1.[744] We note again that Article 6.1 does not govern the substantive issue of how USDOC should determine a dumping margin given a particular set of facts, and likewise does not dictate which information should be required in making such a determination. Thus, China's claim that USDOC did not issue the dumping questionnaire to enough companies within the China-government entity (indeed, *all* the companies within the China-government entity, even those that failed to respond to an initial request for information as noted above) is not within the scope of Article 6.1.

579. In any event, reading together Article 6.1 and the requirements of Article 6.8, and USDOC's ability to control the conduct of its proceedings, in these 8 investigations USDOC was not required to issue a dumping questionnaire to each company within the China-government entity in these 8 investigations. As discussed in Section VII.D.1.b, USDOC properly determined that the failure of a mandatory respondent or mandatory respondents to provide necessary information, despite having notice of the information required, and the failure of these companies to provide information demonstrating their independence from the China-government entity, demonstrated that the China-government entity failed to respond to a request for necessary information and significantly impeded the proceeding.[745] Contrary to China's argument, nothing in the text of Article 6.1 required USDOC to request information from the China-government entity once the China-government entity had failed to cooperate in these 8 investigations.

580. Third, in 2 investigations (Furniture OI and Shrimp OI), as discussed in Section VII.D.1.c, USDOC requested, but did not receive, information from the Government.[746] China

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and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463); Aluminum Extrusions OI, Preliminary Determination, 76 Fed. Reg. at 69410 (Exhibit CHN-111), unchanged in Aluminum Extrusions OI, Final Determination, 76 Fed. Reg. at 18529 (Exhibit CHN-32); Coated Paper OI, Preliminary Determination, 75 Fed. Reg. at 24900 (Exhibit CHN-63), unchanged in Coated Paper OI, Final Determination, 75 Fed. Reg. at 59220-21 (Exhibit CHN-12); OCTG OI, Preliminary Determination, 74 Fed. Reg. at 59124 (Exhibit CHN-62), amended in OCTG OI, Final Determination, 74 Fed. Reg. at 20339 (Exhibit CHN-13); Ribbons OI, Preliminary Determination, 75 Fed. Reg. 7244-45, 7250 (Exhibit CHN-170), unchanged in Ribbons OI, Final Determination, 75 Fed. Reg. at 41810 (Exhibit CHN-33); PET Film OI, Preliminary Determination, 73 Fed. Reg. at 24553, 24557 (Exhibit CHN-112), unchanged in PET Film OI, Final Determination, 73 Fed. Reg. at 55040-41 (Exhibit CHN-56).

[742] *See id.*

[743] China's First Written Submission, paras. 613-615.

[744] *Id.*

[745] *See supra* note 749.

[746] Furniture OI, Preliminary Determination, 69 Fed. Reg. at 35313, 35321 (Exhibit CHN-283), amended in Furniture OI, Final Determination, 69 Fed. Reg. at 67316 (Exhibit CHN-58) and Issues and Decision Memorandum at 84-91 (Exhibit CHN-463); Shrimp OI, Preliminary Determination, 69 Fed. Reg. 42661-62 (Exhibit CHN-215), unchanged in Shrimp OI, Final Determination, 69 Fed. Reg. at 70997 (Exhibit CHN-37).

does not address these facts in its submission. Thus, China has not demonstrated that in these 2 investigations USDOC did not request information from the China-government entity relating to the calculation of a dumping margin for the China-government entity. Therefore, its Article 6.1 claims with respect to these 2 investigations must fail. In addition, the text of Article 6.1 does not require USDOC to continue to request information from the China-government entity where the Government has failed to respond to a request for information. In such instances, consistent with Article 6.8, facts available may be relied upon in determining a dumping margin for the China-government entity.[747]

2. USDOC Acted Consistently With Article 6.1 In Each Of The 13 Challenged Reviews

581. China's arguments that USDOC failed to request from each company within the China-government entity information required to determine a dumping margin for the China-government entity are based on an incorrect reading of the requirements of Article 6.1 and are not supported by the record of each review. We address three types of reviews: 1) Those 6 reviews (Ribbons AR1, Ribbons AR3, Aluminum Extrusions AR1, Retail Bags AR3, Furniture AR7, and Furniture AR8) in which USDOC issued a request for quantity and value information to companies within the China-government entity, 2) those 8 reviews (Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, Shrimp AR8, Diamond Sawblades AR3, Furniture AR8, and Ribbons AR1) in which USDOC issued a dumping questionnaire to one or more companies within the China-government entity, and 3) all 13 reviews in which USDOC notified companies within the China-government entity of the information required to demonstrate their independence from the China-government. We demonstrate that in each of these three types of investigations, USDOC acted consistently with Article 6.1 in notifying companies within the China-government entity of the information which it required, and provided ample opportunities for companies within the China-government entity to provide relevant evidence.

