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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS471/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 11 February 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

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

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

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11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by China. If the United States chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the

floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 7 paper copies of all documents it submits to the Panel. However, Exhibits may be filed in 3 CD-ROMs or DVDs and 4 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to Gabrielle.Marceau@wto.org, Muslum.Yilmaz@wto.org and Sagnik.Sinha@wto.org. CD-ROMs or DVDs shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 16 February 2015

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by the U.S. Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping duty proceedings relevant to this dispute. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the relevant proceedings agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI, as defined above, from an entity that submitted that information in one of the relevant proceedings, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both China and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those proceedings.

3. If an entity refuses to grant the authorization letter, a party may bring the situation to the attention of the Panel. The Panel shall consider what steps to take, which may include requesting information pursuant to Article 13 of the DSU.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the proceedings relevant to this dispute.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state “Contains business confidential information on pages xxxxxx”, and each page of the document shall contain the notice “Contains Business Confidential Information” at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the

Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. USDOC's Application of its Targeted Dumping Methodology in Three Original Investigations

A. USDOC failed to comply with the conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence

1. According to Article 2.4.2, second sentence, the *first* condition under which a Member may depart from the "normal" symmetrical comparison methodologies – i.e., when it may depart from using the weighted average-to-weighted average ("W-W") or transaction-to-transaction ("T-T") comparison methodologies, and instead use the exceptional weighted-average-to-transaction ("W-T") comparison methodology – is that there must exist "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Once a relevant "pattern" has been identified, an investigating authority must satisfy the *second* condition, which is to *explain* why the pattern "cannot be taken into account appropriately" through the application of the symmetrical comparison methodologies.

2. In evaluating an investigating authority's approach to determining whether these two conditions are satisfied, a WTO panel must apply the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*. In particular, "panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts was *unbiased and objective*".[1]

3. For the below reasons, USDOC failed to comply with the two conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence, in each of the three challenged determinations.

1. USDOC's failed to comply with the condition to identify a relevant pricing pattern

a. USDOC used the statistical tools of its own choice in an arbitrary and biased manner

4. An investigating authority is not obliged under the *Anti-Dumping Agreement* to have recourse to any *specific* statistical tools in addressing the first condition under Article 2.4.2, second sentence. However, China argues that the United States failed to use the tools of its own choice in a manner that would have enabled it to establish the facts properly and to evaluate them in an unbiased and objective manner.

5. In order to assess whether the first condition for having recourse to the exceptional W-T comparison methodology was met, i.e., to assess the existence of a "pattern", USDOC applied the so-called Nails Test in the three challenged determinations.[2] However, to be potentially meaningful as an analytical tool, the Nails Test hinges on the assumption that the distribution of the examined export prices was, at the minimum, single-peaked and symmetric around the mean. Across the three challenged determinations, although in some CONNUMs the export price data came close to being normally distributed, this was not generally the case. Thus, China's claims as to USDOC's failure to demonstrate that the identified export price differences were "significant" in a quantitative sense, are not dependent on the assumption that the observed export prices were "normally distributed". Rather, it is the Nails Test, and therefore the validity of the US position, that depends on that assumption.

6. China's three main substantive criticisms of the Nails Test can be summarized as follows:

7. *First*, the threshold of a single standard deviation from the mean, USDOC's primary tool for its Pattern Test, is insufficient for reaching a reliable conclusion that an observed set of prices differ in a relevant way. Such a low threshold is insufficient to draw a conclusion that a random

[1] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56 (emphasis original).
[2] *OCTG* OI, *Coated Paper* OI, and *Steel Cylinders* OI.

price observation is significantly different from other price observations in a given distribution, or whether, by contrast, it falls within that distribution. If USDOC had instead used thresholds consistent with the established statistical conventions for determining quantitative significance, *none of the alleged-target units in any of the three challenged determinations* would have fallen below the threshold price.

8. *Second*, it was inappropriate for USDOC to attribute "significance" to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean, because this is an *inherent feature* of every peaked distribution with tails.

9. *Third*, the US approach to consider only the gap between non-targeted weighted-average export prices which are greater than the weighted-average export prices to the allegedly "targeted" group led to an inherent bias in the design of the Nails Test, unduly increasing the likelihood of a finding that a price difference was "significant", and hence of an ultimate finding of "targeted dumping".

b. USDOC's reliance, in the Nails Test, on weighted-average prices instead of individual export transactions runs afoul of the treaty text and biased the test towards finding a "pattern"

10. USDOC's use of weighted-average prices for purposes of the Nails Test was inconsistent with Article 2.4.2, second sentence, for two reasons: *first*, the US approach is inconsistent with the legal requirement to focus on individual export prices; and, *second*, USDOC's reliance on customer or time period averages ignored within-customer and within time-period price variances. As a result, USDOC systematically biased the standard deviation used in the Pattern Test, drawing it closer to the mean, which improperly qualified more sales as "targeted" than would have been the case had USDOC calculated the one-standard-deviation threshold based on individual transaction prices.

c. USDOC failed to assess whether export prices differed "significantly" in a qualitative sense

11. Both a *quantitative* and a *qualitative* dimension are inherent in the concept of "significance". Variations in prices that can be explained by reference to normal factors in the relevant market are not "prices which differ significantly", in *qualitative* terms, for purposes of Article 2.4.2. 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 differences might be normal within an industry or over time, USDOC mechanically applied the Nails Test and did not provide any explanation as to why prices passing its various thresholds could not arise from normal market dynamics undistorted by "targeted dumping".

2. USDOC failed to comply with the condition to provide a reasoned and adequate explanation as to why the relevant pricing pattern could not appropriately be taken into account using the symmetrical comparison methodologies

12. The explanation provided by USDOC as to why the relevant pricing pattern could not appropriately be addressed using a symmetrical comparison methodology in the three challenged determinations suffer from three fundamental flaws:

13. *First*, the explanation provided by USDOC in each of the three challenged determinations was excessively brief; it consisted of a single assertion as to the reason why a symmetrical comparison methodology was inappropriate. The "explanation" provided no analysis whatsoever of the characteristics of the identified "pattern" that led USDOC to the conclusion that it could not use the symmetrical comparison methodologies.

14. *Second*, contrary to the US argument, the "explanation" required by the second sentence of Article 2.4.2 must include a discussion of *both* the W-W and T-T comparison methodologies. In order properly to interpret the "or" in the second sentence of Article 2.4.2, one must take into account the context provided by the first sentence of Article 2.4.2, which contains the general rule, which is that "normally" an authority is to use a symmetrical comparison methodology to calculate a margin of dumping. Hence, recourse to the exceptional W-T comparison methodology is only

allowed if *neither* of the symmetrical comparison methodologies can take into account appropriately the identified pricing pattern.

15. *Third*, USDOC's explanation is based on the untenable assumption that, under the W-T comparison methodology under Article 2.4.2, second sentence, the application of zeroing procedures is somehow permissible. However, the US position disregards that, for the W-T comparison methodology, the *Anti-Dumping Agreement* imposes the same prohibition against the use of zeroing as in the context of both the W-W or T-T comparison methodologies. A fundamental principle undergirding the *Agreement* is that a margin of dumping must be calculated for the product as a whole, regardless whether the calculation is under the first or second sentence of Article 2.4.2 (or in a review under Article 9.3). And zeroing impermissibly prevents the determination of a margin of dumping for the product as a whole.

B. USDOC violated the treaty limits on an authority's discretion when applying the W-T comparison methodology pursuant Article 2.4.2, second sentence

1. USDOC unduly applied the W-T comparison methodology to all export sales instead of limiting the application of W-T to those sales that comprise the relevant pricing pattern

16. An investigating authority must limit the application of the W-T comparison methodology solely to those sales that comprise the relevant pricing pattern. China's position rests on the following grounds:

17. *First*, the express textual connection in Article 2.4.2 between the concepts of the "export prices which differ significantly" and "the prices of individual export transactions" denotes a parallelism between the scope of those transactions which fall into the relevant pricing pattern and the scope of application of the W-T comparison methodology.

18. Second, Article 2.4.2 limits the scope of application of the W-T comparison methodology to the extent necessary to "take into account appropriately" a relevant pricing pattern. The second sentence allows price differences to be taken into account "appropriately", and not in a generalized or excessive manner. Again, there is parallelism between the scope of the problem (a relevant pricing pattern that cannot be taken into account "appropriately") and the exceptional remedy provided.

19. *Third*, a general principle in WTO law is that an exception takes precedence over a general rule only to the extent of the conflict between the two provisions. Like other provisions of the covered agreements, Article 2.4.2 lays down a general rule that a symmetrical methodology should "normally" be used. The exception allowing use of the W-T comparison methodology takes precedence over this general rule only to the extent necessary to "take{} into account appropriately" a relevant pricing pattern. For sales outside this pattern (for example, sales to customers, regions or time periods other than those found to be targeted, or sales of models or types of the product for which no relevant pricing pattern has been found), no conflict between the first and second sentences of Article 2.4.2 exists, and therefore, an authority must use a symmetrical comparison methodology. The results of all intermediate comparison results must then be aggregated in order to generate a margin of dumping for the product as a whole.

20. *Finally*, China notes that a "relevant pricing pattern" necessarily can exist only in a *subset* of export sales. The process of discerning a "pattern" serves to *distinguish* prices that fall *within* the pattern from those that fall *outside* the pattern. Indeed, the United States' position that the pattern must include all sales because "an export price cannot 'differ significantly' on its own"[3] is at odds with the pattern of prices actually identified by the Nails Test applied by USDOC in the three challenged determinations. A fundamental element of the Nails Test is that it seeks to find "patterns" by reference to models, as well as by time (in *OCTG* and *Steel Cylinders*) or by customer (in *Coated Paper*). In this way, USDOC identified pricing patterns in respect of some models and not others. Having isolated the pattern in this limited way, USDOC was obliged to apply the exceptional W-T comparison methodology solely to the pattern it had identified, i.e., to a subset of the observed export sales.

[3] US First Written Submission, para. 202.

21. For all these reasons, there was no basis for USDOC in the three challenged determinations to apply the W-T comparison methodology to all sales of an exporter.

2. The United States' reliance on the concept of mathematical equivalence is unavailing to justify its use of zeroing when applying the W-T comparison methodology in investigations

22. Zeroing is not permissible when applying the W-T comparison methodology in investigations, just as it is impermissible when using the W-T comparison methodology in reviews. The contrary position is inconsistent with the "exporter-specific" and "product-related" aspects[4] of the foundational concept of dumping, which, as the Appellate Body has consistently explained, is *not* a transaction-specific concept. Since "dumping" cannot be found to exist at the level of individual transactions, there is no justification for failing to take account of any transaction-specific intermediate comparison results when aggregating comparison results in order to yield a margin of "dumping".

23. The United States attempts in vain to re-litigate the "mathematical equivalence" argument, which has consistently been rejected by the Appellate Body.[5] As the Appellate Body has explained, it is possible to generate results using the W-T comparison methodology that are different from those arising from the use of the W-W comparison methodology. For instance, nothing in Article 2.4.2 prevents an investigating authority from dividing the period of investigation into several time periods for purposes of calculating weighted average normal values to compare with individual export transactions under the W-T comparison methodology. As China has demonstrated, using different temporal bases for normal value means that mathematically *different* results will generally arise.

24. Although it is true that the earlier disputes in which the Appellate Body addressed the "mathematical equivalence" argument did not involve an actual application of the W-T comparison methodology under Article 2.4.2, second sentence, the disciplines that constrain how to use the W-T comparison methodology (including the prohibition on the use of zeroing procedures) apply equally regardless of the proceedings in which that methodology is used.

II. USDOC's Application of its Targeted Dumping Methodology in an Administrative Review

A. USDOC's application of zeroing procedures in *PET Film* AR3 is inconsistent with Article 9.3 of the *Anti-Dumping Agreement*

25. Although the *Anti-Dumping Agreement* does not restrict the ability of an investigating authority to use the W-T comparison methodology in administrative reviews, the use of *zeroing* "for purposes of assessing final liability for payment of anti-dumping duties" in an administrative review is prohibited.[6] Instead, as detailed in several Appellate Body Reports, duty liability must not exceed the *margin of dumping* determined for the product as a whole.[7] Accordingly, it is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 to disregard intermediate comparison results yielding negative margins when aggregating the results of multiple comparisons of normal value and export prices. USDOC's resort to zeroing to assess liability for anti-dumping duties in *PET Film* AR3 is, therefore, inconsistent with the United States' obligations under the WTO agreements.

[4] See, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[5] See, e.g., Appellate Body Report, *US – Softwood Lumber V (Article 21.5 Canada)*, paras. 97-100; Appellate Body Report, *US – Zeroing (Japan)*, para. 146; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126; Appellate Body Report, *US – Continued Zeroing*, paras. 296-298.

[6] Appellate Body Report, *US – Continued Zeroing*, para. 285.

[7] See, e.g., Appellate Body Reports, *US – Zeroing (EC)*, paras. 132-133; *US – Zeroing (Japan)*, paras. 108-115, 166 and 174-176; *US – Stainless Steel (Mexico)*, paras. 97-139; and *US – Continued Zeroing*, paras. 276-287 and 314-316.

B. The US argument depends on the untenable assumption that the second sentence of Article 2.4.2 somehow applies not only to original investigations, but also to administrative reviews

26. As regards the third administrative review in *PET Film*, China's challenge focuses on USDOC's application of zeroing procedures in connection with applying the W-T comparison methodology. Thus, China's claim must be analyzed pursuant to Article 9.3 of the *Anti-Dumping Agreement*, which governs reviews. China considers that, while investigating authorities may apply the W-T comparison methodology in administrative reviews, there is no doubt that the WTO disciplines on *how* an investigating authority may apply the W-T comparison methodology govern the application of that methodology in all types of proceedings (reviews and investigations) equally.

27. The US defense against China's claim appears to depend on the untenable assumption that the second sentence of Article 2.4.2 somehow applies to administrative reviews and not only to original investigations. Yet, the precise terms of the treaty text ("…during the investigation phase . . .") allow only one conclusion: recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations. Thus, even if the use of zeroing were permitted in original investigations in connection with applying the W-T comparison methodology under Article 2.4.2, second sentence, which is *not* the case, such permission would not extend to the duty assessment phase governed by Article 9.3 of the *Anti-Dumping Agreement*.

III. The Single Rate Presumption for Non-Market Economies, As Such, and As Applied in 38 Challenged Determinations is Inconsistent with Articles 6.10, 9.2 and 9.4 of the *Anti-Dumping Agreement*

28. In anti-dumping proceedings involving countries considered by USDOC to be "non-market economies" (or "NMEs"), USDOC presumes that all producers/exporters from the country concerned are part of a single, government controlled entity to which USDOC assigns a single rate. In order to rebut this presumption, a producer/exporter must prove both *de jure* and *de facto* absence of government control. China shows – by reference to evidence including USDOC Policy Bulletin 05.01, USDOC's Antidumping Manual, the records of the proceedings at issue, rulings of US courts and a sample of 40 original investigations and 52 administrative reviews issued by USDOC in proceedings involving NMEs since 2001 – that this "Single Rate Presumption", including the "Separate Rate Test" through which it may be rebutted, is a norm of general and prospective application that may be challenged as such in WTO dispute settlement. This norm is materially the same as the norm proven to exist and successfully challenged by Viet Nam in *US – Shrimp II (Viet Nam)* and is closely analogous to the EC measure that was found to be WTO-inconsistent by the Appellate Body in *EC – Fasteners*.

29. Article 6.10 requires that, for "each known exporter or producer ... of the product under consideration", an authority shall "determine an individual margin of dumping" unless an exception specifically contemplated by the *Agreement* applies. The Single Rate Presumption, as such and as applied in the 38 challenged determinations,[8] violates Article 6.10 because USDOC does not determine an individual margin of dumping for each of the known producers/exporters who are grouped into the single NME-wide entity by means of the presumption. Instead, in order to qualify for an individual margin, all producers/exporters from China, or any other country deemed to be an NME by USDOC, must rebut the presumption that they are part of the single NME-wide entity by demonstrating that they satisfy USDOC's Separate Rate Test. Although it is clear that authorities may, based on facts and evidence, determine that two or more respondents in an anti-dumping proceeding have such close affiliations that they may be treated as a single exporter, USDOC's *presumption* of singularity in NME cases, and the imposition of the burden on Chinese producers/exporters to rebut it, have no basis in the covered agreements. In particular, paragraph 15 of China's *Protocol of Accession* does *not* justify the Single Rate Presumption in relation to China. The exception to the generally applicable anti-dumping rules contained in

[8] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *Shrimp* AR9, *OTR Tires* OI, *OTR Tires* AR5, *OTR Tires* AR3, *OCTG* OI, *OCTG* AR1, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Steel Cylinders* OI, *Wood Flooring* OI, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* OI, *Ribbons* AR1, *Ribbons* AR3, *Bags* OI, *Bags* AR3, *Bags* AR4, *PET Film* OI, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* OI, *Furniture* AR7, *Furniture* AR8, *Furniture* AR9.

paragraph 15 of that *Protocol* is limited to certain matters relating to the determination of Chinese normal values.

30. Article 9.2 requires that, when imposing anti-dumping duties, an authority must "name the supplier or suppliers of the product concerned", thereby specifying such suppliers, in order to collect duties in "the appropriate amounts" from each supplier or suppliers.[9] In other words, the authority must apply individual duties to each individually-identified producer/exporter unless an exception specifically contemplated by the *Agreement* applies. The Single Rate Presumption, as such and as applied in the 38 challenged determinations, violates Article 9.2 because USDOC does not name each of the producers/exporters that are grouped into the single NME-wide entity for purposes of imposing anti-dumping duties, and thereby fails to apply to them individual duties and duties in the appropriate amounts. Instead, in order to be named and to qualify for individual anti-dumping duties, a distinct producer/exporter must rebut the presumption that it is part of the single NME-wide entity by means of the Separate Rate Test. Again, this presumption and the requirement to rebut it have no basis in the covered agreements.

31. Article 9.4, second sentence, applies when the authority has exercised its discretion to limit the investigation under the second sentence of Article 6.10. It confers additional rights upon producers and exporters who are "not included in the examination" and who would ordinarily, therefore, be the subject of an anti-dumping duty that complies with the disciplines prescribed by the first sentence of Article 9.4. The second sentence provides, in relevant part, that such producers/exporters must receive an individual duty in cases where they "provide{} the necessary information" to allow the authority to determine an individual margin for such a respondent "as provided for in subparagraph 10.2 of Article 6". Article 6.10.2, in turn, requires the calculation of individual margins of dumping for non-selected respondents who voluntarily submit the necessary information in a timely manner, unless it would be unduly burdensome to do so.

32. The Separate Rate Test violates Article 9.4, second sentence, because – regardless of whether a fictional NME-wide *entity* is considered to be "included in the examination" – at least some of the producers/exporters *included within* the NME-wide entity are *not* included in the examination in a manner that generates an individual margin of dumping or individual duty for them. Such respondents cannot receive an individual margin of dumping or anti-dumping duty rate by submitting the "necessary information", as contemplated by Article 9.4. Instead, such respondents must *additionally* meet the Separate Rate Test. By imposing an *additional* condition for receipt of individual duties that is not contemplated by Article 9.4, the Single Rate Presumption, including the Separate Rate Test, as such and as applied in the 38 challenged determinations, violates Article 9.4, second sentence.

IV. The Methodology through which USDOC Determined the Rate for the Fictional PRC-Wide Entity in 30 Challenged Determinations was Inconsistent with Articles 6.1, 6.8, 9.4 and Annex II of the *Anti-Dumping Agreement*

33. Having presumed, in each of the 13 challenged investigations, the existence of a PRC-wide entity, USDOC proceeded to determine a single dumping rate for the PRC-wide entity, including all of the producers/exporters included within it.[10] A PRC-wide entity rate was also determined in 17 challenged reviews.[11] In the remaining 8 challenged determinations, USDOC did not determine a PRC-wide entity rate.[12]

34. Pursuant to Article 6.10, investigating authorities must, as a rule, determine an *individual margin of dumping* for each known producer/exporter of the product under investigation. China understands that, in each determination, USDOC purported to determine an individual rate for the fictional PRC-wide entity, including *all* of the distinct producers/exporters included within it. In determining such an individual margin of dumping, investigating authorities must observe the procedural requirements set forth in Article 6 of the *Anti-Dumping Agreement.* These procedural

[9] Appellate Body Report, *EC – Fasteners*, para. 339.

[10] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *Pet Film* OI, *Furniture* OI.

[11] *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

[12] *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* AR9.

protections seek to ensure that authorities make an *accurate determination* of whether, and if so, in what magnitude, there is dumping by an individual producer/exporter.

35. In pursuit of an accurate determination, the *Anti-Dumping Agreement* expresses a preference in favor of information submitted by the individual producer/exporter concerned (primary information). In order to obtain primary information from the respondent and accord the respondent due process, the first step required of an authority in connection with the evidence to be used in a determination of dumping is to give *notice of the information that it requires* from interested parties, followed by the grant of *ample opportunity* for interested parties to *present evidence* in writing (Article 6.1). China claims that, in the determinations in which it determined a PRC-wide entity rate, USDOC acted inconsistently with Article 6.1. This is because, in order to determine an individual rate for the fictional PRC-wide entity, including all of the respondents grouped into it, the information that USDOC "require{d}" included all of the information regarding the US sales and the normal value comparators for all those distinct respondents. Only by obtaining this information could USDOC calculate a margin of dumping for an entity comprised of all those distinct respondents. Yet, USDOC: (i) failed to request the detailed information necessary to calculate a margin of dumping for the PRC-wide entity, including from the distinct respondents comprising the entity, and thereby failed to give notice of the required information; and (ii) failed to give the PRC-wide entity, including the distinct respondents comprising it, ample opportunity to submit relevant evidence for that determination.