582. First, in 6 reviews (Ribbons AR1, Ribbons AR3, Aluminum Extrusions AR1, Retail Bags AR3, Furniture AR7, and Furniture AR8), USDOC notified companies within the China-government entity of its intent to select mandatory respondents through a direct request for quantity and value information.[748] USDOC issued a request for quantity and value information to those companies for which a review had been requested, and for which USDOC had

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[747] *See* Section VII.D.1.c

[748] *See* Ribbons AR1, Preliminary Results, 77 Fed. Reg. at 47363, 47367 (Exhibit CHN-171), unchanged in Ribbons AR1, Final Results, 78 Fed. Reg. at 10131-32 (Exhibit CHN-51); Ribbons AR3, Preliminary Results, Preliminary Decision Memorandum at 6-9 (Exhibit CHN-156), unchanged in Ribbons AR3, Final Results, 79 Fed. Reg. at 61289 (Exhibit CHN-52); Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 2-3, 14 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 99 (Exhibit CHN-35); Retail Bags AR3, Preliminary Results, 73 Fed. Reg. at 52283-84 (Exhibit CHN-274), unchanged in Retail Bags AR3, Final Results, 74 Fed. Reg. at 6858 (Exhibit CHN-54); Furniture AR7, Preliminary Results, Preliminary Decision Memorandum at 6-7, 13 (Exhibit CHN-298), unchanged in Furniture AR7, Final Results, 78 Fed. Reg. at 35249-50 (Exhibit CHN-59); Furniture AR8, Preliminary Results, Preliminary Decision Memorandum at 6, 9, 12 (Exhibit CHN-302), unchanged in Furniture AR8, Final Results, 79 Fed. Reg. at 51954 (Exhibit CHN-60).

information that the companies had exports during the period of review.[749] USDOC also notified parties of the process by which they could establish their independence from the China-government entity.[750] Certain companies which were issued a quantity and value questionnaire did not demonstrate their independence from the China-government entity.[751] China does not address these facts in this section of its submission.[752] Therefore, China does not demonstrate that USDOC did not provide the China-government entity with notice of the information required in these 6 reviews, consistent with Article 6.1. In any event, as discussed above, Article 6.1 is not limited only to those instances in which USDOC issues a dumping questionnaire, but rather, may be applicable to those instances in which USDOC requires parties to provide quantity and value information at the outset of a proceeding. Thus, for these 6 reviews, USDOC properly notified companies within the China-government entity of the information which it required, and gave these companies ample opportunity to provide relevant information.

583. Second, in 8 reviews (Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, Shrimp AR8, Diamond Sawblades AR3, Furniture AR8, and Ribbons AR1) USDOC issued a dumping questionnaire to a mandatory respondent or mandatory respondents that were ultimately included in the China-government entity.[753] China appears to acknowledge that the issuance of a dumping questionnaire to these mandatory respondents satisfied Article 6.1's requirements for notice and an opportunity to provide relevant information with respect to these companies within the China-government entity.[754] However, China insists that because USDOC did not issue the same dumping questionnaire to each company within the China-government entity, USDOC acted inconsistently with Article 6.1.[755] We note again that Article

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749 *See id.*

750 *See id.*

751 *See id.*

752 *See* China's First Written Submission, paras. 616-624.