36. The *Anti-Dumping Agreement* recognizes, in its Article 6.8, that an interested party might refuse access to, or otherwise not provide, primary information that is necessary for the authority to make preliminary or final determinations, including in respect of the existence and magnitude of dumping. Article 6.8 establishes that, in such cases, the authority may resort to "facts available", including secondary source information, to replace missing information, provided that the authority observes the requirements of Annex II of the *Anti-Dumping Agreement*. Like the facts available provision of the *SCM Agreement*, Article 6.8 and Annex II allow an authority to "'*reasonably replace* the information that an interested party failed to provide', with a view to arriving at an accurate determination".[13]

37. Consistent with the objective of ensuring *accurate* determinations, Annex II provides for authorities to use the "Best Information Available in Terms of Paragraph 8 of Article 6", and lays down specific requirements that must be observed: (i) before an authority may resort to facts available at all; and, (ii) if the conditions for resorting to facts available have been met, in selecting amongst the facts available.

38. With respect to (i) – that is, the pre-conditions for resort to facts available – Paragraph 1 of Annex II echoes a requirement of Article 6.1. It conditions recourse to "facts available" in respect of an interested party upon the authority having "specif{ied} in detail the information required" from that interested party. Additionally, the authority must have informed the interested party concerned that facts available may be used if the required information is not supplied within a reasonable period of time. In other words, there is no basis for recourse to facts available, if the required information has not, first, been *requested* by the authority. Further, facts available may only be used to replace the specific information that the authority required but did not receive from an interested party. In this way, Article 6.8 and Annex II of the *Anti-Dumping Agreement* are concerned with overcoming the absence of information that is *necessary* to complete a determination. According to the Appellate Body, "{i}t is the absence of *this particular information* that the use of the 'facts available' is designed to mitigate".[14]

39. China claims that, although USDOC purported to determine an individual rate for the entire PRC-wide entity (including *all* of the respondents grouped into it), USDOC failed to "specify in detail" the information that it required to determine an individual margin of dumping for the PRC-wide entity in each of the relevant determinations, as required by Article 6.8 and Annex II(1). Accordingly, USDOC did not have a valid basis to resort to facts available in setting a rate for the fictional PRC-wide entity and the respondents it contained in the challenged determinations in which it determined a PRC-wide entity rate.

[13] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178 (emphasis added by the Appellate Body, footnotes omitted); see also and Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

[14] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (emphasis added, footnote omitted).

40. With respect to (ii) – that is, the criteria for selecting amongst the facts available once the conditions for resorting to facts available have been met by the authority – Annex II specifies that the "facts to be employed are expected to be 'best information available'",[15] which is to say, the "most fitting or 'most appropriate' information",[16] such that "there can be no better information available to be used in the particular circumstances".[17] In this way, Article 6.8 and Annex II contemplate selection of *reasonable* replacements for missing facts, so as to allow the authority to render an *accurate* determination. The *Anti-Dumping Agreement* imposes obligations on the process followed by an investigating authority to identify the *best* available information. Specifically, paragraph 7 of Annex II requires that an authority exercise "special circumspection" in the selection of facts available where such facts are drawn from secondary sources. This requires a comparative evaluation of all the information that is available, in which "all substantiated facts on the record must be taken into account".[18] Thus, where inferences must be drawn from the facts and circumstances of the case at hand, these need to take account of *all* the facts and circumstances, including the circumstances by virtue of which information is missing. Inferences made by the investigating authority must be *reasonable*, so that they allow the authority reasonably to replace the necessary information that is missing. For this reason, the Appellate Body has emphasized that such inferences "cannot be made on the basis of procedural circumstances alone".[19] Negative inferences based solely on the procedural circumstance of non-cooperation, without considering the circumstances in which non-cooperation arose, as well as all the other facts and circumstances, cannot qualify selected information as the "best" information, as required under Article 6.8 and Annex II.

41. China claims that, when selecting the secondary source information to use as facts available to determine a rate for an NME-wide entity, USDOC applies the Use of Adverse Facts Available norm. Under this norm, whenever USDOC finds non-cooperation by the NME-wide entity, it follows a process that selects *adverse* information from amongst the available secondary source information to set the rate for the fictional entity. It does not use a process that selects reasonable replacements, using the best information available, so as to render an accurate determination. Instead, USDOC selects adverse information because it makes an *adverse* inference based solely on the finding of non-cooperation and without regard to the circumstances under which the finding of non-cooperation was made, which frequently include that USDOC *presumes* non-cooperation. USDOC selects adverse facts to set the rate for the fictional NME-wide entity, even in cases where it has not sought the information required to calculate a rate for such an entity, meaning it does so even where the conditions for resort to facts available have not been met at all.

42. China demonstrates the existence of the Use of Adverse Facts Available norm by reference to USDOC's practice in anti-dumping proceedings, the Antidumping Manual, statements by USDOC, statements by US courts, as well as a sample of 64 determinations in which USDOC determined an NME-wide entity rate. This evidence, which indicates that USDOC always selects adverse facts to determine the NME-wide entity rate whenever it deems an NME-wide entity to be non-cooperative, shows the precise content of the norm, that it is attributable to the United States, and that it has general and prospective application in anti-dumping proceedings involving countries considered by USDOC to be NMEs.

43. China claims that this norm (both as such and as applied in 28 of the 30 determinations in which it determined a rate for the PRC-wide entity)[20] is inconsistent with Article 6.8 and Annex II, because the norm establishes a process that, by design, causes USDOC rigidly to select *adverse* information, which, in turn, leads USDOC not to engage in a process to identify the *best* information through an exercise "special circumspection". Contrary to the duty of "special circumspection", the norm effectively prevents USDOC from exploring relevant facts and

[15] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[16] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[17] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[18] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419, referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.
[19] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[20] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *Pet Film* OI, *Furniture* OI, *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

circumstances other than its finding of non-cooperation when selecting the PRC-wide entity rate. USDOC thus does not select replacements for missing facts because they are *reasonable*; instead it selects facts because they yield a rate for an NME-wide entity that is *adverse* – i.e., an "adverse facts available" rate, in USDOC parlance.

44. China also shows that USDOC violated the requirements of Article 6.8 and Annex II in each of the challenged determinations in which it determined a rate for the PRC-wide entity, regardless of whether or not USDOC applied a norm of general and prospective application. Specifically, in 28 of the 30 relevant determinations, USDOC violated Article 6.8 and Annex II because it failed to use a process that selected reasonable replacements, using the best information available, so as to render an accurate determination. Instead, it selected adverse information to assign the rate for the PRC-wide entity due to an *adverse* inference based on the finding of non-cooperation, and without regard to the circumstances under which the finding of non-cooperation was made. Further, in all 30 of the determinations in which it determined a rate for the PRC-wide entity, USDOC selected information to replace missing information in determining the PRC-wide entity rate from among the available secondary sources without conducting the comparative, evaluative process required. USDOC also failed, in each relevant determination, to provide a reasoned and adequate explanation as to how the secondary source information it selected was the *best* available information, in terms of Article 6.8 and Annex II.

45. Finally, where an investigating authority relies upon Article 6.10 to sample a subset of all producers/exporters for individual examination, Article 9.4 establishes disciplines upon *any* anti-dumping duty that is applied to producers/exporters *not* included in the examination. Thus, when an authority resorts to sampling, a rate must be either an *individual rate*, complying with the procedural requirements relating to the determination of an individual margin of dumping in Article 6, or it may be an *"all others" rate* that is subject to Article 9.4.

46. USDOC used sampling in each of the challenged determinations in which it determined a PRC-wide entity rate. The rate assigned to the PRC-wide entity – including each of the distinct respondents that was grouped into the fictional entity – in each of these determinations was different from and higher than the rate assigned to the non-individually investigated separate rate respondents. The rule in Article 9.4 governs "any" anti-dumping duty applied to *non-individually investigated* producers/exporters, whenever sampling is used, and does not permit such rates to exceed the calculated ceiling level or otherwise vary in a manner inconsistent with Article 9.4. Accordingly, to the extent that the PRC-wide entity and the respondents included within it were not the subject of individual examination in any of the challenged determinations in which a PRC-wide entity rate was determined, USDOC failed to observe the requirements of Article 9.4 with respect to the rate assigned to the PRC-wide entity, including the producers/exporters within that fictional entity.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. USDOC'S APPLICATION OF ITS TARGETED DUMPING METHODOLOGY IN THREE ORIGINAL INVESTIGATIONS VIOLATES ARTICLE 2.4.2

A. The United States misunderstands the relevance of the standard of factual review under Article 17.6(i) of the *Anti-Dumping Agreement* for the Panel's assessment of USDOC's application of the Nails Test

1. China does not rely on Article 17.6(i) of the *Anti-Dumping Agreement* as an independent basis for any of its legal claims. China's claims against USDOC's application of the Nails Test in the three challenged determinations are claims of violation of Article 2.4.2 of the *Anti-Dumping Agreement*. However, contrary to the United States' view, Article 17.6(i) does more than merely establish limits for a panel's review of the factual assessment undertaken by investigating authorities in the context of domestic anti-dumping proceedings. The standard of factual review for panels necessarily also illuminates the substantive requirements incumbent upon an investigating authority when it establishes and evaluates the facts. China has demonstrated that, when applying the Nails Test in the three challenged determinations, USDOC's establishment of the facts was not proper, and its evaluation of the facts fell short of being unbiased and objective, as contemplated by Article 17.6(i). Accordingly, the Panel must conclude that USDOC failed to identify a relevant pricing pattern consistent with Article 2.4.2, second sentence.

B. USDOC failed to comply with the conditions on the use of the exceptional W-T comparison methodology under Article 2.4.2, second sentence

1. USDOC failed to comply with the condition to identify a relevant pricing pattern due to three sets of fundamental flaws

a. USDOC used its chosen statistical tools in an arbitrary and biased manner

2. Having chosen to employ particular statistical tools to assist in its analysis, USDOC failed to use those tools in a manner that permits a proper establishment of the facts, and an unbiased and objective evaluation of those facts. It therefore failed to establish the existence of a relevant pricing pattern consistently with Article 2.4.2, second sentence.

3. China's claim does not rest on the assumption that the data in any of the challenged proceedings establish a particular price distribution. Rather, it is the Nails Test, and therefore the validity of the US arguments, that depends on that assumption, despite the United States' protestations to the contrary. Depending on the actual form of the price distribution in a given case, the multiplicity of flaws affecting the Nails Test becomes manifest, as follows:

4. In all instances in which a given price distribution is *not* single-peaked and symmetrical around the mean, and hence may not necessarily have a left-hand tail, the first stage of the Nails Test (i.e., the Pattern Test) is plagued by the initial fundamental flaw identified by China. This flaw is that without a symmetrical, single-peaked distribution, the concept of a standard deviation cannot function as a meaningful threshold for determining whether or not a relevant pricing pattern exists.

5. Alternatively, even in instances involving a distribution that *is* single-peaked and symmetrical around the mean and thus has a left-hand tail, a fundamental flaw infects the second stage of the Nails Test (i.e., the Price Gap Test). This flaw exists because the Test treats as significant something that is inherent in distributions that are single-peaked and symmetric around the mean. Specifically, the Price Gap Test treats the occurrence of wider price gaps among the ATs in the left-hand tail of the distribution (after discarding equally low-priced NTs) as significant, even though wider price gaps in the tails are an inherent characteristic of distributions with tails.

6. The United States does not contest the accuracy of China's statistical arguments but asserts that they are irrelevant as USDOC did not rely on the one-standard deviation threshold as a tool to draw statistical inferences. Yet, USDOC's *subjective* characterization of the Nails Test is no substitute for the Panel's obligation to engage in an *objective* assessment of the nature of that Test. An objective evaluation reveals that the Nails Test uses both the terminology and tools of

statistical analysis, albeit in an arbitrary and inadequate fashion. Having decided to apply an approach that usurps statistical concepts to assess whether sets of observed export prices differ in a relevant way, the United States cannot avoid the legal consequences by pretending that this approach was used for some other purpose.

b. USDOC's reliance, in the Nails Test, on weighted-average prices instead of individual export transactions is inconsistent with the treaty text and biased the Nails Test towards finding the presence of a "pattern"

7. USDOC's application of the Nails Test in the three challenged determinations further failed to identify a relevant pricing pattern consistently with Article 2.4.2, second sentence, because it relied on weighted-average prices instead of individual export transactions.

8. There are two reasons why the US approach is inconsistent with Article 2.4.2. *First*, the US approach is inconsistent with the treaty requirement that an investigating authority focus on individual export prices for purposes of identifying a relevant pricing pattern. *Second*, USDOC's reliance on customer or time period averages ignored within-customer and within time-period price variances. As a consequence, USDOC systematically drew the one-standard-deviation threshold too close to the mean, which caused USDOC to improperly qualify more sales as "targeted" than would have properly been the case.

c. USDOC failed to assess whether the observed export prices differed "significantly" in a qualitative sense

9. Variations in export prices that can be explained by factors that are normal in the relevant market are not "prices which differ significantly", in *qualitative* terms, for purposes of Article 2.4.2, second sentence. Yet, in the three challenged determinations, USDOC mechanically applied the Nails Test and did not provide any explanation as to why prices passing its various thresholds could not arise from market dynamics undistorted by "targeted dumping". Contrary to the United States' insistence, there is no reason why a proper consideration of the *qualitative* dimension of "significance" would prevent an investigating authority from identifying a relevant pricing pattern in a situation in which the exporter concerned has actually engaged in targeted dumping.

10. In at least one of the three challenged determinations, *Steel Cylinders* OI, the exporter advanced a plausible explanation of the observable price fluctuations in the steel market. USDOC's summary dismissal of these arguments as an unsupported assumption was insufficient. USDOC, in its role as the investigating authority, could easily have requested the exporter to supplement the record with evidence necessary to make an informed determination regarding this critical issue. USDOC could have done so even if it were true that the exporter's initial case brief failed to cite record evidence to support the assertion that the increase in underlying steel prices had an impact on the prices of steel cylinders. At the very least, in order to demonstrate, in a WTO-consistent manner, the existence of a pattern of export prices that differ "significantly", USDOC would have had to provide a reasoned and adequate explanation as to why the dynamics in the steel market identified by the exporter could not have been the reason for the observed export price differences.

2. USDOC failed to comply with the condition to provide a reasoned and adequate explanation as to why the relevant pricing pattern could not be taken into account appropriately using the symmetrical comparison methodologies

11. Once a relevant pricing pattern has been identified, an investigating authority must satisfy the *second* condition of Article 2.4.2, second sentence, and *explain* why the pattern "cannot be taken into account appropriately" through the application of the symmetrical comparison methodologies. The explanations provided by USDOC in the three challenged determinations suffer from three fundamental flaws:

- *First*, the "explanation" provided by USDOC in the three challenged determinations provided no analysis whatsoever of the characteristics of the identified "pattern" that led USDOC to the conclusion that it could not use the symmetrical comparison methodologies.

- *Second*, the "explanation" required by the second sentence of Article 2.4.2 must include a discussion of *both* the W-W and T-T comparison methodologies. USDOC does not contest that it did not address the T-T comparison methodology.

- *Third*, USDOC's explanation, as provided in the three challenged determinations, is based on the untenable assumption that, under the W-T comparison methodology pursuant to Article 2.4.2, second sentence, the application of zeroing procedures is somehow permissible.

C. USDOC violated the treaty limits on an authority's discretion when applying the W-T comparison methodology pursuant to Article 2.4.2, second sentence

1. USDOC improperly applied the W-T comparison methodology to all export sales instead of limiting the application of W-T to those sales that comprised the relevant pricing pattern

12. An investigating authority must limit the application of the W-T comparison methodology solely to those sales that comprise the relevant pricing pattern, i.e., the targeted sales in targeted CONNUMs. Importantly, if an investigating authority identifies the existence of a pattern in relation to some models, and not others, the authority must apply the exceptional W-T comparison methodology subject to the same limitation – i.e., solely to the pattern it identifies in those particular models. Applying the W-T comparison to a broader group of export sales for which no pattern has been identified, on the other hand, is arbitrary and disproportionate. China has demonstrated in great detail that this important limitation flows from the language of Article 2.4.2, in context, and in light of the object and purpose of the *Anti-Dumping Agreement*.

13. Contrary to what USDOC did in the three challenged determinations, the application of the W-T comparison methodology to the sales comprising the "pattern" must be combined with the application of one of the standard comparison methodologies (W-W or T-T) to the remaining, non-targeted, export sales, in order to ensure that the investigating authority properly calculates a WTO-consistent dumping margin for the product as a whole.

2. The United States' reliance on the concept of mathematical equivalence is unavailing to justify its use of zeroing when applying the W-T comparison methodology in investigations

14. The fact that the Appellate Body has not specifically encountered the question whether zeroing is prohibited under Article 2.4.2, second sentence, does not mean, as the United States implies, that zeroing is permitted under that provision. The jurisprudence illuminates foundational concepts in the *Anti-Dumping Agreement* that enjoy significance well beyond the immediate context in which they were decided. Of particular note, the fact that "dumping" and a "margin of dumping" are "exporter-specific" and "product-related" concepts is fundamental to the architecture of the *Anti-Dumping Agreement*.[1] These fundamental characteristics of the concepts of dumping and margin of dumping apply across all provisions of the *Anti-Dumping Agreement*. Indeed, towards the end of these proceedings the United States has explicitly conceded that "dumping" and "margins of dumping" mean the same thing across all provisions of the *Anti-Dumping Agreement*, including Article 2.4.2, second sentence. Zeroing, by contrast, is based on a transaction-specific understanding of the concepts of "dumping" and "margins of dumping" that is inconsistent with the entire architecture of the treaty.

15. The United States is plainly wrong when it insists that, unless zeroing were permitted under Article 2.4.2, second sentence, that provision would be rendered inutile. As China has demonstrated, the use of different temporal bases for the weighted average normal value when using the W-W and W-T comparison methodologies will generally lead to mathematically *different* results. China does not argue that investigating authorities *must* use different temporal bases for normal value. What matters for the Panel's assessment is that proceeding in that manner is a WTO-consistent way by which the second sentence of Article 2.4.2 will not be rendered inutile.

16. Furthermore, the proper way for an investigating authority to "unmask targeted dumping" is not by applying WTO-inconsistent zeroing procedures, but rather by ensuring that it correctly identifies the scope of the relevant pricing pattern to which it will subsequently apply the exceptional W-T comparison methodology, provided that it can explain why use of the symmetrical comparison methodologies would not allow the pricing pattern appropriately to be taken into account. In other words, the "unmasking of targeted dumping" is achieved through the proper identification of "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The treaty, however, grants no authority to discard the fundamental

[1] See, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

principle that a margin of dumping must be determined for the product as a whole, in order to "unmask targeted dumping".

II. CHINA'S CLAIMS UNDER ARTICLE 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994 REGARDING USDOC'S APPLICATION OF ITS TARGETED DUMPING METHODOLOGY IN AN ADMINISTRATIVE REVIEW

17. The United States' defense of USDOC's use of zeroing in *PET Film* AR3 hinges on the untenable assumption that the second sentence of Article 2.4.2 somehow applies to administrative reviews as well as original investigations. The United States is wrong to assert that this is an issue of first impression for the Panel. The well-established principles governing the manner in which an investigating authority may apply the W-T comparison methodology, and the well-litigated understanding of the foundational concepts of "dumping" and "margins of dumping", apply to all types of proceedings, including original investigations and the various types of reviews.

18. China has demonstrated that the ordinary meaning to be given to the phrase "during the investigation phase" in Article 2.4.2, considered in its context, and in light of the object and purpose of the *Anti-Dumping Agreement*, allows only one conclusion – namely, that Article 2.4.2, second sentence, applies solely to original investigations and *not* to reviews. Thus, even if the use of zeroing were permitted in original investigations when applying the W-T comparison methodology under Article 2.4.2, second sentence, which is *not* the case, such permission would not extend to the duty assessment phase governed by Article 9.3.

19. According to the United States, it is "logical" for the W-T comparison methodology to operate in the same manner, whether in original investigations or in administrative reviews, whenever the conditions for recourse to the exceptional comparison methodology under Article 2.4.2, second sentence, are met. Yet, the United States errs because the application of the W-T comparison methodology in the context of Article 9.3 reviews is not subject to the preconditions of Article 2.4.2, second sentence. Thus, in Article 9.3 any reference to Article 2.4.2 – whether or not it authorizes the use of zeroing – for the purpose of illuminating the authority to use the W-T comparison methodology would be irreconcilable with the drafters' express choice in Article 2.4.2 to limit the scope of application of that provision to original investigations.

III. THE UNITED STATES' TERMS OF REFERENCE OBJECTIONS IN CONNECTION WITH CHINA'S NON-MARKET ECONOMY TREATMENT CLAIMS

A. Six administrative reviews issued after filing of China's First Written Submission fall within the Panel's terms of reference

20. The Panel should reject the United States' contention that the six reviews issued by USDOC after the filing of China's First Written Submission and submitted to the Panel during the course of the First Hearing[2] fall outside the Panel's terms of reference. Panels may have jurisdiction over measures which have been adopted subsequent to the panels' establishment if they are closely connected to those identified by name in a panel request.[3] In its Panel Request, China specified that "any closely connected, subsequent measures" to measures identified by name and falling within the same 13 anti-dumping proceedings are within the Panel's terms of reference.[4] In its First Written Submission, China put the United States on notice that it considered the relevant six reviews to be within the scope of the dispute, including by informing the Panel that they had been initiated, and by providing the Panel with the issued preliminary determinations. Each of these six reviews is closely connected to the measures identified by name in the Panel Request because they involve "the imposition, assessment and collection of duties under the same anti-dumping order".[5]

21. The United States was given adequate notice and has had ample opportunity to respond to China's claims in respect of these measures. Exclusion of any of the six reviews would further delay settlement of the dispute that China legitimately brought before the DSB in February 2014, contrary to the principle of prompt settlement enshrined in Article 3.3 of the DSU. The fact that

[2] *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR4, *Wood Flooring* AR2, *PET Film* AR5, *Furniture* AR9.

[3] See, e.g., Appellate Body Report, *EC – Chicken Cuts,* para. 156; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 121, 125, 130.

[4] See Annexes 3-5 to China's Panel Request, WT/DS471/5.

[5] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 181). See also Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116.

there have been significant procedural delays in these proceedings has not prevented USDOC from continuing to adopt determinations in anti-dumping proceedings involving China that do not conform with the requirements of the *Anti-Dumping Agreement*. China should thus not be forced to initiate new disputes, or wait to initiate compliance proceedings. This would not only result in delay with respect to the settlement of this dispute, it would also further burden the WTO dispute settlement system as a whole.

B. All of China's arguments and evidence are within the Panel's terms of reference

22. Contrary to the United States' assertions, there is no flaw in the manner in which China's claim with regard to the Use of Adverse Facts Available was put before the Panel. China's Panel Request identifies this specific measure and clearly presents the legal basis for the complaint. The Panel Request goes further than necessary by specifying that the problem arises because of USDOC's failure "to use the best information available and special circumspection when basing its findings on information from secondary sources".[6]

23. Moreover, despite the United States' contentions, all of China's arguments with regard to the Use of Adverse Facts Available norm as well as the arguments in response to the Panel's questions are equally within the Panel's terms of reference. Arguments need not be specified in a panel request, and may be progressively developed and clarified throughout the proceedings before a panel. Development and clarification of arguments may result from responses to questions or counter-arguments raised by an opponent. Similarly, all of the evidence that China submitted in response to the Panel's questions is within the Panel's terms of reference. Although the United States objects to evidence submitted by China in response to questions from the Panel, the working procedures are clear that parties may submit evidence which is necessary to respond to the Panel's questions. The United States has had ample opportunity to respond to the evidence submitted by China.

IV. CHINA'S CLAIMS UNDER ARTICLES 6.10, 9.2 AND 9.4, SECOND SENTENCE, REGARDING THE SINGLE RATE PRESUMPTION AS SUCH AND AS APPLIED IN 38 CHALLENGED DETERMINATIONS

24. In anti-dumping proceedings involving countries considered by USDOC to be "non-market economies" (or "NMEs"), USDOC presumes that all producers/exporters from the country concerned are part of a single, government controlled entity to which USDOC assigns a single rate. In order to rebut this presumption, a producer/exporter must satisfy USDOC's Separate Rate Test by proving both *de jure* and *de facto* absence of government control. China refers to this presumption as the "Single Rate Presumption". The United States conceded in response to questions from the Panel that this presumption has been applied in every anti-dumping determination involving China issued since 1991 – including the 38 determinations challenged by China. Nonetheless, the United States contest that the Single Rate Presumption is a norm of general and prospective application. It argues that China has not substantiated the precise content of the norm and that all that China has shown is repeated past conduct.

25. The evidence before the Panel demonstrates that, contrary to the United States' position, the Single Rate Presumption is a norm of general and prospective application. Despite the United States' assertions, it is not necessary for China to show that the detailed requirements of the Separate Rate Test are part of the precise content of the challenged norm. Additionally, as to general and prospective application, the evidence of consistent application, in combination with the United States' inability to identify even a single contrary example issued since 1991, demonstrates that the norm has been *invariably* applied by USDOC for more than a decade. This invariable conduct, together with evidence including USDOC Policy Bulletin 05.01 and the Antidumping Manual (which describe the presumption in a manner indicative of general and prospective application), as well as statements in individual determinations (which show that USDOC draws guidance from its previous decisions and practice), reveal that what is at issue goes beyond past conduct. The United States' attempts to downplay the language of these categories of evidence are, in each case, unconvincing. Consideration of all of the evidence together provides an overwhelming basis upon which the Panel must find the existence of a general and prospective norm.

26. On the merits, the United States has failed to rebut China's claims under Articles 6.10, 9.2 and the second sentence of Article 9.4 against the Single Rate Presumption. The Single Rate

[6] See China's Panel Request, WT/DS471/5, para. 26.

Presumption imposes a condition upon access to individual rates for Chinese and other NME respondents, without any justification under the *Agreement*. Contrary to the United States' assertions, the Appellate Body in *EC – Fasteners* was correct to find that singularity cannot be *presumed*. Although it can be permissible to group legally distinct respondents into single entities, an investigating authority must have facts and evidence in support of a determination to do so. USDOC's Single Rate Presumption operates in the absence of facts or evidence, and, therefore, cannot justify denial of the rights that each Chinese producer/exporter enjoys under Article 6.10, 9.2, and 9.4, second sentence, of the *Agreement.*

V. CHINA'S CLAIMS UNDER ARTICLES 6.1, 6.8 AND ANNEX II(1) REGARDING USDOC'S FAILURE TO REQUEST NECESSARY INFORMATION IN 30 CHALLENGED DETERMINATIONS

27. Having presumed, in each of the 13 challenged investigations, the existence of a PRC-wide entity, USDOC proceeded to determine a single dumping rate for the PRC-wide entity, including all of the producers/exporters included within it.[7] A PRC-wide entity rate was also determined in 17 challenged reviews.[8] In the remaining 8 challenged reviews, USDOC did not determine a PRC-wide entity rate.[9]

28. China challenges each of the relevant 30 determinations in which USDOC determined a rate for the PRC-wide entity under Articles 6.1, 6.8 and Annex II(1) of the *Agreement*. In each of these determinations, USDOC failed to request the information necessary to calculate a margin of dumping for the entity but nevertheless purported to determine an individual rate for the entity. China argues that, through failing to request this necessary information, USDOC failed to give notice of the required information and thereby also failed to provide appropriate rights of defense in the sense of Article 6.1. China also argues that, in each of these 30 determinations, USDOC resorted to facts available to replace the information necessary to calculate a margin of dumping for the PRC-wide entity even though it did not have a valid basis for doing so under Article 6.8 and Annex II(1) because it had failed to specify in detail the information required to determine the PRC-wide entity rate.

29. The United States has not denied that USDOC failed to request the information necessary to calculate a margin of dumping for the respondents included within the PRC-wide entity. The United States nevertheless argues that this failure was justified on the facts of certain groups of measures. However, China has demonstrated that USDOC's failure to request information was not justified in respect of any of the groups of measures addressed by the United States.

30. *First*, USDOC's express findings of non-cooperation by the PRC-wide entity in 20[10] of the relevant 30 challenged determinations cannot justify USDOC's failure to request the information required to calculate a margin of dumping for the PRC-wide entity. Each of these express findings of non-cooperation was based on *presumption* instead of fact because USDOC extended a finding of non-cooperation by a subset of respondents included within the PRC-wide entity to the fictional entity as a whole. However, USDOC had no basis in law or fact to attribute the conduct of one respondent to the other respondents included within the PRC-wide entity. The absence of information relating to one respondent in the PRC-wide entity does not obviate the need for information from the remaining respondents included within the fictional entity. There is no justification for replacing information required from *other* respondents included within the PRC-wide entity, in the absence of any request for that information from those respondents.

31. *Second*, USDOC's failure to request the necessary information cannot be justified in relation to the remaining 10[11] of the relevant 30 challenged determinations in which USDOC resorted to facts available without expressly saying so. Contrary to the United States' assertions, the disciplines of Article 6.8 and Annex II are not limited to instances in which an investigating

[7] *Aluminum* OI, *Coated Paper* OI, *Shrimp* OI, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Bags* OI, *PET Film* OI, *Furniture* OI.

[8] *Aluminum* AR1, *Aluminum* AR2, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* AR5, *Solar* AR1, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Ribbons* AR3, *Bags* AR3, *Furniture* AR7, *Furniture* AR8.

[9] *Shrimp* AR9, *OTR Tires* AR3, *OCTG* AR1, *Bags* AR4, *PET Film* AR3, *PET Film* AR4, *PET Film* AR5, *Furniture* AR9.

[10] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, *PET Film* OI, *Furniture* OI, *Furniture* AR7.

[11] *OTR Tires* AR5, *Diamond Sawblades* AR1, *Diamond Sawblades* AR2, *Diamond Sawblades* AR3, *Diamond Sawblades* AR4, *Wood Flooring* AR1, *Wood Flooring* AR2, *Ribbons* AR1, *Bags* AR3, *Furniture* AR8.

authority expressly states that it has resorted to facts available. Rather, these disciplines apply whenever an investigating authority, in substance, replaces information from an interested party with facts available. China has shown that, in all 10 relevant challenged determinations, USDOC, in substance, replaced with facts available all or some of the information necessary to calculate a margin of dumping for the PRC-wide entity, including all of the producers/exporters included within that entity. Thus, USDOC acted inconsistently with Article 6.8 and Annex II(1) by replacing, with facts available, necessary information that USDOC had failed to seek from the producers/exporters included within the PRC-wide entity.

32. Even if the Panel were to take the view that USDOC did not resort to facts available in the relevant 10 determinations, USDOC's failure to request the required information in these determinations would nevertheless be inconsistent with Article 6.1. Contrary to the United States' assertions, the "information which the authorities require" under Article 6.1, is the information that the *Agreement* dictates an investigating authority requires in order to make a particular determination. If an authority is to determine an individual margin of dumping for a respondent consistent with the *Agreement*, the information necessary to calculate such a margin of dumping is objectively required by the authority. Accordingly, by purporting to determine an individual margin for the PRC-wide entity in each of the relevant 10 challenged determinations, without giving notice of the information necessary to calculate such a margin, USDOC acted inconsistently with Article 6.1 in each of these determinations.

VI. CHINA'S CLAIMS UNDER ARTICLE 6.8 AND ANNEX II(7) AGAINST USDOC'S USE OF ADVERSE FACTS AVAILABLE IN 30 CHALLENGED DETERMINATIONS AND THE USE OF ADVERSE FACTS AVAILABLE NORM

33. Whenever USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, USDOC systematically draws an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are adverse to the interests of that entity and each of the producers/exporters included within it. China refers to this process as the "Use of Adverse Facts Available norm". The process subject to the Use of Adverse Facts Available norm causes USDOC to select rates that, by design, are adverse to the interests of the NME-wide entity and each of the producers/exporters included within the entity, whenever it is triggered.

34. The evidence before the Panel demonstrates, contrary to the United States' position, that the Use of Adverse Facts Available norm is a norm of general and prospective application. Despite the United States' arguments, there is no need for China to prove that USDOC always selects the highest rate on the record for NME-wide entities. China does not challenge a *result* such as the selection of the highest rate on the record, but rather a selection *process*, which, when triggered, is based uniformly on inferences that are adverse to the interests of the NME-wide entity, and each of the producers/exporters included within it. Moreover, China does *not* allege that this process is triggered in each anti-dumping determinations involving countries deemed to be NMEs by the United States, but only in those determinations that involve a finding of non-cooperation by the NME-wide entity.

35. Moreover, contrary to the United States' assertions, the evidence as to general and prospective application also demonstrates that what is at issue goes beyond repeated past conduct. China has demonstrated that the norm has been consistently applied in a representative sample of all the investigations and reviews issued since China's WTO accession relating to countries deemed by USDOC to be NMEs. In combination with the United States' inability to identify even a single contrary example, this evidence demonstrates that the norm has been *invariably* applied by USDOC for more than a decade. This invariable conduct, together with evidence including the Antidumping Manual and statements by US courts (which describe aspects of the norm in a manner indicative of general and prospective application), as well as statements by USDOC in individual determinations (which show that USDOC relies on its past application of the norm as a justification and motivation for taking the same approach in new determinations) demonstrates that what is at issue goes beyond past conduct. An analysis of all this evidence together reveals a norm of general and prospective application that provides administrative guidance and sets expectations on a consistent and predictable basis.

36. On the merits, China has demonstrated that the Use of Adverse Facts Available norm necessarily results in a violation of Article 6.8 and Annex II(7) in defined circumstances. In particular, the norm is WTO-inconsistent when the non-cooperation that triggers the norm is presumed and not genuine non-cooperation, and when USDOC itself has not requested necessary information. This is because the duty to exercise special circumspection requires an authority to

have careful regard to all the facts and circumstances, including the fact that respondents have not genuinely failed to cooperate, or the fact that the authority has not sought necessary information. Inferences drawn from the facts and circumstances must be reasonable inferences in light of those facts and circumstances. Thus, when USDOC draws an adverse inference and selects adverse facts available based on *presumed* non-cooperation by an NME-wide entity, it necessarily violates Article 6.8 and Annex II(7). The same is true in circumstances where USDOC has not sought the necessary information to determine a rate for an NME-wide entity.

37. Despite the United States' assertions, USDOC's corroboration efforts in some cases cannot remedy the WTO-inconsistency of the challenged norm. A corroborated rate remains, and is explicitly described by USDOC as, "adverse facts available". At best, corroboration refines the specific rates chosen as adverse facts available and the degree to which that rate is adverse. Importantly, corroboration does not take account of the cooperation by respondents included within the NME-wide entity or USDOC's failure to request necessary information from those interested parties. Consequently, corroboration cannot cure the norm's inconsistency in these defined circumstances.

38. USDOC's application of the Use of Adverse Facts Available norm and selection of adverse facts available in 28 challenged determinations is also inconsistent with Article 6.8 and Annex II(7). In each of the relevant 28 challenged determinations in which the Use of Adverse Facts Available norm was triggered, USDOC considered the NME-wide entity to be non-cooperative based on *presumption* instead of fact. Specifically, in 20[12] of these 28 challenged determinations, USDOC extended a finding of non-cooperation by a subset of respondents included within the PRC-wide entity to the entity as a whole. In the remaining 8[13] of these 28 challenged determinations, USDOC pulled forward the finding of non-cooperation from an earlier phase of the proceeding, triggering the Use of Adverse Facts Available norm by continuing to presume non-cooperation in the instant review. In the circumstances of these determinations, even assuming *arguendo* that USDOC was justified to resort to facts available to replace missing information, the duty of special circumspection means that USDOC was not justified in drawing adverse inferences and selecting adverse facts available.

39. China has also demonstrated that USDOC failed to exercise special circumspection and select reasonable replacements for the missing information in *Diamond Sawblades* AR4 and *OTR Tires* AR5. In these two challenged determinations, the Use of Adverse Facts Available norm was *not* triggered because USDOC did not consider the PRC-wide entity to be non-cooperative but rather acknowledged that the PRC-wide entity and the respondents included within it had been fully cooperative. In these cases, even assuming *arguendo* that USDOC was justified to resort to facts available to replace missing information, USDOC failed to follow a process designed to select the "best" facts available for the PRC-wide entity, including all of the respondents included within that entity. This is because USDOC partially relied on adverse facts available rates to replace the missing information despite its finding of *cooperation* by the PRC-wide entity.

40. In response to the Panel's questions, the United States did not deny that USDOC did *not* use special circumspection in the sense of Article 6.8 and Annex II(7) in *Diamond Sawblades* AR4, *OTR Tires* AR5, as well as the other 8 reviews[14] in which USDOC did not make an *express* finding of non-cooperation in the same phase of the proceeding. Instead, the United States argued that there was no occasion for USDOC to use special circumspection because USDOC did not apply facts available to the PRC-wide entity, including the producers/exporters included within that entity. However, as noted above, in substance, USDOC replaced information with facts available in each of these 10 determinations and was, therefore, subject to the disciplines of Article 6.8 and Annex II(7). USDOC failed to comply with these disciplines.

VII. CHINA'S CLAIM UNDER ARTICLE 9.4, FIRST SENTENCE, REGARDING THE RATE DETERMINED IN 30 CHALLENGED DETERMINATIONS

41. Finally, China argues that in each of the 30 challenged determinations in which USDOC determined a rate for the PRC-wide entity, USDOC acted inconsistently with Article 9.4, first sentence. Article 9.4 applies whenever a producer/exporter has "not {been} included in the

[12] *Aluminum* OI, *Aluminum* AR1, *Aluminum* AR2, *Coated Paper* OI, *Shrimp* OI, *Shrimp* AR7, *Shrimp* AR8, *OTR Tires* OI, *OCTG* OI, *Solar* OI, *Solar* AR1, *Diamond Sawblades* OI, *Steel Cylinders* OI, *Wood Flooring* OI, *Ribbons* OI, *Ribbons* AR3, *Bags* OI, *PET Film* OI, *Furniture* OI, *Furniture* AR7.

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

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

examination". The question whether Article 9.4 applies to an individual producer/exporter is one of legal characterization that must be determined by reference to the facts of each case. A *properly* determined individual margin of dumping results from "examination" of a respondent, and therefore is *not* subject to Article 9.4. However, the same is not necessarily true for an *improperly* assigned individual rate which may *not* have resulted from "individual examination" in the sense of the *Agreement.* In such a case, a Member may act inconsistently with Article 9.4 *in addition* to provisions addressing the proper process for determining an individual rate such as Articles 6.1, 6.8, and Annex II.

42. The evidence before the Panel indicates that the PRC-wide entity and most of the individual respondents included within the entity were *not* properly included in the examination in the sense of Article 9.4, first sentence. In particular, the severe flaws in USDOC's *process* for determining the PRC-wide entity rate mean that the PRC-wide entity was *not* properly subject to individual examination. Specifically, USDOC requested the information necessary to calculate a margin of dumping from few, if any, respondents included in the entity. That being the case, USDOC was obliged to arrive at the *outcome* specified under the *Agreement*; namely, application of a rate consistent with Article 9.4.

43. Nevertheless, USDOC failed to adhere to the disciplines of Article 9.4, first sentence, in each of the relevant 30 challenged determinations. In many of these 30 challenged determinations, the rate assigned to the PRC-wide entity is clearly above the permissible level, because it is higher than even the highest calculated margin in the same phase. In the remaining relevant challenged determinations, other comparators show that the rate assigned to the PRC-wide entity is *not* a neutral all others rate that is appropriate and non-discriminatory. Accordingly, China has demonstrated that USDOC acted inconsistently with Article 9.4, first sentence, in all the 30 challenged determinations in which it determined a rate for the PRC-wide entity.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

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

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

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

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

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

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

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

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically

different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

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

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

9. In each of the challenged investigations, the USDOC applied a two-part test – the *Nails* test – to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by respondents. As reflected in the discussion in the final issues and decision memoranda, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" of Article 2.4.2.

10. China argues that the USDOC "failed properly to identify as 'significant', in a quantitative, *statistical* sense, the differences among export prices that it found to be a part of a relevant pricing pattern." The premises of China's statistical arguments are flawed. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause" of the second sentence of Article 2.4.2. Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake the particular statistical analysis discussed by China, even if the investigating authority chooses to utilize certain statistical tools. The basic logical premise of China's arguments is equally flawed. China contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis. However, the *Nails* test does not involve the type of statistical analysis discussed by China. China's statistical criticism of the *Nails* test simply is inapposite. China seeks to replace the USDOC's balanced approach with one of the extremes noted by the USDOC, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is China's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

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

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

The "Explanation Clause"

13. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

14. In the challenged investigations, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the weighted average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The USDOC concluded that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. The USDOC provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the "explanation" that the USDOC provided in the challenged investigations is not inconsistent with Article 2.4.2.

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

15. China claims that the USDOC acted inconsistently with Article 2.4.2 in the challenged investigations by applying the alternative, average-to-transaction comparison methodology to all sales when, in China's view, "the exceptional [average-to-transaction] comparison methodology

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

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

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

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

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

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

20. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical

equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the challenged antidumping proceedings, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

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

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

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

23. While the Appellate Body has found previously that the use of zeroing in administrative reviews, including in connection with the use of an average-to-transaction comparison methodology, is inconsistent "as such" with the AD Agreement, the Appellate Body has never found that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. As with investigations, the permissibility of using zeroing in administrative reviews when applying the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is an issue of first impression for the Panel.

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

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

24. China's "as such" claims cannot be sustained because China's evidence fails to establish that the so-called Single Rate Presumption is a "rule" or "norm of general and prospective application" that can be challenged "as such." In particular, China has not demonstrated that USDOC's treatment of Chinese companies rises to the level of a measure challengeable "as such", that is, a measure that expresses a rule or norm of general and prospective application. Even assuming that China has demonstrated the existence of such a measure, "particular rigor is required … to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document." China has not met this high evidentiary burden. Specifically, a complainant in order to discharge its high burden must demonstrate, at the very least: (1) that the rule or norm embodied in that measure is attributable to the responding Member; (2) the precise content of the rule or norm; and (3) that the rule or norm has general and prospective application.

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

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

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

28. China cites to prior USDOC determinations involving non-market economy cases. These documents do not help China meet its burden of establishing that the so-called "single rate presumption" is an unwritten measure. Moreover, it is critical to note that the referenced statements are taking place in the context of specific investigations rather than any document that purports to reflect a general and prospective measure. Thus, even under China's presentation, these documents only illustrate what USDOC has practiced in particular instances in the past. Legally, past practice is insufficient to establish the existence of a measure because repeated application in and of itself only proves that repeated applications occurred.

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

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

B. China Has Misapplied The Legal Analysis

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

32. In applying Article 6.10 of the AD Agreement, the initial question is to identify the entity, or group of entities, that constitute each known "exporter" or the known "producer." China has no

basis for asserting that related entities, simply because they may be organized as a formal matter as separate companies, must be treated as individual exporters for the purpose of Article 6.10. Similarly, Article 9.5 of the AD Agreement establishes an obligation to carry out a review to determine an "individual" margin of dumping for a new shipper "provided that the[] exporter[] or producer[] can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." This provision indicates that such an exporter that cannot demonstrate that it is not related to an exporter or producer subject to the duty would not be entitled to an "individual" margin of dumping.

33. Accordingly, depending on the facts of a given situation, an investigating authority may reasonably consider actual commercial activities and relationships of companies in deciding whether they should be treated as a single exporter or producer as opposed to simply accepting their nominal status as legally distinct companies. This textual analysis is consistent with the Appellate Body findings in *EC – Fasteners*, which in turn approvingly drew from the panel report's findings in *Korea – Certain Paper*.