753 Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 3, 14 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 97, 99-100 (Exhibit CHN-35); Aluminum Extrusions AR2, Preliminary Results, Preliminary Decision Memorandum at 3-4, 14-16 (Exhibit CHN-205), unchanged in Aluminum Extrusions AR2, Final Results, 79 Fed. Reg.at 78786 (Exhibit CHN-36); Furniture AR7, Preliminary Results, Preliminary Decision Memorandum at 2-3, 12-13 (Exhibit CHN-298), unchanged in Furniture AR7, Final Results, 78 Fed. Reg. at 35320 (Exhibit CHN-59); Shrimp AR7, Preliminary Results, Preliminary Decision Memorandum at 3, 7 (Exhibit CHN-167), unchanged in Shrimp AR7, Final Results, 78 Fed. Reg. at 56210 (Exhibit CHN-38); Shrimp AR8, Preliminary Results, Preliminary Decision Memorandum at 2, 6-7 (Exhibit CHN-120), unchanged in Shrimp AR8, Final Results, 79 Fed. Reg. at 57872 (Exhibit CHN-39); Diamond Sawblades AR3, Preliminary Results, Preliminary Decision Memorandum at 9-10 (Exhibit CHN-256), unchanged in Diamond Sawblades AR3, Final Results, 79 Fed. Reg. at 35724 (Exhibit CHN-48); Furniture AR8, Preliminary Results, Preliminary Decision Memorandum at 3, 6, 9, 12 (Exhibit CHN-302), unchanged in Furniture AR8, Final Results, 79 Fed. Reg. at 51954 (Exhibit CHN-60); Ribbons AR1, Preliminary Determination, 77 Fed. Reg. at 47363-64, 47365, 47367 (Exhibit CHN-171), unchanged in Ribbons AR1, Final Results, 78 Fed. Reg. at 10131-32 (Exhibit CHN-51). China references 7 investigations in this category. *See* China's First Written Submission, para. 619. However, China fails to include Ribbons AR1, in which a mandatory respondent, Precious Planet Ribbons & Bows Co., Ltd. (Precious Planet), who was issued a dumping questionnaire was ultimately included in the China-government entity because it withdrew its request for review and did not have a separate rate from a prior proceeding. *See* Ribbons AR1, Preliminary Results, 77 Fed. Reg. at 47363-64, 47365, 47367 (Exhibit CHN-171).

754 China's First Written Submission, paras. 618-620.

755 *Id.*

6.1 does not govern the substantive issue of whether USDOC sought the correct information in calculating a dumping margin for the China-government entity. Thus, China's claim that USDOC did not issue the dumping questionnaire to enough companies within the China-government entity is not within the scope of Article 6.1.

584. In any event, with respect to 5 of these reviews (Aluminum Extrusions AR1, Aluminum Extrusions AR2, Furniture AR7, Shrimp AR7, and Shrimp AR8) as discussed *supra*, USDOC properly determined that the failure of a mandatory respondent or mandatory respondents to provide necessary information, despite having notice of the information required, and the failure of these companies to provide information demonstrating their independence from the China-government entity, demonstrated that the China-government entity failed to respond to a request for necessary information and significantly impeded the proceeding.[756] Contrary to China's argument, nothing in the text of Article 6.1 required USDOC to request information from the China-government entity once the China-government entity had failed to cooperate in these 5 reviews.

585. Third, in all 13 reviews, USDOC notified each company within the China-government entity of the information which USDOC required to determine the company's eligibility for a separate rate.[757] Such a request for information fell within the scope of Article 6.1.

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[756] Aluminum Extrusions AR1, Preliminary Results, Preliminary Decision Memorandum at 3, 14 (Exhibit CHN-213), unchanged in Aluminum Extrusions AR1, Final Results, 79 Fed. Reg. at 97, 99-100 (Exhibit CHN-35); Aluminum Extrusions AR2, Preliminary Results, Preliminary Decision Memorandum at 3-4, 14-16 (Exhibit CHN-205), unchanged in Aluminum Extrusions AR2, Final Results, 79 Fed. Reg.at 78786 (Exhibit CHN-36); Furniture AR7, Preliminary Results, Preliminary Decision Memorandum at 2-3, 12-13 (Exhibit CHN-298), unchanged in Furniture AR7, Final Results, 78 Fed. Reg. at 35320 (Exhibit CHN-59); Shrimp AR7, Preliminary Results, Preliminary Decision Memorandum at 3, 7 (Exhibit CHN-167), unchanged in Shrimp AR7, Final Results, 78 Fed. Reg. at 56210 (Exhibit CHN-38); Shrimp AR8, Preliminary Results, Preliminary Decision Memorandum at 2, 6-7 (Exhibit CHN-120), unchanged in Shrimp AR8, Final Results, 79 Fed. Reg. at 57872 (Exhibit CHN-39).