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

35. Contrary to China's arguments, nothing in the text of Article 9.2, as with the text of Article 6.10, precludes USDOC from treating multiple companies as a single entity, including, where appropriate, a China-government entity. China's attempts to rely on *EC – Fasteners* to avoid this interpretation is misplaced because it ignores the Appellate Body's conclusion in that dispute that "if the State instructs or materially influences the behavior of several exporters in respect of prices and output, they could be effectively regarded as one exporter … and a single margin and duty could be assigned to that single exporter."

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

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

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

1. Normal Value

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

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

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

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

3. Pricing and Output of Exports

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

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

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

43. First, USDOC actually collects and evaluates information that goes directly to whether Chinese respondents should be afforded individual treatment or not. USDOC's separate rate analysis allows for an in-depth and individualized review of a company's relationship with the Chinese government. *EC – Fasteners* did not preclude such examination, but rather noted the examination in that dispute, the IT Test, was flawed because the relevant criteria denied individual treatment to producers and exporters with "little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State." Here, China makes no similar claim against USDOC's Separate Rate Test, but rather takes issue that any such test is required at all.

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

45. Third, the evidence China puts forward for its as-applied claims is deficient here. Principally, China relies on Table SRP, which appears to be a compilation of quotes from various antidumping proceedings. This table proves nothing because it simply provides extracted generalized quotes

rather than any evidence of concrete treatment by USDOC with respect to any of the particular participants in any of the respective proceedings. For example, nowhere in Table SRP does China present evidence to indicate whether the China-government entity was under examination for purposes of Article 6.10. Likewise, China's table fails to demonstrate as-applied breaches of Articles 6.10 and 9.2 because it is does not demonstrate that any actual exporter or producer failed to receive an individual margin or confirm whether circumstances that triggered such a denial were inconsistent with the AD Agreement.

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

V. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

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

48. China argues that Article 9.4 does not allow an investigating authority to differentiate between those non-selected companies that are uncooperative, and those non-selected companies that are cooperative. Rather, according to China, the phrase "any anti-dumping duty applied" means that there can only be one rate applied to the non-selected companies. The text of Article 9.4 of the AD Agreement actually provides that *any* antidumping duty for those producers or exporters not under examination "shall not exceed" the weighted-average margin of dumping for the investigated exporters or producers, and restricts the use of zero and *de minimis* margins and margins based on facts available in calculation of that ceiling. China thus improperly seeks to create a new obligation to calculate a "single" rate.

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

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

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

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

51. Furthermore, China has not demonstrated a norm of general and prospective application that may be challenged as such. The determination to apply facts available to the China-government entity, and its selection of the rate to apply to the China-government entity, continues to be a case-by-case determination that will reflect the facts of a given case. Moreover, the U.S.

statutory and regulatory framework provides USDOC with the discretion to make such a determination based on the facts and information before it.

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

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

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

54. Second, China argues that where an investigating authority collapses multiple entities into a single exporter, the investigating authority may rely on facts available only if it requested this specific information from all companies within that exporter. China is incorrect. To avoid a potential scenario in which the China-government entity shifts its exports through the producer/exporter of the China-government entity which is assigned the lowest rate, an investigating authority must apply the same antidumping duty rate to all of the China-government entity's exports. Moreover, if companies within the China-government entity do not provide requested information, the investigating authority must determine what this means for the China-government entity. Further, where a company that is part of the China-government entity has been notified of and fails to respond to an initial request for quantity and value information, the investigating authority may find that the company, and by extension, the China-government entity, has failed to respond to a request for necessary information and has significantly impeded the progress of the proceeding. Finally, China mischaracterize the present dispute because it ignores that USDOC may need to rely on facts available if it did not have the necessary information to calculate a dumping margin for the NME-government entity because of the non-cooperation of *all* or *nearly all* companies within the entity.

55. Third, China misinterprets the term "special circumspection" as stated in paragraph 7 of Annex II. China argues the term requires the investigating authority to consider whether it requested such information from each of the members of the China-government entity. Article 6.8 does not limit the type of information or the parties from whom the information was requested in the way China advocates here. Moreover, an investigating authority (such as USDOC) may find that certain companies within the NME-government entity have failed to cooperate by failing to respond to an initial request for quantity and value information or failing to provide requested information pertaining to the actual calculation of a dumping margin. In each instance, the investigating authority may also find that such a failure has significantly impeded the proceeding.

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

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

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

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

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

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

D. China Has Not Established Its As-Applied Claims

61. As an initial matter, in seven of the challenged determinations, USDOC did not make a determination based on "facts available". Rather, in these particular determinations, USDOC assessed duties at the cash deposit rate and thus, the duty rate previously established from a previous period of investigation or review continued to apply. Where USDOC did make a facts available determination in a challenged proceeding, the evidence demonstrates that USDOC notified companies within the China-government entity of the necessary information required, and appropriately determined that a failure to respond to this request for information warranted the use of facts available for the China-government entity. In these 19 determinations, USDOC

applied facts available, using one of the following, depending on the information available: (1) a rate from the domestic industry's application; (2) a rate calculated for a cooperative respondent in a previous period of review; or (3) a rate calculated from a cooperative respondent's transactional information in the current period of investigation. Each determination met the requirements under Article 6.8 and Annex II: each had a factual foundation; no substantiated fact contradicted the information selected; and nothing indicated the information selected was an unreasonable replacement for the missing information.

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

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

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

VIII. CONCLUSION

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

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. INTRODUCTION

1. China continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. China still has failed to establish that the United States has breached any provision of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. CHINA'S CLAIMS RELATED TO 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

2. China's proposed interpretations are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely. While China attacks the *Nails* test applied by the U.S. Department of Commerce ("USDOC") in the challenged antidumping investigations, China does not describe how, in its view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

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

3. China insists that it is "not arguing that the *Anti-Dumping Agreement* compels the adoption of any particular statistical method or particular standard deviation threshold or multiple thereof." However, at every turn, the arguments China advances belie that assertion. China's arguments are all premised on the notion that a statistical probability analysis – or China's own version of such an analysis – is the standard against which the *Nails* test is to be measured. We have shown that USDOC makes *no* assumptions (whether implicit or explicit) concerning the probability distribution, let alone assume the existence of a particular type of probability distribution, and we have not suggested that the *Nails* test would meet the requirements for statistical probability analysis as understood by China or even "as generally recognized in the field of statistics." That, of course, is not the standard against which the *Nails* test is to be measured. The question before the Panel, which China appears to misunderstand, is whether USDOC's application of the *Nails* test in the challenged investigations is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. We have shown that it is.

4. China refers to the Appellate Body report in *US – Upland Cotton (Article 21.5 – Brazil)*. There are no parallels between the facts in that dispute and the facts here, and that portion of the *US – Upland Cotton (Article 21.5 – Brazil)* Appellate Body report does not contain findings that are relevant to the Panel's resolution of this dispute.

5. China asserts that, "USDOC designed the test as a statistical tool to conduct a probability analysis for purposes of assessing whether a set of observed export prices differed in a relevant way." China's assertion is wrong, and it is plainly contradicted by what USDOC said *at the time* it made its determinations.

6. China's interpretation of the "pattern clause" limits it to identifying random and aberrational outliers, or "unusually low" export prices. This interpretation, however, is incorrect. The terms of the second sentence of Article 2.4.2 do not refer to "unusually low export prices." Further, China's position is contrary to the logic of the second sentence of Article 2.4.2. Dumping may be "targeted" even in a situation where lower-priced sales are not "unusual" or "outliers." Lower prices may not be unusual and may not appear to be outliers at all.

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

7. China argues that the second sentence of Article 2.4.2 of the AD Agreement establishes a "legal requirement to focus on individual export prices" and refers to the Appellate Body report in *US – Zeroing (Japan)*. To the extent that the Panel takes into account the Appellate Body's discussion in paragraph 135 of the *US – Zeroing (Japan)* Appellate Body report, it should exercise caution in doing so. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the alternative, average-to-transaction comparison methodology. Furthermore, the Appellate Body expressly was not making findings of legal interpretation that resulted from an analysis undertaken pursuant to the customary rules of interpretation. Additionally, the Appellate Body simply was not addressing the question of whether or not it is permissible for an investigating authority to use weighted averages when examining export prices to determine if a "pattern" exists. While China quotes from the Appellate Body report, it offers no explanation for its assertion that the statements it quotes "strongly support China's interpretation."

8. China contends that its reading of the second sentence of Article 2.4.2 "ensures *parallelism* between the analysis of whether the W-T comparison methodology may be used and the substantive nature of the W-T comparison methodology, which by definition focuses on individual export prices." However, China's proposed reading lacks textual and contextual support.

9. China complains that "[i]t would be incongruous to interpret this text to permit an investigating authority to overlook the individual prices." We have explained that USDOC did not "overlook" any individual prices. Calculating weighted averages of the export prices to each of the purchasers is a way for the investigating authority to analyze the "hundreds or even thousands" of export prices and make a judgment about differences not among all of the hundreds or thousands of export prices, but among the small number of purchasers. China's argument once again reveals that China is seeking to impose statistical probability analysis as the standard against which an investigating authority's examination must be measured.

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

10. In China's view, even after the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean, including an inquiry into why they exist at all. Regardless of whether China frames its argument in terms of discerning an exporter's *intent* or identifying *reasons* for the pattern of export prices that differ significantly, nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. Certain third parties agree.

11. In China's view, any numerical difference in export prices can be explained away. The quantitative difference between the export prices, in China's view, does not matter. China's proposed interpretation is untenable, and, as we have explained, it is inconsistent with prior Appellate Body findings regarding the meaning of the term "significant."

12. While China argues that the numerically large differences in export prices that USDOC observed in the challenged investigations were, for purportedly qualitative reasons, not significant, China's arguments go toward explaining *why* the prices were different, or giving reasons for the price differences. They do not address *how*, qualitatively, the differences, which were numerically large, were not important or notable.

13. China appears to acknowledge that there was no information in the administrative records of the coated paper and OCTG antidumping investigations that would have been relevant to an analysis of the kind of "qualitative factors" China discusses, and this is because the interested parties did not raise the issue of "qualitative factors" or present evidence to USDOC about that issue. In the steel cylinders antidumping investigation, as we have explained, USDOC responded to an argument by BTIC concerning increases in steel prices and determined that the argument was "merely an unsupported assumption without the support of record evidence."

D. China Has Failed To Establish that Certain SAS Programming Errors Constitute a Breach of the AD Agreement

14. China confirms that it is "challenging" the SAS programming errors, but adds nothing that would support a finding that an inadvertent error amounts to a breach of any provision of the WTO Agreement.

15. China continues to offer the Panel no explanation of how the identified SAS programming errors could reflect a failure to provide a reasoned and adequate explanation or a failure to establish the facts properly and evaluate them in a manner that was unbiased and objective. There are no parallels between the facts in *US – Upland Cotton (Article 21.5 – Brazil)* and the facts here, and the portion of the *US – Upland Cotton (Article 21.5 – Brazil)* Appellate Body report to which China refers does not contain findings that are relevant to the Panel's resolution of this dispute.

16. China acknowledges that "correction of the two types of programming errors does *not* lead to a situation in which the Price Gap Test would no longer be passed for at least one CONNUM in *OCTG* OI and *Coated Paper* OI." So, it is clear that the finding China seeks from the Panel related to the programming errors is advisory and not necessary to secure a positive solution to the dispute.

E. 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

17. It is logical for an investigating authority to examine the extent to which dumping would be masked by a normal comparison methodology, in contrast to the alternative comparison methodology, as it considers whether a normal comparison methodology can "take into account appropriately" the pattern of export prices that differ significantly. In other words, logically, some manner of comparison is necessary to test whether the average-to-average comparison methodology or the average-to-transaction comparison methodology can more "appropriately" take into account a pattern of significantly differing export prices. Such a comparative exercise is precisely what USDOC undertook in the challenged antidumping investigations. It is unclear what more, beyond such a comparative exercise, would be needed to satisfy the requirements of the "explanation clause."

18. China complains that comparing the result of the average-to-transaction comparison methodology (with zeroing) and the result of the average-to-average comparison methodology (without zeroing) is insufficient because, China argues, the use of zeroing is not permitted in the application of the alternative, average-to-transaction comparison methodology. However, as demonstrated in the U.S. first written submission, and as discussed further below, 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.

F. The "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Does Not Require an Investigating Authority to Discuss Both the Average-to-Average and Transaction-to-Transaction Comparison Methodologies in Its Explanation

19. While the Appellate Body has not previously addressed the particular legal question that is before the Panel, neither in *US – Softwood Lumber (Article 21.5 – Canada)* nor in any other dispute, the *logical extension* of the Appellate Body findings is that the exceptional, average-to-transaction comparison methodology *should* "lead to results that are systematically different" when the conditions for its use have been met. Accordingly, as the U.S. first written submission demonstrates, 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 second sentence of Article 2.4.2 of the AD Agreement.

20. China also discusses the Appellate Body report in *US – Zeroing (Japan)*. We have already commented on the passage from the *US – Zeroing (Japan)* Appellate Body report in response to

question 17. China, in an attempt to support its argument, refers to "grammatical convention" and provides to the Panel a dictionary definition of the word "either." In doing so, China appears to invite the Panel to apply a Vienna Convention analysis to the language in the *US – Zeroing (Japan)* Appellate Body report. Of course, an adopted report is not treaty language, and China's suggestion that this dispute should turn on a Vienna Convention analysis of a potentially ambiguous passage of the *US – Zeroing (Japan)* Appellate Body report only serves to highlight the weakness of China's argument.

G. USDOC's Application of the Alternative Average-to-Transaction Comparison Methodology to All Sales

21. China continues to argue that USDOC was required to apply the alternative, average-to-transaction comparison methodology on a model-specific basis, and limit its application only to certain models, because USDOC, China asserts, "decide[d] to identify the existence of a 'pattern' in a limited, model-specific, way." China appears to misunderstand USDOC's analysis and also misunderstands the Appellate Body report in *EC – Bed Linen*.

22. USDOC did not "seek[] to find 'patterns' by reference to models" in the challenged investigations. Instead, USDOC established the existence of "a pattern" – within the meaning of the second sentence of Article 2.4.2 – based on all of a respondent's sales of subject merchandise. This is evident from USDOC's discussion of its application of the *Nails* test in the challenged determinations.

23. China utterly fails to grapple with the import of the Appellate Body's findings in *EC – Bed Linen*. Despite the Appellate Body's findings in *EC – Bed Linen*, China continues to suggest that "an investigating authority may assess the existence of relevant pricing patterns on a model-specific basis," but the Appellate Body has clearly rejected this proposition and there is no support for it in the text of the second sentence of Article 2.4.2 of the AD Agreement.

H. China's Arguments Concerning the Appellate Body's Zeroing Findings Lack Merit

24. While the Appellate Body has addressed zeroing in numerous prior disputes involving different comparison methodologies, it has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. China also argues that the Appellate Body has previously "rejected" the mathematical equivalence argument. The U.S. first written submission discusses at some length the Appellate Body's prior consideration of the mathematical equivalence argument and demonstrates that the Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection.

25. China further contends that "the function of Article 2.4.2, second sentence, is found in that it allows a different *process*, as opposed to requiring a different *outcome*, in determining the margin of dumping in the presence of a relevant pricing pattern." China misses the point of the U.S. argument. The United States does not argue that the alternative, average-to-transaction comparison methodology necessarily must yield a different outcome. The outcome may or may not be different, depending on the facts.

26. China argues that the Appellate Body's findings related to the meaning of the term "margin of dumping" compel the conclusion that zeroing is impermissible in connection with the application of the alternative, average-to-transaction comparison methodology. China's reasoning is flawed, and China's argument bears no connection whatsoever to the text of Article 2.4.2 of the AD Agreement or prior Appellate Body findings.

27. It is crucial to recognize that, when the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, such as the meaning of the term "margin of dumping," those interpretations, on a basic level, are rooted in the text of the first sentence of Article 2.4.2 of the AD Agreement. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

I. China's Effort To "Avoid" Mathematical Equivalence Is Unpersuasive

28. China does not dispute that, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the challenged antidumping investigations. The dispute between the parties is not about arithmetic or algebra. It is about so-called "assumptions" related to the calculation of normal value. It is China's assumptions that are untenable and without explanation. Each of the scenarios in Exhibit CHN-497 depends on and is exclusively premised on manipulating the calculation of normal value for the application of the average-to-transaction comparison methodology while not making any similar change to the calculation of normal value for the application of the average-to-average comparison methodology. Yet, China fails to explain why changing the calculation of the *normal value* used in the application of the normal average-to-average comparison methodology and the exceptional average-to-transaction comparison methodology would in any way address a pattern of significantly differing *export prices* among different purchasers, regions, or time periods. There is no logical reason why an investigating authority would do so and China has not explained how calculating normal value differently would assist an investigating authority to, in the words of the Appellate Body, "unmask targeted dumping."

29. There also is no textual basis in Article 2.4.2 of the AD Agreement to support calculating normal value differently for the purposes of applying the average-to-average and average-to-transaction comparison methodologies set forth in the first and second sentences of Article 2.4.2, respectively. The phrase "weighted average normal value" in the first sentence of Article 2.4.2 is nearly identical to and conveys the same meaning as the phrase "normal value established on a weighted average basis" in Article 2.4.2, second sentence.

30. The United States does not argue that the investigating authority's flexibility to use monthly normal values is limited by the terms of Article 2.4.2 of the AD Agreement. China simply has failed to explain the logic of changing the basis of the calculation of the weighted-average normal value as part of the effort to "unmask" dumping concealed by a pattern of significantly differing export prices.

31. While China attempts to avoid mathematical equivalence, it expends no effort to advance an interpretation of the second sentence of Article 2.4.2 that would give that provision meaning or permit investigating authorities to use the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."

32. The scenarios presented in Table 4 of Exhibit CHN-497 support the argument made in the U.S. opening statement at the first panel meeting concerning the unpredictability of changing the basis for the calculation of normal value in the manner that China proposes. The results are unpredictable and not systematic, and they bear no relationship to the pattern of significantly differing export prices or the aim of the second sentence of Article 2.4.2 to "unmask targeted dumping."

33. China also argues that the U.S. mathematical equivalence argument "fails to grapple with the relevance of the T-T methodology," which "will generally yield results that are different from both W-W and W-T methodologies, even though zeroing is not permissible under the T-T methodology." China's observation does not support its position. The United States has never argued that the transaction-to-transaction comparison methodology should lead to the same result as either the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing). The Appellate Body has found that there is no hierarchy between the average-to-average and transaction-to-transaction comparison methodologies and they should not be interpreted in a way that would "lead to results that are systematically different." This does not mean that the outcomes of these two methodologies should be mathematically the *same*.

J. "As Applied" Claims Related to the PET Film Third Administrative Review

34. China's arguments that prior Appellate Body findings establish that zeroing is "never permissible" in administrative reviews and that recourse to the alternative, average-to-transaction comparison methodology is "only available in original investigations" are incorrect.

35. The Appellate Body has never found that the use of zeroing in an administrative review is impermissible when it is used 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. China's reading of the Appellate Body report in *US – Zeroing (EC)* is untenable. The Appellate Body did not endorse the *US – Zeroing (EC)* panel's legal reasoning concerning the term "during the investigation phase" in Article 2.4.2.

36. China's argument that "recourse to the exceptional methodology under Article 2.4.2, second sentence, is only available in original investigations" and is not available in assessing the precise amount of antidumping duty in administrative reviews is not supported by the text of Articles 2.4.2 and 9.3 of the AD Agreement or by logic. Article 9.3 of the AD Agreement provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." A margin of dumping established pursuant to the second sentence of Article 2.4.2 is a margin of dumping established under Article 2. Even if the term "during the investigation phase" is interpreted in the manner for which China argues, the implication simply would be that there is no *requirement* to apply the comparison methodologies described in Article 2.4.2 in the context of administrative reviews. It would not follow, logically, that it would be impermissible for an investigating authority to apply those comparison methodologies in administrative reviews.

III. CHINA'S CLAIMS AND ARGUMENTS CONCERNING THE ALLEGED SINGLE RATE PRESUMPTION AND THE ALLEGED USE OF ADVERSE FACTS AVAILABLE NORMS DO NOT COMPORT WITH THE DSU OR THE PANEL'S WORKING PROCEDURES

A. The Six New Determinations China Introduced During The First Substantive Meeting Are Not Within The Panel's Terms Of Reference

37. China introduced six new antidumping determinations during the course of the first substantive meeting that are in fact "new measures" that are not within the Panel's terms of reference and cannot be challenged in this dispute. These new measures are outside the scope of this dispute because China did not consult with the United States over them in accordance with Article 4.4 of the DSU or identify them in its Panel Request per Article 6.2 of the DSU.

38. China fails to recognize that under the DSU, the concept of – and need to identify – "measures" is discrete from the concept of and need to identify the requisite "legal basis of the complaint." Thus, whatever the level of precision with respect to the *legal basis* put forward by China, it is irrelevant for whether the requirement to identify *the measure* in both the Request for Consultations and the Panel Request has been fulfilled. Moreover, when China concedes that only particular arguments from China's first written submission may even be relevant for a particular determination, this only further highlights that these determinations are new measures.

B. China's Recent Arguments Are Contrary to the Panel's Working Procedures and the DSU

39. China has presented extensive arguments that properly belonged in its first written submission per paragraph 6 of the Panel's Working Procedures. Indeed, the situation here is more prejudicial than in the *EC – Fasteners* dispute (in which a previous panel has similarly been faced with a situation in which China provided evidence and arguments going to its primary case well beyond its first submission) because the substantive deficiency is qualitatively higher. Moreover, unlike *EC – Fasteners*, which concerned a single antidumping determination, the present dispute entails dozens and dozens of determinations increasing the potential prejudice upon the United States and undermining its rights to present a full defense, including by having sufficient time to prepare its submissions (DSU Article 12.4) and to receive the facts of China's case and China's arguments *before* presenting its own first submission (DSU Article 12.6 & Appendix 3, para. 4).

IV. CHINA STILL HAS NOT ESTABLISHED THE EXISTENCE OF AN ALLEGED "SINGLE RATE PRESUMPTION" NORM OR AN ALLEGED "ADVERSE FACTS AVAILABLE" NORM

40. China's challenge to both a purported "Single Rate Presumption" norm and a purported "Adverse Facts Available" norm rests on China meeting the "high threshold" that such unwritten norms exist. China has not shown the existence of anything with independent operational effect,

in the sense of doing something or requiring something to be done, which could establish the existence of such norms as measures. China does not show the existence of norms that affect USDOC's behavior generally and prospectively. Regarding the alleged Adverse Facts Available norm, China has additionally failed to articulate the content of the purported norm. Consequently, China's "as-such" challenges to these alleged measures must fail.

A. China's Evidence Still Fails to Demonstrate That The Alleged Single Rate Presumption Norm Applies Generally and Prospectively

1. The Evidence Generally

41. China's purported evidence does not show that any alleged Single Rate Presumption has any type of general and prospective application, let alone legally binding effect.

a. Policy Bulletin 05.1

42. The first piece of evidence that China relies upon is a statement taken from Policy Bulletin 05.1. That statement does not establish the existence of a rule that has independent operational effect or otherwise directs USDOC's future conduct. The cited statement is located in a section titled "Background" and, thus, does not demonstrate that the alleged Single Rate Presumption has a "normative" character. China's attempt to equate Policy Bulletin 05.1 with the Sunset Policy Bulletin at issue in *US –OCTG Sunset Reviews* is also misplaced, particularly as in that dispute, unlike in this dispute, Argentina challenged the Sunset Policy Bulletin ("SPB") itself as a measure.

43. Moreover, China's excerpted language when put next to the adjoining sentences makes clear that what, if anything, may happen in the future is a particular procedure concerning a separate rate application. Critically, China has not explained what words in the proffered excerpt will "necessarily give rise" to the alleged Single Rate Presumption. To the extent China relies on the language noting the "Department presumes", the use of the present tense confirms that, at most, the USDOC is describing conduct in the past up to the present.

b. Antidumping Manual

44. China relies on three sentences from the Antidumping Manual to assert the existence of the norm. China does not explain how or why any of the text in these sentences establishes or otherwise supports its contention that the alleged Single Rate Presumption will "necessarily give rise" with respect to particular situations in the future.

45. Instead, China asserts these statements serve "as a *justification* and a *motivation* for the decision in the instant investigation or review." Justification, however, does not speak to general and prospective application. With respect to motivation, the cited statements do not in any way evince in any respect future and general application. Moreover, the Antidumping Manual contains an explicit disclaimer and USDOC, nearly 10 years ago, had explicitly, and publicly stated in a memorandum that the manual is not meant to be relied upon by the public

c. Rulings by U.S. Courts

46. The language referenced from the various court decisions do not support the existence of a norm of general and prospective effect. These statements simply note, at most, that USDOC has done something previously, and then done something different at a subsequent time. The statements also note that it is well settled under U.S. law that USDOC may undertake such actions. The fact that a particular exercise of discretion is lawful under a Member's domestic legal framework does not mean that this is the only choice available under domestic law, nor that the agency will continue to exercise its discretion in the exact same way in the future.

d. Tabulated statements from 38 challenged determinations and Statements from other sampled determinations

47. The various tabulations, such as Table SRP, provided by China are nothing but the string of cases that the Appellate Body explicitly described as insufficient evidence – and thus do not prove

the existence of the alleged norm. Indeed, nowhere in its submissions does China actually direct the Panel as to what aspect or entry in the table proves general and prospective application.

2. The Evidence With Respect to the Separate Rate Test

48. As China implicitly concedes through its reference to a "first element," China's alleged norm is different from the unwritten norm alleged in *US – Shrimp II (Viet Nam*). Specifically, China alleges that the alleged norm includes two elements, the latter involving a Separate Rate Test. Furthermore, China has not identified in its submissions what evidence China is putting forward to establish the general and prospective nature of this second element.

B. China's Evidence Still Fails to Demonstrate The Content of The Alleged Adverse Facts Available Norm

49. China's own description of the alleged Use of Adverse Facts Available Norm ("Adverse Facts Available Norm") highlights three critical defects. First, while China recognizes at the outset that a norm must apply "whenever," its own description of the purported norm is lacking in that regard. Second, China has failed to specify what constitutes "adverse information" or "adverse facts." Third, China's reference to the "process" employed by USDOC failed to identify the discrete conduct that is required by the alleged norm.

C. China's Evidence Still Fails to Demonstrate The Existence of an Alleged Adverse Facts Available Norm with General and Prospective Application

50. The statements cited by China do not speak to the actual selection of facts. Moreover, as these statements are phrased conditionally – "in many cases" or "[o]ccasionally" – China cannot reasonably claim that they evince general and prospective application.

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. China's Arguments Fail to Address That USDOC May Treat Nominally Distinct Respondents as a Single Entity

51. China has failed to satisfy its *prima facie* case because all of its arguments go to the first, inapposite question of treatment of individual companies. Where an entity has been properly established, there is no basis to evaluate further whether the individual companies properly within the entity have been assigned an individual margin and duty.

B. China Has Otherwise Failed To Establish Its *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With Articles 6.10 and 9.2

52. China does not explain for those cases in which the China-government entity is not under review, how the alleged Single Rate Presumption precludes individual producers/exporters who are grouped within the entity from receiving an individual margin of dumping. Additionally, China has not demonstrated through evidence that the rate assigned to the China-government entity is inconsistent with Article 9.2 in each challenged investigation. It bears emphasis that China has not addressed U.S. arguments concerning USDOC's Separate Rate Application and Separate Rate Certification. Specifically, USDOC asks a company to provide information that goes to whether the company's export activities are controlled by the Chinese Government. The questions asked by USDOC go to factors that the Appellate Body in *EC – Fasteners* found could be considered 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."

53. China's failure to put forward the requisite evidence means that is unclear whether evidence gathered from the Separate Rate Test was relied upon, and not any presumption. Because of the particularized circumstances, it was incumbent upon China to demonstrate the exporters, producers, or suppliers were denied an individual rate in the challenged proceedings. In other words, in a particular proceeding no company may have been treated as part of the China-

government entity on account of a presumption, or a company may have been so treated on the basis of record evidence.

C. China Has Not Addressed The Importance Of China's Accession Protocol And The Working Party Report

54. As the United States has established, China's Accession Protocol and Working Party Report provide both a legal and factual predicate for USDOC's treatment of Chinese companies as part of a single China-government entity. Paragraph 15 of the Accession Protocol, placed in proper context, and relevant provisions of the Working Party Report, provide the basis for USDOC's recognition that multiple companies may comprise a single China-government entity.

55. An interpretation of Section 15 that construes it exclusively as a derogation for how normal value may be calculated for Chinese respondents would create serious problems for investigating authorities trying to address injurious dumping. Indeed, a particular irony to such an interpretation is that companies that are found not to be part of the China government entity could be disadvantaged in antidumping investigations in comparison to those under the control of the Chinese government, since the Chinese government could potentially manipulate export price by rechanneling sales though different legal entities under its control.

56. A more logical interpretation is that Section 15's silence on export price is simply a reflection that there was no need to explicitly reference the issue in order for Members to address it. At least two reasons justify such silence. First, explicit reference is not required because it is addressed by implication. Second, Members viewed existing mechanisms being used in Chinese antidumping investigations at the time of China's accession –treating Chinese companies as part of a single China-government entity absent evidence demonstrating independence – as sufficient to address concerns arising with export price.

VI. CHINA'S ARTICLE 9.4 CLAIMS MUST FAIL

57. China's arguments fail because Article 9.4 applies only where the China-government entity is not under examination. Where the China-government entity receives its own rate, the facts in a proceeding will often, if not always, subject the China-government entity to examination. In several of the referenced determinations, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination.

A. China Has Failed To Establish A *Prima Facie* Case That The Alleged Single Rate Presumption Is As Such Or As Applied Inconsistent With The Second Obligation Of Article 9.4

58. There are two critical defects to China's "as such" claim. First, Article 9.4 does not govern the rate assigned to those companies that have been included in the examination. Moreover, China must demonstrate that the China-government entity is not under examination. In nearly every determination referenced by China, the China-government entity received its own rate pursuant to Article 6.8 of the AD Agreement and was subject to examination. In those few determinations referenced by China in which the China-government entity was not under review or in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

59. This leads to the second defect in China's claim. The crux of China's claim here – that the alleged Single Rate Presumption is "as such" inconsistent with the second obligation of Article 9.4 – rests on the applicability of the very particular situation described in Article 6.10.2 and the last sentence of Article 9.4. China ignores that the last sentence of Article 6.10.2 does not provide for an *automatic* right to an individual rate for those companies not included in the examination, but creates certain prerequisite conditions. China does not point to a single example where there exists such a company that has met these conditions.

B. China Has Failed To Establish That USDOC Acted Inconsistently With The First Obligation Of Article 9.4 In The 26 Challenged Determinations

60. China argues that USDOC acts inconsistently with Article 9.4's first obligation concerning the "ceiling rate for the level of duties that may be applied to non-selected exporters or producers" in 26 challenged determinations. However, in 19 of the challenged determinations, the China-government entity was under examination and received its own rate pursuant to Article 6.8. The pertinent issue is USDOC's treatment of the China-government entity *as a whole*, rather than simply the treatment of the individual companies. For those seven (7) determinations in which USDOC assigned the China-government entity a rate from a previous proceeding, China has not explained how Article 9.4 is implicated.

VII. CHINA HAS NOT DEMONSTRATED THAT USDOC WAS REQUIRED TO SEND A DUMPING QUESTIONNAIRE TO ALL MEMBERS OF THE CHINA-GOVERNMENT ENTITY IN 26 OF THE CHALLENGED DETERMINATIONS

61. China has failed to establish that the United States has breached Articles 6.1, 6.8, and Annex II of the AD Agreement for the 26 challenged determinations. Despite the numerous requests for information made by USDOC, China's claims focus instead on the information that was not requested. Specifically, China's argument is that USDOC was required to send a dumping questionnaire to all members of the China-government entity in all instances, no matter the circumstances. Nothing in the AD Agreement requires so.

A. China's Article 6.1 Claims With Respect to the 26 Challenged Determinations Are Legally And Factually Deficient

62. China continues to put forth an interpretation of Article 6.1 of the AD Agreement which purports to govern not just an investigating authority's procedural obligations with respect to notifying parties "of the information which the authorities require", but also the content of the information required for a certain determination. The *substantive* issue of which information is required for a particular determination is addressed elsewhere in the AD Agreement.

B. China Has Not Demonstrated That USDOC Resorted To Facts Available In 7 Challenged Determinations[1]

63. The record is undisputed that USDOC did *not* make a finding of noncooperation in these 7 reviews. As found by the panel in *US – Shrimp II (Viet Nam)*, applying a rate that had previously been determined in a prior proceeding does not equate to a determination that is governed by Article 6.8. Additionally, with respect to China's "as such" claim, according to China, the alleged Use of Adverse Facts Available norm is only triggered where USDOC makes a finding of noncooperation. Because USDOC did not make such a finding with respect to these 7 reviews, the alleged norm was not triggered per China's own definition.

C. China Has Not Established That USDOC Acted Inconsistently With Article 6.8 and Annex II(1) In Tires AR5 and Diamond Sawblades AR4

64. In Tires AR5, that part of the China-government entity that USDOC found to be cooperative did not represent the entirety of the entity. In Diamond Sawblades AR4, USDOC made no findings with respect to the level of cooperation of the China-government entity. Importantly, in both of these reviews, because China has not demonstrated that USDOC resorted to facts available, it has failed to demonstrate any inconsistency with Article 6.8 and Annex II(1).

D. China Has Not Demonstrated That USDOC's Resort To Facts Available In The 19 Challenged Determinations Is Inconsistent With Article 6.8 And Annex II(1)

65. The crux of China's as applied arguments with respect to USDOC's resort to facts available is that in each determination USDOC could not resort to facts available because it did not send a

[1] These are (1) Diamond Sawblades AR1, (2) Diamond Sawblades AR2, (3) Diamond Sawblades AR3, (4) Furniture AR8, (5) Retail Bags AR3, (6) Ribbons AR1, and (7) Wood Flooring AR1.

dumping questionnaire to each and every member of the China-government entity, regardless of the circumstances. USDOC's determination to resort to facts available in assigning a margin to the China-government entity in the 19 challenged proceedings is consistent with Article 6.8 and Annex II(1) because the China-government entity was notified of a request for and failed to provide necessary information.

66. China argues that resort to facts available based on the failure of certain companies within the China-government entity to respond to a request for quantity and value information is not a proper basis to reach a finding of noncooperation. However, if a party could pick and choose what information it submits, it would be incentivized to only selectively disclose information that benefits its interests rather than ensure the most appropriate determination.

VIII. CHINA'S CLAIMS CONTINUE TO CONFUSE USDOC'S RESORT TO FACTS AVAILABLE WITH THE SUBSEQUENT SELECTION OF FACTS AVAILABLE

67. Two of China's three "as such" claims should be found outside of the Panel's terms of reference because they are related not to the alleged Use of Adverse Facts Available norm, but rather, to USDOC's resort to facts available through a finding of noncooperation. These are: China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} a facts available rate for NME-wide entities based on the (frequently presumed) procedural circumstances of non-cooperation{,}" and China's claim that "USDOC, as a result of the Use of Adverse Facts Available norm, select{s} Adverse Facts Available in circumstances when it has not requested the necessary information{.}"

IX. CHINA HAS FAILED TO ESTABLISH THAT THE UNITED STATES BREACHED ARTICLE 6.8 AND ANNEX II IN SELECTING THE FACTS AVAILABLE FOR THE CHINA-GOVERNMENT ENTITY

A. In Selecting From Among The Available Facts, USDOC Performed A Comparative, Evaluative Assessment

68. USDOC considers the universe of information on the record. This included information contained in the domestic parties' application for initiating an anti-dumping investigation, information that was obtained during the course of the investigation or administrative review, such as dumping margins from cooperating parties, data on sales transactions and normal value provided by those cooperating parties, and any other information obtained by USDOC during the course of the investigation or review. USDOC considered all of this information and selected from among the facts available, taking a party's non-cooperation into account.

69. USDOC then ensured that the rate selected had probative value, meaning it was both reliable and relevant, by checking the selected rate with independent sources of information on the record. USDOC performed this comparative, evaluative assessment at least twice during each determination: at the preliminary determination or results, and again at the final determination or results. Apart from this examination, USDOC also considers whether the rate selected is aberrational or unusual, is not reflective of the missing information, and therefore should be rejected for use as facts available.

B. USDOC's Process Did Not Automatically Select The Highest Available Rate

70. If the "the highest of" language cited by China accurately reflected USDOC's determinations, then the rates selected would be the highest rates available. In the challenged determinations in which USDOC resorted to facts available, the highest rate was rejected in many cases based upon an examination of the probative value of such rates. The same point holds with respect to China's reliance on the U.S. court rulings it cites. In *Lifestyle Enterprise, Inc. v. United States*, China ignores the court's language that such rates "*must be reasonably accurate estimates of respondents' rates*" and instead focuses on the language of a "built-in increase" as a deterrent. In so doing, China fails to realize that the notion of deterring non-cooperation is no more than taking account of a party's failure to cooperate.

71. China also points to the term "sufficiently adverse" as if USDOC performs a test to ensure the rate selected is adverse enough to deter non-compliance. There is no test to determine

whether a rate is "sufficiently adverse" to induce cooperation. Rather, by taking into account the party's non-cooperation, USDOC may apply an inference that *may* be unfavorable, which may incentivize a party to cooperate.

72. In the challenged determinations, China is unable to point to any rate in which the evidence supporting that rate has greater probative value for the non-cooperating entity *as a whole*. Instead, China breaks apart the NME-entity into component parts to make its argument that the rate selected is inaccurate. In doing so, China concedes that the comparator or benchmark that it insists be used as the hallmark of accuracy – *i.e.*, the all others rate - is *not* a reasonable replacement for a party that has "genuinely" failed to cooperate.

73. China argues that the rate assigned to separate rate companies is an appropriate comparison rate in determining whether the rate assigned to the China-government entity is "adverse" or a reasonable replacement for missing facts. However, those companies that receive a separate rate have demonstrated that they are eligible for a separate rate, and, in certain proceedings, cooperated by responding to a request for Q&V information. In contrast, those companies that are within the China-government entity failed to demonstrate that they are eligible for a separate rate, and, in those proceedings at issue, the entity itself failed to cooperate.

74. China points to factors that it claims USDOC does not consider when selecting a facts available rate for the China-government entity, including the rates of cooperating respondents, the rate assigned as the all others rate, the age of the selected information, and information about the non-cooperative company's age and size. However, USDOC does consider the rates of cooperating respondents and the all others rate but, depending on the facts and circumstances of the particular case, may find that this information has less probative value because it does not correspond with a party's non-cooperation.

X. THE PANEL MAY EXERCISE JUDICIAL ECONOMY ON CLAIMS RELATING TO THE USE OF ADVERSE FACTS AVAILABLE NORM OR DISMISS THEM UNDER ARTICLE 6.2 OF THE DSU

75. If the Panel finds for China on any of its claims against the alleged Single Rate Presumption, then additional findings under Articles 6.1, 6.8, and Annex II and Article 9.4 would not contribute to a positive resolution of the dispute because such findings – and the underlying analysis – would not be relevant in resolving the dispute.

76. China asserts that relevant description in the panel request of China's facts available claims is contained only in the following, general phrase: "inconsistent with the obligations of the United States under Article 6.8 and Annex II of the Anti-Dumping Agreement." This phrase, however, is so lacking in specificity that all of China's claims under Article 6.8 and Annex II would fail to comply with the requirement of Article 6.2 of the DSU.

XI. CONCLUSION

77. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject China's claims.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

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ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil's participation in this dispute will focus on the conditions for the use of the second sentence of Article 2.4.2, on the operation of the W-T comparison method (or "third method") and on Article 6.8 of the Anti-Dumping Agreement.

2. Regarding the second sentence of Article 2.4.2, although there are considerable uncertainties related to when it could be invoked or how the W-T method should operate in practice, there is one aspect that is clear: this method is not expected to be routinely used. Indeed, the situation described in the second sentence of Article 2.4.2 is a very specific factual situation that exceptionally authorizes investigating authorities to use the W-T method to calculate the dumping margin. Contrary to the recourse to the W-W and T-T, which "shall normally" be used, recourse to the third method is contingent upon the fulfillment of the established requirements. This "exceptional nature" was also recognized by the Appellate Body."[1] It follows from that reasoning that particular attention must be paid to whether the specific conditions established for its use in the Agreement are met.

3. The first condition established in the Agreement is that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods". Article 2.4.2 does not convey a precise definition of what type of variation of export prices matters for the purposes of application of the "third method", neither does it require investigating authorities to rely on any particular methodology to assess the existence of such a pattern. Yet, investigating authorities are under the obligation to establish and evaluate the facts under investigation in an unbiased and objective manner (article 17.6 of the ADA). In this sense, while a mathematical model may confer objectivity to the analysis, what is before the Panel is whether the Nails test can be deemed sufficient to establish, in an unbiased and objective manner, in each and every case of its application, a pattern for the purpose of the Article 2.4.2.

4. Brazil agrees that there is nothing in the text of the Anti-Dumping Agreement suggesting that the investigating authority is compelled to assess why certain export prices were significantly lower or differ from each other or to examine the intention behind price behavior. However, the possibility that both a quantitative and qualitative dimension be taken into account, given the exceptional nature of the third method, seems to be undisputed. The respondent itself, based on the decision of the Appellate Body in *US – Large Civil Aircraft*[2], agrees that "the term "significantly" in the "pattern clause" can have both quantitative and qualitative dimensions."[3] If this is true, then it may be appropriate to consider a qualitative dimension in the analysis of the existence of a pattern relevant for the purposes of Article 2.4.2 of the Anti-dumping Agreement.

5. The finding of a "pattern" must also take into account the object and purpose of the Anti-Dumping. Brazil and the United States seem to agree that what is to be condemned is injurious dumping.[4] Accordingly, while many different patterns of export prices might be found in the total universe of export transactions, not necessarily all of them would automatically constitute "a pattern" within the meaning of the second sentence of Article 2.4.2. It is possible that even significant variations between two export prices of a given purchaser, region or time period may not be *per se* decisive. Brazil is not also convinced that there is "a pattern" within the meaning of the second sentence of Article 2.4.2 when all export prices are above normal value[5], since in such a situation there is no dumping.

6. The second condition for the use of the second sentence of Article 2.4.2 is that an explanation is provided as to why the differences in prices cannot be taken into account appropriately by the use of the W-W or T-T comparison methods. This is not a trivial obligation. The authority has to

[1] US – Zeroing (Japan) (Appellate Body Report, para. 131).
[2] US- Large Civil Aircraft (Second Complaint), AB paragraph1272
[3] US First Written Submission, paragraph 72.
[4] US. First Written Submission, para 48.
[5] U.S. First Written Submission, paras. 169 and 194.

elaborate further on the reasons why, given the operational characteristics of the W-W and the T-T methods and the factual particularities of the case under investigation, those methods were not appropriate to deal with the differences in export prices. Considering that, from a purely mathematical perspective, all investigations could, in principle, be run with one of the two symmetrical comparison methods, the particular aspects of the concrete case need to be explained in order to support a decision not to use the symmetrical methods. For example, if dumping is heavily concentrated in the first half of the year, the use of the symmetrical methods could produce a zero-margin result, when, in fact, there is high dumping in the first half of the year and no dumping in the second half. This type of factual situation should be part of the explanation to be provided together with a complementary explanation of why the pattern observed could not be tackled by adjusting the period of investigation (POI), for instance. In short, an explanation of the peculiarities of the concrete case, together with an explanation of why the regular tools already at the disposal of the investigating authority were not sufficient to enable the use of one of the symmetrical methods, is essential to justify the use of third method.