[757] *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (10 July 2012), 77 Fed. Reg. 40565 (Exhibit CHN-192), p. 40566 (Aluminum Extrusions AR1, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (28 June 2013), 78 Fed. Reg. 38924 (Exhibit CHN-193), pp. 38924-25 (Aluminum Extrusions AR2, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (30 March 2012), 77 Fed. Reg. 19179 (Exhibit CHN-194), pp. 19180-81 (Shrimp AR7, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (29 March 2013), 78 Fed. Reg. 19197 (Exhibit CHN-195), p. 19198 (Shrimp AR8, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (28 December 2010), 75 Fed. Reg. 81565 (Exhibit CHN-196), p. 81566 (Diamond Sawblades AR1, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (30 December 2011), 76 Fed. Reg. 82268 (Exhibit CHN-197), p. 82269 (Diamond Sawblades AR2, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (31 December 2012), 77 Fed. Reg. 77017 (Exhibit CHN-198), pp. 77018-19 (Diamond Sawblades AR3, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (30 January 2013), 78 Fed. Reg. 6291 (Exhibit CHN-199), pp. 6291-92 (Wood Flooring AR1); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (31 October 2011), 76 Fed. Reg. 67133 (Exhibit CHN-200), pp. 67133-34 (Ribbons AR1); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (8 November 2013), 78 Fed. Reg. 67104 (Exhibit CHN-201), pp. 67104-05 (Ribbons AR3); Retail Bags AR3, Letter to Interested Parties Regarding Separate Rates (18 September 2007) (Exhibit USA-75); Wooden Bedroom Furniture From the People's Republic of China: Initiation of Administrative Review (29 February 2012), 77 Fed. Reg. 12235 (Exhibit CHN-

586. In 5 reviews (Diamond Sawblades AR1, Diamond Sawblades AR2, Retail Bags AR3, Wood Flooring AR1, and Ribbons AR1) China is correct that USDOC did not issue a dumping questionnaire to companies within the China-government entity.[758] However, in each of these 5 reviews USDOC had notified each company within the China-government entity under review of the process by which they could establish their independence from the China-government entity.[759] Moreover, in 2 of these reviews (Retail Bags AR3 and Ribbons AR1), as discussed above, USDOC had requested information pertaining to the quantity and value of imports from those companies included in the China-government entity.[760] In addition, in each of these 5 reviews USDOC found no basis to re-examine the dumping margin for the China-government entity which had been set in a prior proceeding.[761] China argues that USDOC was required under Article 6.1 to request a dumping margin from each company within the China-government entity.[762] Once again, however, China has not demonstrated that Article 6.1 governs the substantive issue of which information should be relied upon for purposes of establishing a dumping margin for the China-government entity.

191), p. 12237 (Furniture AR7, Initiation Notice); Wooden Bedroom Furniture From the People's Republic of China: Initiation of Administrative Review (28 February 2013), 78 Fed. Reg. 13636 (Exhibit CHN-203), pp. 13627-28 (Furniture AR8, Initiation Notice).

[758] Diamond Sawblades and Parts Thereof From the People's Republic of China, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results) (Exhibit CHN-46), p. 11145 (Diamond Sawblades AR1); Diamond Sawblades and Parts Thereof From the People's Republic of China, 78 Fed. Reg. 36166 (June 17, 2013) (final results) (Exhibit CHN-47) (Diamond Sawblades AR2); Polyethylene Retail Carrier Bags from the People's Republic of China, 74 Fed. Reg. 6857(Feb. 11, 2009) (final results) (Exhibit CHN-54) (Retail Bags AR3); Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China, 78 Fed. Reg. 10130 (Feb. 13, 2013) (final results) (Exhibit CHN-51) (Ribbons AR1); Multilayered Wood Flooring From the People's Republic of China, 79 Fed. Reg. 26712 (May 9, 2014) (final results) (Exhibit CHN-50) (Wood Flooring AR1). China states that there are 6 reviews in this category, but it only lists these 5. *See* China's First Written Submission, para. 621, fn 704.