7. The "explanation" must contemplate the reasons of why *both* symmetrical methods cannot be used. Had the drafters of the Anti-Dumping Agreement intended that an explanation be limited to only one of the symmetrical methods, they would have said so explicitly at the end of the second sentence by stating, for example " by the use of *one* of the symmetrical methods". Finally, a positive or higher margin of dumping obtained with the use of third method does not seem a legitimate reason *per se* to justify its use. Ultimately, the explanation of why the third method is needed cannot be confounded with the results obtained in the dumping margin by any given methodology. In sum, for exceptional situations of targeted dumping, an exceptional level of explanation is required so as to avoid the temptation to unduly, and illegally, characterize regular dumping situations as targeted dumping.

8. Another important issue before this Panel is the operation of the third method once the conditions for its use are met. More specifically, whether "zeroing" should be used for a proper operation of this method. There seems to be more doubts than certitudes in this matter. On the one hand, whether "zeroing" is permissible in the second sentence of Article 2.4.2 "is an issue of first impression for the Panel"[6]. On the other hand, certain conclusions of the Appellate Body in past "zeroing" disputes could be of interest in the interpretative exercise that this Panel has to undertake, especially the conclusion that the concepts of "dumping" and "margin of dumping" are consistently defined in relation to a product under investigation as a whole[7]. In interpreting the relevant findings of the vast jurisprudence regarding "zeroing", the Panel will have to account for the existence of the third method and to the principle of "effet utile" of treaty interpretation. How this can be done is so far not clear. Some WTO Members have suggested that the W-W and W-T would not yield necessarily the same results if the WA normal value in these methods was different. The United States advocates that nothing in the Anti-Dumping Agreement suggests that such change could be made. The Appellate Body, on its turn, hinted with the possibility that the universe of export transactions could be limited to the export transactions within the pattern[8]. Such an interpretation raises other doubts, however. With regard to the mathematical equivalence argument, it would seem that different mathematical results would be difficult to achieve if there are no changes, both from the legal and from the practical perspective, to the way of comparing the WA normal value and the export price in a targeted dumping situation. Ultimately, the answers should be found on the basis of the text, object and purpose of the Anti-Dumping Agreement itself.

9. Brazil would also like briefly to comment on another important question raised by this dispute: if the interested Member or the interested party is non-cooperative, may dumping determinations be made on the basis of "adverse facts available"?

10. Article 6.8 of the Anti-dumping Agreement[9] requires that the provisions of Annex II be observed in its application. Together, they govern how investigating authorities are to proceed so as to apply the best available information to make sound dumping determinations.

[6] U.S. First Written Submission, para. 214.
[7] US – Softwood Lumber V, Appellate Body Report, paras. 93 and 96.
[8] US – Zeroing (Japan), Appellate Body Report, para. 135.
[9] Antidumping Agreement, Article 6.8: "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or

11. Article 6.8 is intended to ensure that the failure of an interested party to provide necessary information within a reasonable period or its action to hamper the investigation does not prevent authorities from making preliminary or final determinations. Simply put, the provision is intended to prevent any party from holding the investigating authority hostage by not providing necessary information.[10]

12. However, as emphasized by the Appellate Body, an investigating authority's discretion is not unlimited with respect to the facts it may use when faced with missing information. Rather, the facts to be employed are expected to be the "best information available". In addition, if secondary sources are used, the authority should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties.[11]

13. Furthermore, the investigating authority is not allowed to choose facts that would lead to a biased determination of dumping. As the Panel in the *Mexico - Anti-Dumping Measures on Rice* dispute exemplified, Article 6.8 is not intended to operate as a punishment for those parties that do not provide such information.[12] It is important to recall that Article 6.8 itself foresees that either "affirmative or negative [determinations] may be made on the basis of the facts available".

14. Nonetheless, Brazil believes that Article 6.8 should not be interpreted as an obligation to seek "neutral" information, as it would also mean to import into the provision an equally harmful bias, where parties could benefit from non-cooperating. Rather, Brazil understands that the best information available seems to be the most reliable one, whether positive or negative, and then it would be up to the Panel to assess whether the choice of information was actually reasonable.

15. In this connection, Brazil draws the Panel's attention to the Panel Report in "EC – Countervailing Measures on DRAM Chips".[13] While the investigating authorities are not allowed to use facts available in order to punish the non-cooperative parties, these exporters should not be somehow rewarded by non-cooperating.[14]

16. In sum, like the Panel in "*EC – DRAM Chips*", in the context of Article 12.7 of the SCM Agreement, Brazil considers there is a balance to be found in the interpretation of Article 6.8 and Annex II do Anti-dumping Agreement. While the investigating authorities are not allowed to use facts available in order to punish the non-cooperative parties, these exporters should not be somehow rewarded by non-cooperating.[15]

17. The possibility of using adverse inferences in cases of non-cooperation encompasses any situation of failure in providing necessary information required by the investigating authority, either in the form of a full dumping questionnaire or, for instance, an initial questionnaire for the purpose of exporters' selection in the context of Article 6.10. In that sense, Brazil understands that any initial questionnaire should be considered "information which the authorities require", as set forth by Article 6.8. For that reason, the failure to respond to this kind of inquiry could justify the use of facts available by the investigating authority when determining any final or preliminary anti-dumping duty. Brazil considers that the dumping determination would not be restrained by the limitation specified in Article 9.4.[16] In this regard, the panel in *EC-Salmon (Norway)* has already

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significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

[10] *Mexico - Anti-Dumping Measures on Rice* (Panel Report, para. 7.238)

[11] *Mexico - Anti-Dumping Measures on Rice* (Appellate Body Report, para. 289)

[12] *Mexico - Anti-Dumping Measures on Rice* (Panel Report, para. 7.238)

[13] Paragraph 7.61.

[14] See also Appellate Body report, *US – Hot-Rolled Steel*, paragraph 102.

[15] See also Appellate Body report, *US – Hot-Rolled Steel*, paragraph 102.

[16] 9.4 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, provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins

clarified that the ceiling for the dumping margin for exporters not included in the sample would not apply to those parties that failed to provide the requested information for the purpose of sampling[17].

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.

[17] European Communities — Anti-Dumping Measure on Farmed Salmon from Norway (Panel Report, paragraph 7.431)

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. THE USDOC APPLICATION OF THE *NAILS TEST* DOES NOT ESTABLISH THE REQUISITE PATTERN OF EXPORT PRICES WHICH DIFFER SIGNIFICANTLY

1. In the challenged investigation, the USDOC applied the *Nails Test*, a two-part test composed of the standard deviation test and the gap test.

2. The Appellate Body has stated that the average-to-transaction methodology may only be used if an investigating authority finds a pattern of export prices which differ significantly among different purchasers, regions or time periods (*US – Zeroing (Japan)*). This requires findings that clearly demonstrate the existence of: (i) significant differences in export prices, and (ii) a pattern to these differences.

3. In relation to the pattern requirement, in its first written submission the United States observes that use of the average-to-transaction comparison methodology requires an investigating authority to 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". The United States describes in detail the various stages of the *Nails test* and how the *Nails test* identifies "targeting". However, it fails to demonstrate that its methodology identifies a "pattern".

4. The text of Article 2.4.2 makes it clear that the pattern to be identified is one "of export prices". The USDOC application of the *Nails test* does not meet this requirement because the USDOC averages export prices instead of comparing them to each other. The very nature of an average is that it creates a typical value and by so doing obfuscates differences. In averaging export prices, the USDOC conceals whether or not there is a form or sequence to those prices.

5. The United States argues in its first written submission that the focus should be on differences among purchasers, regions or time periods and not individual export prices. However, this argument overlooks the requirement that there must be a pattern to these differences.

6. Article 2.4.2 requires a pattern of export prices which "differ significantly". In order for prices to "differ", there must be a point of comparison. In its first written submission, the United States rightly points out that "[a]n 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". However, the USDOC distorts its gap test when it ignores lower prices among non-targeted prices, thereby eliminating non-targeted prices that may be similar to alleged targeted prices.

7. The USDOC methodology, as applied, therefore does not include a proper assessment as to whether there is a significant difference among prices and whether the variance in export prices follows any discernible sequence or "pattern".

II. THE USE OF ZEROING WHEN APPLYING AVERAGE-TO-TRANSACTION METHODOLOGY IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

8. Canada submits that, in addition to the inconsistencies described above, the USDOC's use of zeroing when applying the exceptional average-to-transaction methodology is inconsistent with Articles 2.4.2 of the Anti-Dumping Agreement.

9. When employing the average-to-transaction methodology, the USDOC calculated an intermediate result for each export transaction compared to the weighted average normal value. When aggregating these results, the USDOC did not offset the intermediate results of transactions for which the export price is lower than the normal value with intermediate results of transactions

for which the export price is found to exceed normal value. Aggregation without offsetting is commonly referred to as "zeroing".

10. The Appellate Body in *US – Zeroing (EC)* and *US – Softwood Lumber V (Article 21.5 – Canada)* has found that the practice of "zeroing" is inconsistent with the Anti-Dumping Agreement in the context of both the average-to-average and the transaction-to-transaction methodologies. It also reached the same finding in *US – Stainless Steel (Mexico)* and *US – Continued Zeroing* when considering the average-to-transaction methodology in the context of administrative reviews.

11. The principles espoused in those decisions on zeroing demonstrate that zeroing is also not permissible even when an investigating authority employs the exceptional average-to-transaction methodology set out in Article 2.4.2 in the context of initial investigations.

12. The definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. When examining the use of zeroing under the transaction-to-transaction methodology, the Appellate Body found that the concepts of "dumping" and "margins of dumping" can only be found to exist in relation to a product. Because the individual comparisons only yield intermediate results and not margins of dumping, margins of dumping cannot be found to exist under any methodology at the transaction level (*US – Zeroing (Japan)*).

13. This means that even when an investigating authority is justified in using the exceptional average-to-transaction methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

14. The United States argues in its first written submission that zeroing is permissible when applying the average-to-transaction methodology because failing to do so would lead to results that are mathematically equivalent to those obtained through the standard methodologies. We note that the Appellate Body has already rejected such reasoning (*US – Softwood Lumber V (Article 21.5 – Canada)*). Moreover, it does not follow from the fact that a given methodology may yield a mathematical difference, that this methodology is permissible under the Anti-Dumping Agreement. This simple fact does not cure the deficiencies in the U.S. methodology, including those identified in this submission.

15. Therefore, the USDOC's use of zeroing in the challenged investigations was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements, in particular the GATT 1994 and the Anti-Dumping Agreement ("AD Agreement"). The European Union's comments focus on: (I) the targeted dumping methodology applied by the United States; and (II) the US' methodology for dumping determinations with regard to non-market economies (NME's). This executive summary integrates comments made by the European Union in the Third Party Hearing on 15 July 2015 and in its reply to the written questions by the Panel of 30 August 2015.

II. TARGETED DUMPING

2. The European Union considers that the purpose of the final sentence of Article 2.4.2 of the AD Agreement, as reflected in the preparatory work, is to strike a reasonable compromise between two different points of view. The first point of view is that whether or not dumping exists must be measured by taking into account the average pricing behaviour of an exporter, in both domestic and export markets, as well as average costs, irrespective, on the export side, of the purchaser, region or time period. Thus, for this purpose, the data universe includes all export transactions to all purchasers and regions and in all time periods of the investigation period, to the full value of all export transactions, whether they are less or more than the normal value. This is so whether the comparison methodology is weighted average-to-weighted average or transaction-to-transaction. The second point of view is that whether or not dumping exists may be measured by comparing each export transaction with a normal value, and, if the export price exceeds the normal value, by recording a finding of zero dumping, that is, by not allowing any off-set between positive and negative results. The compromise, as enshrined in Article 2.4.2 of the AD Agreement is that normally the first rule applies; but that exceptionally, if targeted dumping by purchaser, region or time period is demonstrated to exist, a normal value established on a weighted average basis may be compared to prices of individual export transactions.

3. What the final sentence of Article 2.4.2 of the AD Agreement does is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. Thus, in the case of regional targeted dumping, a weighted average-to-weighted average comparison might lead to a determination of no dumping. However, a closer examination of one particular regional market within the importing Member might reveal that, in fact, the relatively low priced and dumped transactions are pouring into that region and devastating the local industry, and this is being off-set by relatively high priced transactions to other regions. In such a case, what the final sentence of Article 2.4.2 of the AD Agreement does is to permit an investigating authority to respond to such a situation, by unmasking the targeted dumping. Instead of determining the existence and amount of dumping by reference to the entire territory of the importing Member, it is entitled instead to determine the existence of a pattern of export prices which differ significantly among different regions, and unmask the targeted dumping accordingly.

4. The same observations apply, *mutatis mutandis*, with respect to targeted dumping by purchaser or time period.

5. This process is not aptly described as "zeroing" as that term has been used in prior DSB reports. It is not something done when calculating a dumped amount. Rather, it is something done after a dumped amount has been lawfully calculated in accordance with the provisions of the final sentence of Article 2.4.2 of the AD Agreement.

6. The point that the European Union has been consistently making during the course of these and earlier proceedings is that the particular fact pattern and legal context with which this Panel is presented has not previously been adjudicated. That is why we disagree with China's approach of

asserting the existence of a generic concept of "zeroing" that past case law has prohibited, leading to the conclusion that it is impossible for an investigating authority to unmask targeted dumping (for example by region), because the fact of not offsetting the targeted dumped amount against a negative amount for non-targets is to be characterised as "zeroing". This is just not helpful, because the same term is being used to describe very different fact patterns and legal concepts. Therefore, if the Panel is nevertheless minded to refer to this issue as "zeroing", the European Union would strongly suggest that the Panel consider following the approach adopted in the past cases, by adopting an appropriate qualifier, such as "regional zeroing" or "purchaser zeroing" or "zeroing by time period".

7. To put the matter in these terms, the European Union does not agree with China that just because the past case law has established that "model zeroing" and "simple zeroing" are generally prohibited, it necessarily follows that "regional zeroing" is prohibited. That is because the final sentence of Article 2.4.2 expressly provides for the possibility that there is a pattern of export prices that differ significantly among different regions. Thus, even if regional zeroing would generally not be permitted, it would certainly be permitted when the exceptional circumstances set out in the final sentence of Article 2.4.2 have been demonstrated to exist. The dumped amount thus calculated would have been lawfully calculated in accordance with the provisions of the AD Agreement. It could therefore lawfully form the basis for the calculation of the margin of dumping and thus the rate of anti-dumping duty to be applied.

8. The European Union agrees with the Appellate Body in *US – Continued Zeroing* that the mathematical equivalence argument does not determine the question on the use of different methodologies in case of targeted dumping determinations, because it is most likely not to hold in the case of transaction-to-transaction comparisons, and because the data set changes.

9. Furthermore, during the Third Party Hearing Japan explained that, in order to appropriately counteract low-priced transactions to a "targeted" group, it may be most appropriate to interpret the second sentence of Article 2.4.2 as allowing an investigating authority to "focus" on the transactions for that particular targeted group, and to establish the margin of dumping on the basis of the export prices in that targeted group (e.g. in a region). The European Union understood Japan to argue that the dumped amount thereby calculated does not need to be set-off against a negative dumped amount with respect to non-targets (that is, the remainder of the data set). An anti-dumping duty may then be imposed at that rate with respect to products destined for that region. This would mean that Japan would in fact ignore the exports to non-targets in the calculation of the exporter-specific dumping margin for the investigated product. Japan would apply the same approach, *mutatis mutandis*, with respect to targeted dumping by purchaser and by time period.

10. During the oral hearing the European Union explained that it disagreed with Japan's proposition regarding the levying of the duties insofar as Japan is not taking into account the context provided by Article 4.2 of the AD Agreement. We explained that, although Article 4.2 refers to a situation in which the domestic industry has been interpreted as referring to the producers in a certain area, that is, a market as defined in paragraph 1(ii) of Article 4, nevertheless it provides relevant contextual guidance disproving Japan's proposition.[1] It expressly recognises that there may be circumstances in which the constitutional law of the importing Member does not permit the levying of anti-dumping duties only on products consigned for final consumption to a particular area. In such circumstances, it provides for the exporters to be given the opportunity to cease exporting at dumped prices or give assurances to that effect pursuant to Article 8. It also refers to the possibility of the duties being levied only on products of specific producers which supply the area in question. However, if neither of these approaches is possible, Article 4.2 expressly provides that the importing Member may levy the anti-dumping duties "**without limitation**". As we explained during the oral hearing, this certainly means at least without limitation as to the geographical area.

[1] The European Union does not consider that, for the purposes of resolving the dispute before it, the Panel needs to get into the question of the relationship between the legal concept of a "region" within the meaning of Article 2.4.2 of the AD Agreement and the legal concept of a "region" within the meaning of Article 4.2. We think that the Panel can refer to the term "without limitation" as context in support of a refutation of Japan's argument without doing that.

11. What this means is that, contrary to what Japan submits, it remains possible to impose an anti-dumping duty on the exporter in Japan's example of regional targeted dumping with respect to shipments of all products to the entire geographical area of the importing Member, that is, "without limitation" as to geographical scope. The amount of the anti-dumping duty to be imposed would be equal to the margin of dumping for that exporter. The margin of dumping for the exporter in Japan's example would not be expressed as a margin of dumping into the targeted region, that is, by dividing the dumped amount by the total value of transactions to that region. Rather, the margin of dumping for that exporter would be expressed as a margin of dumping into the entire territory of the importing Member, that is, by dividing the dumped amount by the total value of **all** transactions into the importing Member. This would mean that the investigating authority would *not* ignore the exports to non-targets in the calculation of the exporter-specific dumping margin for the investigated product. Rather, they would **all** be taken into account in the calculation of the dumping margin.

12. With respect to Japan's complaint that this would mean that an anti-dumping duty would initially be imposed on products destined for regions where no regional targeted dumping had previously occurred, we agree with what we understand the US position to be, that is, that any such issues could be addressed (to the extent that this would be necessary at all) during final assessment or refund proceedings as provided for in Article 9.3 of the AD Agreement, or through the use of a variable duty, as provided for in Article 9.4 of the AD Agreement.

13. Finally, the European Union notes that, in a normal anti-dumping calculation, that is, one that does not involve any determination of targeted dumping, an investigating authority is not required to assess the reason for which dumping is occurring. Rather, the determination of the existence and amount of dumping is based on an objective assessment of the data. If the export price is less than the normal value, then dumping exists. The European Union fails to see why the situation should be any different under the final sentence of Article 2.4.2 of the AD Agreement.

14. The reasons for which the dumping might be occurring, and specifically the reasons for the existence of the pattern and the use of the weighted average-to-transaction methodology, might be relevant to the explanation to be provided pursuant to the final sentence of Article 2.4.2 of the AD Agreement, but such reasons are not relevant to the question of whether or not a pattern of relatively low priced exports by purchaser, region or time period, has been demonstrated to exist. We think that the terms "pattern" and "significantly" can be understood quantitatively; and we agree with the United States that the term can also be understood qualitatively.

III. SINGLE ENTITY METHODOLOGIES

15. The European Union expects the Panel to follow the guidance provided by the Appellate Body in *EC – Fasteners (China)*, where a similar presumption of Single Entity in EU law was found inconsistent with Articles 6.10 and 9.2 of the AD Agreement. According to the Appellate Body, legal entities may under certain circumstances be treated as a single exporter or producer, but such singularity cannot be presumed.

16. The criteria for establishing singularity may include the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management, and control or material influence by the State in respect of pricing and output. The European Union considers the criteria referred to by the United States in line with these principles, if they are effectively applied to establish singularity (and not to rebut a presumption of singularity).

17. The European Union agrees with the United States that Article 9.4 of the AD Agreement is inapplicable to entities which have received an individual rate (which can be a Single Rate for several companies if singularity has been correctly established). Where Article 9.4 of the AD Agreement is applicable, it does not require one single "all others" rate, but allows an investigating authority to impose more than one such rate. However, any "all others rate" must not exceed the ceiling calculated according to Article 9.4 (ii). Where it cannot be calculated because there are no reference margins other than zero, *de minimis*, and facts available determinations, Members must provide methodologies which are reasonable in view of the specific circumstances of the case at hand.

18. The European Union anticipates that the Panel will take account of the Appellate Body's findings in *US – Zeroing (EC)* and in *Argentina – Import Measures* when assessing whether China has demonstrated the existence and precise content of a practice of punitive use of facts available. The European Union would like to recall that in *US – Carbon Steel (India)* the existence of such a practice was not challenged by India and hence the findings in that case are not conclusive for the present case. The EU expects that when assessing whether China has sufficiently substantiated its claim, the Panel will look closely into the characterisation of the measure by China and assess the evidence provided in the light of the specific challenge, as indicated by the Appellate Body in *Argentina – Import Measures*.

19. On information rights of individual components of the Single Entity under Article 6.1 of the AD Agreement, the EU considers that a balance must be found between the fundamental due process rights of interested parties and the interest of investigating authorities in efficient and expeditious investigations. In the European Union's view, this requires that basic information about the investigation be given, whenever possible, at the outset of the investigation, to all individual companies known by then to the investigating authorities. All companies included within the Single Entity should be informed thereof once it is established that they belong to the Single Entity, including about the composition of the Entity at that point in time, and about the fact that failure to provide complete information for the whole entity might entail the use of facts available for the Single Entity as such (see next paragraph). Subsequently, it will be for the Single Entity to channel information to its components and investigating authorities.

20. If the Single Entity has been constituted correctly, i.e. not on the basis of a presumption but establishing, for each of its companies whether the criteria set out in *EC – Fasteners (China)* are met, and if all companies included within the Single Entity have been duly informed of their inclusion and the consequences thereof, investigating authorities should be allowed to apply facts available to the extent the Single Entity has been given notice of the information specifically required and failed to provide complete information for the whole Entity. In the European Union's view, a different reading would be in contradiction with the very concept of the Single Entity.

21. Finally, the European Union also advocates a balanced approach on the question whether failure to cooperate at early stages of the investigation can justify the use of facts available at later stages of the investigation, without giving again all parties notice of the information then required. Such balanced approach could consist in giving interested parties from the outset maximum notice of the information required throughout the proceedings, but on the other hand allowing investigating authorities to cease communication with those respondents which make it clear that they do not intend to cooperate.

IV. CONCLUSION

22. The European Union considers that this case raises important questions on the interpretation of various provisions of the AD Agreement and the GATT 1994. The European Union requests the Panel to carefully review the scope of the claims in light of the observations made in its submissions.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. Due to its systemic interest, Japan will address the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") as well as the conduct of the United States Department of Commerce (the "USDOC") pertaining to Certain Methodologies and their Application to Anti-Dumping Proceedings involving China.

II. Zeroing Is Inconsistent with the Anti-Dumping Agreement When Applying the Second Sentence of Article 2.4.2

A. The Appellate Body Consistently Has Held Zeroing to Be Inconsistent with the Anti-Dumping Agreement

2. The Appellate Body has consistently held that zeroing is incompatible with the Anti-Dumping Agreement. It emphasized that dumping and margins of dumping do not pertain to individual transactions or individual models/sub-types of a product, but to a product under investigation as a whole.[1] This conclusion is not only based on the text of Article 2.4.2 but also on the definition of "dumping" set out in Article 2.1, which defines the determination of dumping in relation to "a product", as well as on Article VI:2 of the GATT 1994, which allows a Member and its authorities to levy anti-dumping duties with respect to "any [dumped] product" or "such product". The Appellate Body also clarified that the term "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper review, and periodic reviews",[2] and that the concepts of "dumping" and "margin of dumping" "should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[3] The Appellate Body emphasized that while an investigating authority may undertake multiple comparisons and/or averaging when calculating margins of dumping, the results of such individual calculations are "not 'margins of dumping' within the meaning of Article 2.4.2", and the authority "necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."[4]

3. Zeroing is also inconsistent with the fair comparison obligation under Article 2.4 of the Anti-Dumping Agreement. The Appellate Body stated that zeroing "cannot be described as impartial, even-handed, or unbiased" (i.e., "fair") in the sense of Article 2.4, because the use of zeroing "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[5] The Appellate Body found that zeroing in W-T comparisons in the context of periodic reviews and new shipper reviews is, as such, inconsistent with Article 2.4.[6]

4. While the Appellate Body has not expressly addressed the issue of zeroing with respect to the second sentence of Article 2.4.2, nothing in the Anti-Dumping Agreement allows an investigating authority to depart from the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-wide, and not transaction-specific, concepts. The second sentence

[1] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 106.
[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.
[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.
[4] Appellate Body Report, *US – Softwood Lumber V*, para. 98; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Zeroing (Japan)*, para. 121.
[5] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 169.

expressly allows an investigating authority to compare "a normal value established on a weighted average basis" ("W") with "prices of individual export transactions" ("T"), but it does not prescribe how to deal with the results of such comparisons. Japan emphasizes that the use of the W-T comparison methodology to establish the existence of margins of dumping and the use of zeroing to disregard the intermediate comparison results in establishing the margins of dumping are clearly distinguished and must not be confused. As such, the permissibility of W-T comparisons by no means allows an investigating authority to apply zeroing. With respect to administrative reviews, the Appellate Body has clarified that the application of zeroing under the W-T methodology is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[7]

B. The Use of Zeroing Is Irrelevant to the Role and Function of the Second Sentence of Article 2.4.2 Which Is to "Unmask" "Targeted Dumping"

5. The practice of zeroing cannot be justified in light of the role and function of the second sentence of Article 2.4.2 either. The Appellate Body repeatedly confirmed that the second sentence of Article 2.4.2 is an instrument to "unmask" "targeted dumping".[8]

6. As the second sentence requires differences in export prices to be found "among different purchasers, regions or time periods", targeted dumping may be found when export prices for certain purchasers, regions or time periods "differ significantly" from export prices for other purchasers, regions or time periods. As the Appellate Body clarified, there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".[9] Japan considers that in order to find targeted dumping, export prices to a targeted purchaser, region or time period must *overall* "differ significantly" from other export prices. Differences in export prices among individual transactions or among individual models/subtypes are not relevant for a finding of targeted dumping because the second sentence of Article 2.4.2 does not differentiate among individual transactions or individual models/sub-types.

7. To "unmask" something is to effectively remove a masking effect. Suppose that export prices to a particular region (or purchaser or time period) are significantly lower than the export prices for other regions. Because the first sentence of Article 2.4.2 does not differentiate among different purchasers, regions or time periods, such "targeted" or "selective" pricing could be "masked", i.e., may not be detected and appropriately counteracted with a margin of dumping established under the first sentence of Article 2.4.2 by aggregating all export prices across *all* regions.

8. Therefore, Japan considers that the role and function of the second sentence of Article 2.4.2 is to allow the authority to compare the weighted average normal price ("W") with the prices of the individual transactions ("T") to "targeted" purchasers, regions or time periods when establishing the margin of dumping and to counteract the low-priced transactions to the "targeted" groups with the margin of dumping specifically tailored for such groups. In other words, the second sentence contemplates the price comparisons that are specifically focused on the prices of the export transactions for targeted "purchasers, regions or time periods". This interpretation is consistent with the Appellate Body's understanding of the second sentence of Article 2.4.2 that the application of the W-T comparison methodology may be limited to the "pattern", which, in the Appellate Body's view, consists of export prices that differ significantly from other export prices.[10]

9. It should be noted, however, that an investigating authority may not apply the margin of dumping established for the "targeted" purchasers, regions or time periods to "non-targeted" purchasers, regions or time periods because that margin of dumping was established for the purpose of unmasking and counteracting the low-priced export transactions to the "targeted" groups. Such an application would violate the authority's obligations under various provisions of Anti-Dumping Agreement, including Articles 9.1, 9.3 and 11.1.

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[7] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

[9] Appellate Body Report, *EC – Bed Linen*, para. 62.

[10] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

10. In light of the above, the application of zeroing is at odds with, and goes far beyond, the role and function of the second sentence of Article 2.4.2. It is obvious and logical that the "masking" effect on the "targeted dumping" for certain purchaser, region or time period will be appropriately removed by separating and distinguishing the universe of export prices for that purchaser, region or time period, from that of the other export prices. Picking up export prices that are lower than the normal value from among those for the certain targeted purchaser, region or time period is irrelevant to unmask "targeted dumping".

C. The Mathematical Equivalence Argument Does Not Warrant an Interpretation That Zeroing Is Permitted under the Second Sentence of Article 2.4.2

11. Turning to the argument of mathematical equivalence, as the United States itself admits, this argument rests on the assumption that "for both [W-W and W-T] methodologies, *all of the normal value and sales data that are fed into the calculations … are identical*".[11] This assumption has no basis in the Anti-Dumping Agreement. The Appellate Body explained the U.S. argument in a previous dispute, stating it would apply only "under the specific assumptions of the hypothetical scenario".[12]

12. The Appellate Body ruled in *US – Zeroing (Japan)* that under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, an investigating authority may unmask targeted dumping by limiting the "universe" of the dumping investigation to export transactions that constitute a "pattern" when conducting W-T comparisons under that provision.[13] Thus, the export prices compared to the weighted average normal value under the second sentence of Article 2.4.2 would be different from the export prices considered under the first sentence.

13. In addition, an investigating authority may use different pools of home market transactions when calculating the weighted average normal value for the W-W comparison and the weighted average normal value for the W-T comparison. In this regard, Japan notes that the USDOC has applied the W-T comparison methodology pursuant to the second sentence of Article 2.4.2 to administrative reviews, in which it seemingly calculates the normal values on a monthly basis, in contrast to the USDOC calculating the normal values on a yearly basis when applying the W-W comparison methodology in original investigations. Japan also emphasizes that the T-T comparison methodology under the first sentence will almost certainly never yield the same results as the W-T comparison methodology under the second sentence.

III. The Methodology Employed by the USDOC to Invoke the Second Sentence of Article 2.4.2 Is Inconsistent with its Obligations As Set Forth in that Provision

14. Japan emphasizes that the first sentence of Article 2.4.2 provides that the existence of margins of dumping "shall normally" be established in accordance with that sentence. Given that it is perfectly normal to observe certain differences in export prices of a product in a given market, such variations are expected to be addressed by the methodologies available under the first sentence, which "shall normally" be used. As such, it is critical to ensure that the requirements of the second sentence not be construed so broadly as to capture the kinds of pricing variations that are "normally" observed in the market in question.

A. The Methodology Employed by the USDOC to Find a "Pattern" Is Inconsistent with its Obligations As Set Forth in the Second Sentence of Article 2.4.2

15. A textual interpretation of the term "pattern" suggests that it is "a regular and intelligible form or sequence discernible in certain actions or situations".[14] In order to be discernible, the arrangement or order must be meaningful to the objective of the analysis. Further, the "pattern" referred to in the second sentence of Article 2.4.2 must also relate to export prices which "differ significantly". Japan agrees with China and the United States that the word "significant" is defined as "in a significant manner; *esp*. so as to convey a particular meaning expressly, meaningfully".[15]

[11] U.S. First Written Submission, para. 237. Emphasis added.
[12] Appellate Body Report, *US – Softwood Lumber V (Art. 21. 5 – Canada)*, para. 99.
[13] Appellate Body Report, *US – Zeroing (Japan)*, para.135.
[14] Oxford English Dictionary Online (CHN-90).
[15] China's First Written Submission, para. 137; U.S. First Written Submission, para. 44.

As such, the term "significantly", in Japan's view, has both qualitative and quantitative aspects, and therefore the "difference" in export prices must be qualitative as well as quantitative.[16] It should be also noted that the drafters of the second sentence of Article 2.4.2 did not employ a unified, purely quantitative threshold for the determination of a "pattern", but adopted instead the phrase "differ significantly", which sets forth criteria that may be construed on a case-by-case basis. Thus, an investigating authority must qualitatively assess the differences observed among different purchasers, regions or time periods with respect to the specific facts before it. Here, one needs to take into account the characteristics of the relevant product and market, including the price variances of such a product in the market.

16. Moreover, Japan also considers that in order to properly examine whether export prices "differ significantly" by *comparing* the export prices to certain purchasers, regions or time periods with the export prices to other purchasers, regions or time periods, an investigating authority must ensure that the former prices be *comparable* with the latter prices in light of all the facts and the evidence before it. In so doing, the authority must take into account various factors that may affect the price comparability, such as conditions and terms of sale, levels of trade, transaction scales, seasonal trends, increase or decrease in costs.

17. The methodology adopted by the USDOC in its *OCTG* OI, *Coated Paper* OI and *Steel Cylinders* OI[17] in the form of the *Nails* test is inconsistent with the second sentence of Article 2.4.2, for it appears to have consistently and exclusively relied on purely quantitative and inflexible benchmarks such as one standard deviation (pattern test) and 5% (gap test) in order to find a "pattern", and there is no evidence that the USDOC examined whether these numerical criteria were appropriate for each specific case at hand. Even if an investigating authority is not prohibited from using certain numerical benchmarks or criteria for the assessment as to whether the export pricing data at hand meets the requirement under the second sentence of Article 2.4.2, it cannot *ex ante* choose a unified and inflexible threshold values that are applicable to all cases. The USDOC also failed to interpret the meaning of the results of the application of those criteria in a qualitative and holistic manner.

18. Japan considers that the problem with the USDOC's methodology could be particularly significant in situations like the *Steel Cylinders* investigation, where an investigating authority allegedly finds a "pattern" based exclusively on mathematically lower prices in certain months during the POI. Such a methodology could unreasonably lead to a finding of a "pattern" in most, if not all, situations, because it is perfectly common and usual for export prices to fluctuate over time, reflecting various factors such as increases or decreases in input costs and seasonal trends.

19. The second sentence of Article 2.4.2 requires export prices to differ significantly "among different purchasers, regions and time periods"; it does not differentiate between different *models* or *sub-types* of a product under investigation. Accordingly, in order to find targeted dumping, an investigating authority must find that the export prices to certain purchasers (or regions or time periods) differ significantly from the export prices to other purchasers (or regions or time periods), taking into account *all models*. In this regard, the *Nails* test is inconsistent with the second sentence of Article 2.4.2, because it divides export transactions for a particular purchaser (or region or time period) by different *models* and focuses only on deviations of export prices observed with respect to *certain* models in order to identify a "pattern".

B. The USDOC Acted Inconsistently with the Second Sentence of Article 2.4.2 by Failing to Provide an "Explanation"

20. Given the role of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to provide an *exception* to the W-W or T-T comparison methodologies which "shall normally" be used, the obligation to provide an explanation imposes a high standard. This is underscored by the context that allows the exception only if the W-W or T-T comparisons "cannot" be used – or if their use is "not possible" ("il n'est pas possible") as the French text of Article 2.4.2 of the Anti-Dumping Agreement puts it. As explained, export prices usually vary because each export price is determined based on various factors, and such variations are expected to be captured by the comparison methodologies available under the first sentence which "shall normally" be used. Therefore, an investigating authority is required to provide an explanation at least as to why the

[16] China's First Written Submission, para. 140.
[17] China's First Written Submission, para. 61.

observed variations in export prices are not a mere reflection of factors that normally exist in a given market, or otherwise why those variations do not allow to establish an appropriate margin of dumping under the first sentence.

21. The USDOC's interpretation of the "explanation" clause of the second sentence of Article 2.4.2 falls short of its obligations set forth in that provision. First, under the *Nails* test the USDOC considers the "explanation" clause to be satisfied as soon as it finds a "meaningful difference" to exist between the margin of dumping calculated with the use of the W-T comparison methodology (with zeroing) provided for under the second sentence of Article 2.4.2 and the margin of dumping calculated with the use of the W-W comparison methodology (without zeroing) provided for under the first sentence. However, in light of the fact that the USDOC employs zeroing in its W-T comparison methodology, while it is barred from doing so in the W-W comparison methodology, such an argument renders the "explanation" requirement of the second sentence of Article 2.4.2 practically inutile. Second, the USDOC does not provide any explanation about the inability or impossibility to take into account appropriately differences in export prices by the use of the W-W comparison methodology. Finally, the USDOC fails to provide any explanation as to why the price differences cannot be taken into account appropriately by the use of the T-T comparison methodology. Japan considers that in a situation like the *Steel Cylinders* investigation, the T-T comparison methodology could have properly taken into account increases or decreases in input costs and seasonal trends, given that under such a methodology both export transactions and domestic transactions are to be considered in close temporal proximity.

IV. The Use of Zeroing in Administrative Reviews Is Inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

22. As explained above, the Appellate Body has also found that applying zeroing in administrative reviews involving the W-T comparison methodology is, as such, inconsistent with the Anti-Dumping Agreement.[18] Therefore, zeroing in administrative review is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

V. Conclusion

23. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

[18] Appellate Body Report, *US – Zeroing (Japan)*, para. 166.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF KOREA

I. The USDOC's Methodology for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement Are Inconsistent with the Obligations Set Forth in That Provision

A. Pattern Clause

1. The term "pattern" is defined by the Oxford English Dictionary as "[a] regular and intelligible form or sequence discernible in certain actions or situations."[1] The word "pattern" or its equivalent in other languages implies certain important characteristics. First, any variation in prices may not be simply random, but rather must display a discernible, regular form or design. The variation must have some relationship to each other so that this form can be discerned (that is, they must be "intelligible"). Second, to be "intelligible" or to "serve to govern the execution of something," the pattern must be meaningful to the purpose of what is being undertaken. In the context of Article 2.4.2, the differences in prices must be meaningful for the purpose of determining whether use of the W-T comparison set forth in the second sentence of Article 2.4.2 is justified.

2. This conclusion is reinforced by the requirement in Article 2.4.2 that the prices differ not only by customer, region or time period, but also that they differ "significantly." In English, the word "significant" conveys both qualitative and quantitative aspects. Anti-Dumping Agreement uses the word "significant" or "significantly" with the intent of conveying a meaning that is qualitative as well as, or instead of, quantitative. For example, Article 3.2 refers to "significant price undercutting" and "significant price depression." As the Appellate Body has recognized, the use of the term "significant" in this context has both quantitative and qualitative aspects.[2] The same is true in Article 2.4.2.

3. Conversely, when the Anti-Dumping Agreement seeks to describe a difference in purely quantitative terms, it uses a word other than "significant" in English, "notable" in French or "significativo" in Spanish. The Agreement uses the word "large" in English, "grand" or "elevé" in French, and "grande" or "elevado" in Spanish. The clearest example of this word choice is found in Article 6.10.

4. In light of these ordinary meanings and contextual considerations, the use of the word "significantly" to describe the price differences that must be found to trigger the W-T comparison in Article 2.4.2 must mean something other than merely "large" quantitative differences. Rather, the requirement that prices differ "significantly" must mean that the price differences reflect a meaning or purpose other than random price variation or price differences that reflect normal commercial factors.

5. Prices for agricultural products often follow seasonal pricing patterns, with lower prices during the harvest season when supply is greater than in the offseason, when prices are higher. Prices for consumer goods are often discounted during key holiday seasons, by all market participants, not just exporters. Similarly, both domestic and foreign suppliers will tend to charge larger volume customers lower prices than they charge smaller volume customers. Prices for most products normally go up or down over time when the underlying costs of production change. This is most evident in the case of many basic commodities, where one or two raw materials constitute a large percentage of the cost of producing the finished product, and in the case of certain high

[1] *OxfordDictionaries.com*, Oxford University Press, accessed 7 May 2015, <http://www.oxforddictionaries.com/us/definition/american_english/pattern>. Similarly, the Oxford English Dictionary defines "pattern" as "[a]n arrangement or order discernible in objects, actions, ideas, situations, etc." The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 2, p. 2126.

[2] Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft*, para. 1272 (citing Appellate Body Report, *EC – Measures Affecting Trade in Large Civil Aircraft*, para. 1218).

technology products, where costs of production typically decline dramatically over the life-cycle of the product.

6. Contrary to the ordinary meaning of the terms "pattern" and "significantly," however, the USDOC applied its so-called "pattern test" and "gap test" as purely quantitative tests. The USDOC applied these tests mechanically, and then it analysed only the quantitative differences among those average prices; the USDOC never examined the reasons why the alleged "pattern" of "significant" price differences exists.

B. Explanation Clause

7. Under the second sentence of Article 2.4.2, an investigating authority may use the W-T comparison methodology only if it provides "an explanation … as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The W-T comparison methodology is not permitted if there is any way in which the W-W or T-T comparison methodology can produce a dumping margin calculation in which the pattern of significantly differing prices to the purchaser (or region, or time period) in question can be taken into account appropriately.

8. In the *Nails* test, the USDOC made no pretence of meeting this explicit requirement of the second sentence of Article 2.4.2. After finding the existence of "targeting" through a mechanical application of its "pattern test" and "gap test," the USDOC compared the respondents' dumping margins using the W-W comparison methodology (without zeroing) and the W-T comparison methodology (with zeroing). Based on this comparison, the USDOC determined that there is a "meaningful difference," and concluded that it must apply the W-T comparison methodology to all sales. These "explanations" are facially inadequate to meet the high standard that the second sentence of Article 2.4.2 imposes. Indeed, the USDOC's statements are wholly conclusory and provide no explanation at all.

9. A mere comparison of the results from W-W (without zeroing) and W-T (with zeroing) does not adequately explain why the two symmetrical comparisons cannot take into account appropriately the significant difference. Simply, the margin increase resulting from the W-T comparison comes from the use of zeroing. This is problematic because even the result of the W-W comparison on the same sales data will be different depending on the use of zeroing. This implies that the United States cannot meet the explanation clause without using the zeroing methodology.

10. Finally, the explanation under the *Nails* test does not address at all why the T-T methodology cannot take into account appropriately the pattern of significantly differing prices it found to exist, as clearly required by the second sentence of Article 2.4.2.

C. All the transactions

11. The structure and language of Article 2.4.2 confirm that the W-T comparison methodology only apply to those transactions determined to have met the criteria for invocation of the exception, and not to all export transactions. The Appellate Body in *US – Zeroing (Japan)* stated that "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 W-T comparison methodology to the prices of export transactions falling within the relevant pattern.[3]"

12. It necessarily follows that the "symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply" to the export transactions not falling with the "pattern of export prices which differs significantly among different purchasers, regions or time periods."

[3] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

13. The United States itself previously shared the Appellate Body's understanding of the operation of the second sentence of Article 2.4.2. As the Appellate Body noted in *United States – Softwood Lumber V (Article 21.5 - Canada),* before the panel in that proceeding the United States indicated that if the USDOC found targeted dumping to exist, "the USDOC would apply the weighted average-to-transaction comparison methodology to export transactions falling within the 'pricing pattern' and would examine the other export transactions using the weighted average-to-weighted average methodology."[4] This understanding is further reinforced by the USDOC's original targeted dumping regulation, which stated that "…the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section."[5]

14. Under the correct interpretation of Article 2.4.2, therefore, application of W-T with zeroing to all the transactions will be unnecessarily punitive, and inconsistent with the second sentence. However, once a pattern was found by the problematic *Nails* test, the USDOC applied the W-T comparison methodology with zeroing to the all the transactions.

15. Additionally, the United States suggested a new concept that is foreign to the second sentence. It argues that a pattern within the meaning of the second sentence encompasses all the transactions which are composed of lower and higher prices.[6] This new concept is just meritless, because the United States confuses a situation where the second sentence should be invoked with a situation where the first sentence should be invoked. Furthermore, the US argument is self-contradictory, because the *Nails* test was only applied to the allegedly targeted purchasers, regions, or time periods, and did not test whether the export sales to other purchasers, regions, or time periods also may have been targeted.

D. Other Problems in the *Nails* Test

16. There are two more problems entrenched in the *Nails* test. First, the USDOC calculated standard deviations based on average export prices, not the actual "export prices" themselves. This approach ignored the textual obligation to analyse "export prices," not averages, which necessarily made the standard deviations smaller. Because of this method, the benchmark price (one standard deviation below the average price) was increased, which also meant the possibility of finding a pattern was increased arbitrarily.