[759] Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (28 December 2010), 75 Fed. Reg. 81565 (Exhibit CHN-196), p. 81566 (Diamond Sawblades AR1, Initiation Notice); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (30 December 2011), 76 Fed. Reg. 82268 (Exhibit CHN-197), p. 82269 (Diamond Sawblades AR2, Initiation Notice); Retail Bags AR3, Letter to Interested Parties Regarding Separate Rates (18 September 2007) (Exhibit USA-75); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (30 January 2013), 78 Fed. Reg. 6291 (Exhibit CHN-199), pp. 6291-92 (Wood Flooring AR1); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part (31 October 2011), 76 Fed. Reg. 67133 (Exhibit CHN-200), pp. 67133-34 (Ribbons AR1).

[760] Ribbons AR1, Preliminary Results, 77 Fed. Reg. at 47363, 47367 (Exhibit CHN-171), unchanged in Ribbons AR1, Final Results, 78 Fed. Reg. at 10131-32 (Exhibit CHN-51); Retail Bags AR3, Preliminary Results, 73 Fed. Reg. at 52283-84 (Exhibit CHN-274), unchanged in Retail Bags AR3, Final Results, 74 Fed. Reg. at 6858 (Exhibit CHN-54).

[761] Diamond Sawblades and Parts Thereof From the People's Republic of China, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results) (Exhibit CHN-46), p. 11145 (Diamond Sawblades AR1); Diamond Sawblades and Parts Thereof From the People's Republic of China, 78 Fed. Reg. 36166 (June 17, 2013) (final results) (Exhibit CHN-47) (Diamond Sawblades AR2); Polyethylene Retail Carrier Bags from the People's Republic of China, 74 Fed. Reg. 6857(Feb. 11, 2009) (final results) (Exhibit CHN-54) (Retail Bags AR3); Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China, 78 Fed. Reg. 10130 (Feb. 13, 2013) (final results) (Exhibit CHN-51) (Ribbons AR1); Multilayered Wood Flooring From the People's Republic of China, 79 Fed. Reg. 26712 (May 9, 2014) (final results) (Exhibit CHN-50) (Wood Flooring AR1).

[762] *See* China's First Written Submission, para. 621.

587. Lastly, China takes issue with USDOC's "conditional review" of the China-government entity in 12 reviews. China argues that in these reviews, the China-government entity, including all companies within the China-government entity, "had no indication as to whether they were even subject to review until the issuance of the preliminary determination."[763] However, China confuses the requirements of Article 6.1 with its general grievance towards the "conditional review" process. As demonstrated above, Article 6.1 requires USDOC to 1) notify all companies within the China-government entity of the information which USDOC requires, and 2) permit the companies within the China-government entity ample opportunity to present in writing all evidence which they considered relevant. Article 6.1 does not govern the substantive issue of how USDOC determines a dumping margin for the China-government entity.

588. In any event, as demonstrated above, USDOC properly notified all companies within the China-government entity of the information required in each stage of the review. For instance, USDOC notified parties that any company that had exported to the United States during the review period had the opportunity to request a review of its exports.[764] This included those companies that had previously been included in the China-government entity. As part of the review process, all companies had the opportunity to demonstrate that they were not subject to the China-government entity by either completing a separate rate application (for those companies that had not demonstrated their entitlement to a separate rate in the prior segment of the proceeding) or a separate rate certification (for those companies that had been granted a separate rate in the prior segment of the proceeding).[765] Thus, the China-government entity was notified of the process by which it could request a review of the dumping margin assigned to the China-government entity. The China-government entity was also made aware that at any time, the China-government entity could be under review if a company within the China-government entity failed to demonstrate its independence from the China-government entity. Thus, consistent with Article 6.1, USDOC properly notified companies within the China-government entity of the information required, and provided opportunities for the companies within the China-government entity to provide relevant information.

IX. CONCLUSION

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

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[763] *See Id.* paras. 622-623 (emphasis not included).

[764] *See*, *e.g*. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 77 Fed. Reg. 25679 (May 1, 2012) (Aluminum Extrusions AR1, Opportunity To Request Review Notice) (Exhibit USA-76).

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