17. Second, it does not consider the lower priced transactions below the alleged transaction in calculating 'average price gap' under the 'gap test.' In the example the United States provided, the price of $5.75 would be omitted from the gap test.[7] The United States acknowledged this problem. However, the United States did not provide any reason why it omitted the price. One possible concern is that if a petitioner wants to protect its market by applying W-T comparison with zeroing to all the imported products, it can do so simply by cherry-picking the most possible transactions to successfully pass the *Nails* test. Here an argument can be made that the omission by the USDOC passes its role as investigating authority to the petitioners. Petitioners are private companies that are inherently prone to protect its market share from the imports.

II. The Use of Zeroing When Applying Article 2.4.2, the Second Sentence, Has No Basis under the Anti-Dumping Agreement and Prior Appellate Body Rulings

18. The Appellate Body ruled that for the purposes of Articles 2.1 and 2.4.2 of the Anti-Dumping Agreement, the terms "dumping" and a "margin of dumping" must be established for the "product as a whole."[8] Moreover, the Appellate Body has held that the concepts of "dumping" and "margin of dumping" are exporter-specific, in that they relate to the aggregated pricing behaviour of the exporter.[9] The Appellate Body further held that the definition of "dumping" as a product-wide and exporter-specific concept must be applied in a coherent and consistent manner to *all* provisions of

[4] Appellate Body Report, *United States – Softwood Lumber V (Article 21.5 - Canada)*, para. 98.
[5] Targeted Dumping Proposed Final Rule, p. 27416; 19 C.F. R. § 351.414(f) (2007).
[6] US First Written Submission, paras. 55, 202, 289.
[7] US First Written Submission, paras. 91 – 104.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93.
[9] Appellate Body Report, *US – Continued Zeroing*, para. 283; Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 89-90; Appellate Body Report, *US – Zeroing (EC)*, para. 128.

the Anti-Dumping Agreement, regardless of the specific anti-dumping proceeding and of the particular comparison methodology applied by the investigating authority.

19. The Appellate Body also observed that the Anti-Dumping Agreement deals with "injurious dumping," and that the very purpose of an anti-dumping duty is to counteract injury caused by "dumped imports" to the domestic industry producing a "like product." For this reason, the concepts of "dumping," "injury," and "margin of dumping" are "interlinked and should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[10] In *US – Stainless Steel (Mexico)*, the Appellate Body summarized the above jurisprudence.[11]

20. These findings of the Appellate Body are dispositive of the interpretation advanced by the USDOC as a basis for applying zeroing under the second sentence of Article 2.4.2. The use of zeroing invariably results in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons when aggregating those results for the purposes of calculating the margin of dumping for the product as a whole and for each individual exporter or foreign producer. For this reason, it is inconsistent with the second sentence of Article 2.4.2.

21. The United States supports its position, *inter alia*, by arguing the following three points: unmasking, exception, and mathematical equivalence. However, all of these theories fail for the following reasons.

A. Unmasking

22. The United States argues that an investigating authority should use W-T with zeroing to all the transactions in order to unmask the targeted dumping. Based on this unmasking theory, the United States has been applying the zeroing methodology to all the transactions, once it had found a pattern. However, the United States' assertion based on the "unmasking" theory is simply baseless.

23. First of all, the use of the term, "unmask," does not provide the United States with justification of using zeroing. The meaning of "unmasking" as guided by the Appellate Body is to "find" or "distinguish" a pattern where prices differ significantly, not to raise the margins of dumping as a remedy for the injury caused by the targeted dumping. The use of zeroing as employed by the USDOC does not contribute to "unmask" targeted dumping. The use of zeroing simply inflates the margin of dumping, which has nothing to do with unmasking. Therefore, the "unmasking" theory is flawed.

24. Second, the problem of masking also exists in W-W and T-T comparison, because lower prices and higher prices co-exist in the symmetrical comparison as well. Nonetheless, the Appellate Body has ruled against the use of zeroing in W-W and T-T comparison. If the U.S. argument on "unmasking" should be accepted by this Panel, the United States has to provide persuasive evidence of why the use of zeroing is necessary to unmask particularly in the case of targeted dumping situation, as opposed to the clear and consistent Appellate Body rulings against the use of zeroing in W-W and T-T where the problems of masking also exist. The United States failed to do so.

B. Exception

25. The United States asserts that the second sentence of Article 2.4.2 is an exception, and therefore, a new interpretation is required, and the Appellate Body rulings do not apply to this situation. With the "exception" argument, the United States is trying to prolong the life of zeroing through the unacceptable interpretation of the second sentence.

26. The United States shares the same understanding with Korea with respect to the Appellate Body rulings on the concepts of "dumping" and "margin of dumping."[12] However, the United States

[10] Appellate Body Report, *US – Continued Zeroing*, para. 284; see also Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94; Appellate Body Report, *US – Zeroing (Japan)*, para.114.

[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[12] US First Written Submission, para. 216.

omitted the equally important Appellate Body's ruling that these concepts must apply with equal force to the entire Anti-Dumping Agreement. Obviously, Article 2.4.2, the second sentence is also a provision of the Anti-Dumping Agreement. The United States cannot avoid this Appellate Body ruling by arguing that the second sentence is an "exception."

27. Moreover, the exception argument misleads this Panel. The Appellate Body found that the second sentence may be applied in an "exceptional" situation. The Appellate Body did not even mention that the second sentence is an "exception" to the existing jurisprudence under the Anti-Dumping Agreement. Therefore, the consistent Appellate Body ruling that the concepts of "dumping" and "margins of dumping" must apply with equal force to the second sentence as well.

C. Mathematical Equivalence

28. The United States seems to acknowledge that the issue of mathematical equivalence is just a matter of assumption. Korea agrees. The issue is whether the United States' assumption is consistent with the second sentence or not. The United States adopted an assumption in favour of itself to produce mathematical equivalence. However, its logic is just vulnerable. This is true because the Appellate Body in *US – Stainless Steel (Mexico)* and *US – Zeroing (Japan)* also found that mathematical equivalence may occur under certain circumstances, (a.k.a., assumptions) and therefore, the second sentence would not be inutile.

29. The United States is trying to argue that the meanings of the terms in the first sentence and the second sentence of Article 2.4.2 are the same.[13] However, the plain reading of the first and second sentences demonstrates that the meanings of the terms could be different. In the first sentence, it is stated "a weighted average normal value," while in the second sentence it is stated, "a normal value established on a weighted average basis." If the drafters were to intend the same meaning, they should have drafted as such. However, they did not. Therefore, there is no clue in the provision that these two normal values should be the same.

30. Second, more accurate comparison would be possible if the normal value is changed, and thus allowed a W-W or T-T comparison to properly and "appropriately" take into account price differences. For example, the use of monthly normal values would allow a more precise comparison of prices that may be changing over time. Prices may change over time because of seasonality, or because costs are changing over time. By comparing the monthly average export sale in one month to the monthly average normal value for the same month, the adjusted W-W method might well appropriately take into account the price differences. Similarly, in W-T comparison, comparing a specific export sale in one month to the monthly average normal value for the same month, the adjusted W in the W-T comparison might well take into account the price differences. The key point is that the method for determining the W for normal value is not fixed, and can be adjusted to better reflect the particular circumstances of a case.

31. Korea notes that the USDOC itself uses monthly comparisons in administrative reviews, because it considers monthly normal values to be more contemporaneous and thus more accurate. This shift from annual average normal value to monthly average normal value is a routine part of the USDOC practice. The USDOC does not limit monthly normal value to some cases; it applies this more contemporaneous approach to all its administrative reviews for the market economies.

32. Once one recognizes that there are some reasons to use a different normal value, mathematical equivalence is broken. As an argument for treaty interpretation, mathematical equivalence (relying on the inutile principle) only works when it exists in *all* cases. Mathematical equivalence in some cases, or even most cases, does not establish that a treaty provision has been rendered inutile.

[13] See US First Written Submission paras. 219 – 227.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. THE USE OF ZEROING

A. Interpretation of the Anti-Dumping Agreement

1. The Appellate Body has pointed out on several occasions that it is clear from the opening phrase of Article 2.1 – "[f]or the purposes of this Agreement" – that the definition of "dumping" contained in that article applies to the entire Anti-Dumping Agreement.[1] According to the Appellate Body, "dumping" and "dumped imports" must have "the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews".[2]

2. The Appellate Body has repeatedly found that the texts of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 clearly indicate that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[3] Furthermore, the Appellate Body has concluded that the concepts of "dumping" and "margin of dumping" are exporter-specific,[4] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[5] The cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.

3. Moreover, the Appellate Body has held that Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement require aggregation of <u>all</u> results of intermediate comparisons when calculating the dumping margin.[6] In *US – Softwood Lumber V*, the Appellate Body ruled that the individual comparisons only represent "intermediate values" that the investigating authority had to aggregate in order to arrive at the margin of dumping for the product as a whole. Furthermore, the investigating authority "necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[7] Disregarding or artificially reducing to zero the results of intermediate comparisons, through the application of zeroing, is at odds with this and thus inconsistent with Article 2.4.2.

4. This interpretation has been confirmed by the Appellate Body, both in the context of the "transaction-to-transaction" methodology,[8] as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews.[9]

5. Norway cannot see anything in the wording of the second sentence of Article 2.4.2 that suggests a different interpretation. On the contrary, Norway agrees with China that although the second sentence of Article 2.4.2 provides an exception from the first sentence in terms of the

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[1] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 109; Appellate Body Report, *US - Softwood Lumber V*, para. 93; *US – Zeroing (EC)*, para. 125; *US – Stainless Steel (Mexico)*, para. 84; and *US – Zeroing (Japan)*, para. 109.

[2] Appellate Body Report, *US - Zeroing (Japan),* para. 109. See also Appellate Body Report, *US - Softwood Lumber V*, para. 93.

[3] Appellate Body Report, *EC – Bed Linen,* para. 53; Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93 and 96; Appellate Body Report, *US – Zeroing (EC)*, para 126.

[4] Appellate Body Report, *US – Stainless Steel (Mexico*), para. 94; Appellate Body Report; *US – Zeroing (EC)*, paras. 128-129.

[5] Appellate Body Report, *US – Continued Zeroing*, para. 283. See also Appellate Body Report, *US – Zeroing (EC)*, para. 128; Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 89.

[6] Appellate Body Report, *EC – Bed Linen*, para, 53; and Appellate Body Report, *US – Softwood Lumber V*, para. 97.

[7] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (emphasis original).

[8] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.

[9] Appellate Body Report, *US - Stainless Steel (Mexico),* para. 133.

comparison methodology used to compare normal value and export price in investigations, this is not an exception from the requirement to determine "margins of dumping".[10] Furthermore, the object and purpose of the provision is to address possible dumping targeted at particular purchasers, regions or time periods. These dumping situations reflect a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining higher prices for other sales. The very nature of targeted dumping thus necessitates a reference to the overall pricing behaviour of the exporter, in order to identify this type of dumping. A logical consequence of this is that dumping cannot take place at the level of each individual transaction. This was reflected in *US – Stainless Steel (Mexico)* when the Appellate Body noted that "[a] proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transaction over a period of time".[11]

B. The negotiating history of the Anti-Dumping Agreement

6. Norway notes that the United States claims that the negotiation history of the Anti-Dumping Agreement confirms that zeroing should be permissible under the second sentence of Article 2.4.2.[12] As Norway understands it, the gist of this argument seems to be that communications of two delegations and minutes of a negotiating meeting could be read as proof that the asymmetrical comparisons, that is comparisons between individual export transactions and weighted average normal value in anti-dumping investigations, and zeroing, were viewed as the same thing. Norway strongly disagrees with this assumption. In our opinion, the material only show that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is indeed very different from deducting a permission of applying zeroing when using the said comparison methodology.

7. Furthermore, we note that the United States has previously described the negotiating history of Article 2.4.2 in quite a different way. In *US – Softwood Lumber V*, the United States argued that there were two practices employed by Members to establish "margins of dumping" at the time of the Uruguay Round negotiations that were relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, while the second practice was zeroing. The United States asserted that, because the negotiators were able to agree only on the issue of "asymmetry", it would be reasonable to expect that, absent modified text in the Anti-Dumping Agreement addressing zeroing, that practice would continue to be consistent with the Anti-Dumping Agreement.[13] In that particular case, the United States clearly saw these two practices as two separate issues.[14] The Appellate Body did not agree with the United States in those proceedings. Similarly, the material at hand does not in any way prove that the negotiators intended to allow zeroing when applying the third comparison methodology.

C. The obligation to make a "fair comparison"

8. Moreover, the use of zeroing when applying this third comparison methodology is inconsistent with the obligation of Article 2.4 of the Anti-Dumping Agreement to make a "fair comparison" between the export price and the normal value. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness or lack of bias".[15] The Appellate Body has found that zeroing tends to inflate the margins calculated, and that it can, in some instances, turn a negative margin of dumping into a positive margin of dumping.[16] Thus, the Appellate Body has emphasised that there is an "inherent bias" in zeroing,[17] and that "this way of calculating cannot be described as impartial, even-handed or unbiased".[18] As with the other two comparison methodologies, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias,

[10] First Written Submission of China paras. 217-218.
[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.
[12] First Written Submission of the United States, paras. 242-250.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[14] Appellate Body Report, *US – Softwood Lumber V,* para. 108.
[15] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[16] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.

making a positive determination of dumping more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the Anti-Dumping Agreement.

II. THE MATHEMATICAL EQUIVALENCE ARGUMENT

9. The United States argues that prohibiting the use of zeroing under the weighted average-to-transaction comparison methodology would lead to results that are "mathematically equivalent" to the comparison methodologies under the first sentence of the provision. According to the United States, this would render the second sentence of Article 2.4.2 redundant. The United States draws this conclusion from findings by the Appellate Body in other disputes that the first two comparison methods should not "lead to results that are systematically different".[19] Thus, the United States asserts that the third comparison method "logically" should lead to results that *are* systematically different, and that any interpretation to the contrary would mean that Article 2.4.2 would no longer be "exceptional" and therefore inutile.[20] Norway disagrees with this reasoning.

10. The mathematical equivalence argument is based on the assumption that the investigating authority must use the same set of pricing data. This is a consequence of the United States' interpretation of the term "a weighted average normal value" in the first sentence as meaning the same as "a normal value established on a weighted average basis" in the second sentence. In Norway's view, this interpretation is incorrect, and it does not follow from the wording of Article 2.4.2 that these two normal values should be the same. On the contrary, an investigating authority may use different pools of home market transactions when calculating the two different normal values. We would also point to the fact that this argument has already been rejected by the Appellate Body.[21]

11. In any event, the "mathematical equivalence" argument is misleading. The focus of the exceptional methodology in the second sentence of Article 2.4.2 is, after having examined all transactions, to show a pattern of dumping targeted at particular purchasers, regions or time periods. What is then allowed is to address such targeted dumping with targeted measures.

[19] United States' First Written Submission, para. 229.
[20] United States' First Written Submission, paras. 229-230.
[21] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 99.

ANNEX C-7

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSION OF TURKEY[*]

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes this opportunity to submit her views as a third party in this case. Turkey's objective is to contribute to the accurate and consistent interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "ADA").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining her systematic interest, Turkey would like to limit her third party submission to the discussion on the rights and obligations of an investigating authority under Article 2.4.2 of the ADA.

II. INTERPRETATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2

3. Turkey observes that the discussion concerning the legal interpretation of the second sentence of Article 2.4.2 of the ADA has already become a frequently addressed subject in several panel proceedings. Turkey's third part contribution in some of these proceedings aimed to bring a clear perspective to this contentious issue which is cardinal to understand the methodology on how the dumping margin will be calculated in case of "*targeted dumping*".

4. Turkey understands that the arguments presented by the parties concerning this issue focus primarily on the interpretation of the conditions that trigger the use of weighted average normal value-individual transactions comparison (hereinafter referred to as "W-T comparison" or "W-T") and whether this methodology, by definition, renders the use of zeroing inevitable and most importantly legal. Turkey will address these two issues separately.

Interpretation of the conditions concerning W-T comparison

5. In Turkey's understanding the second sentence of Article 2.4.2 of the ADA, on its face, stipulates one substantive and one procedural condition. Article 2.4.2 reads as follows:

> 2.4.2.[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.*(emphasis added)

6. As the substantive condition, the investigating authority has to reach a conclusion that a pattern of export prices displaying a significant difference among purchasers, regions or time periods is present. As the procedural condition, the investigating authority has to bring an explanation why these differences cannot be taken into account appropriately by the use of the usual comparison methodologies.

7. The article refrains from elaborating on the methodology on how the "pattern of significantly different export prices" will be established. In that manner, the drafters of the article have given legal leeway to the investigating authority to define the steps that lead to the conclusion that a pattern of significantly differing export prices among purchasers, regions and time periods is present. Turkey understands that investigating authority has discretion to employ any methodology that is appropriate to analyze whether the export sales display a pattern which may also include statistical data analysis. Neither in the ADA nor in the case law there is any obligation to use specific means to construct the pattern test.[1] Nevertheless, the investigating authority

[*] Turkey requested that its written submission serve as its executive summary.

[1] China's first written submission, p.154; United States' first written submission, p.116

is under the obligation to act in an even-handed and unbiased manner while defining the mechanics of the methodology to evaluate the existence of a possible pattern.

8. The United States of America (hereinafter referred to as "U.S") interprets the word "pattern" in a contextual manner and underlines that a "pattern" shows a regular and intelligible form or sequence of export prices which significantly differ among purchasers, regions and time periods[2]. Turkey considers that the assessment focusing on a group of export transactions, to understand whether a pattern exists, primarily depends on the examination whether transactions repeat themselves consistently during the investigation period and such repetition form a structure that significantly differ among purchasers, regions and time periods. As a matter of fact, such an evaluation puts weight equally on the transactions itself and the export sales as a whole to pinpoint whether the repeating lines in export sales form a grouping or differing structure.

9. As explicitly stipulated in the Article 2.4.2, such a pattern should not only differ among purchasers, regions and time periods but that difference must be significant in scale. Turkey is in the same line with the case law that "*significant*" has a meaning of "*notable, important or consequential*" [3]. We equally agree that the word "significant" may have both quantitative and qualitative aspects that necessitate a more comprehensive look to the definition[4]. Yet, Turkey considers that, in Article 2.4.2, the quantitative aspect of the word "*significant*" becomes more pronounced than its qualitative side. The negotiation history confirms such a conclusion. In Carlise I and II texts, this part has been drafted as "[w]*hen a significant portion of export sales*.". This phrase turns into "*significant degree*" in New Zealand I and II texts. In New Zealand III (Ramsauer) text "*significant degree*" is omitted altogether. The last version of this part of the sentence receives its final shape in Dunkel Draft which is formulated as " …[d]*iffer significantly among purchasers, regions or time periods*.."[5]. In Turkey's understanding the words "*degree*" and "*portion*", as used in the previous version of the text, reveal implicitly that the drafters aimed to design the article so that the word "*significantly*" could show a level of comparison that is quantifiable and discernable.

10. Closely connected with this point, Turkey disagrees with the argument that the targeted sales of the product under consideration should be necessarily an outcome of a specific intent. According to this approach, usual commercial practices, based on seasonality or other commercially driven rationales, are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices[6]. Turkey underlines that neither the reading of Article 2.4.2 nor the examination of case law confirms the possibility that so called "*usual commercial*" practices are rendering targeted dumping plausible[7].

11. Finally, the plain reading of the Article 2.4.2 shows that the W-T comparison acts as an exception and that the investigating authority can resort to the methodology only under certain conditions[8]. As an expected result of the due process requirement, diversion from the general rule requires an explanation on why normal methodologies, stipulated in the first sentence of Article 2.4.2, cannot be used appropriately. Turkey understands that this explanation should be in such a context that it should not deprive the interested parties from using their right of presenting evidences they consider relevant.

The relevance of zeroing in W-T comparison methodology

12. At this stage of the proceedings Turkey refrains from commenting on the specifics of the U.S. methodology and on mathematical equivalence argument.

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[2] United States' first written submission, para.36

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

[4] Ibid, para.1272

[5] Understanding The WTO Anti-Dumping Agreement; Negotiating History and Subsequent Interpretation; James P.Durling, Matthew R.Nicely (Cameron May International Law and Policy, 2002); p.93-95

[6] China's first written submission, para. 143

[7] United States' first written submission, para.78

[8] U.S. - Softwood Lumber VI, Article 21.5 (Panel), para.5.33

13. Nevertheless, Turkey underscores once more that the second sentence of Article 2.4.2 operates as an exception to the first sentence part of the Article and that the rules and procedures to be followed differ in terms of legal obligations and burden of explanation.

14. Turkey understands that the W-T comparison methodology was designed to address a specific case, namely targeted dumping. In this framework, it should be assessed carefully whether applying the legal discipline that was devised to mark the boundaries of the normal comparison methodologies of the first sentence of Article 2.4.2 can really fit the exceptional structure of the comparison methodology stipulated in the second half of the Article.

15. As a matter of legal interpretation, Turkey would like to share her view that the application of the legal discipline envisaged for the first two methodologies shown in Article 2.4.2 may act contrary to the legal rationale of this provision stipulated in the second half of Article 2.4.2 and erode the effectiveness of the results expected from the W-T comparison methodology which is exceptional in nature and asymmetric in terms of comparison structure.

III. CONCLUSION

16. With these comments, Turkey expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its views on this relevant debate, regarding the interpretation of the ADA.

ANNEX C-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF VIETNAM

I Introduction

1. In this third party executive summary, Viet Nam comments on two issues as follows:

(i) The United States Department of Commerce's (USDOC) application of the "targeted dumping" methodology in its determinations is inconsistent with the obligations of the United States under Article 2.4.2 of the Anti-Dumping Agreement;

(ii) The USDOC's presumption that all producers/exporters are part of a single government-controlled "NME-wide entity" and its application of an NME-wide rate to all producers/exporters from NMEs that do not successfully demonstrate that they are not subject to government control and are entitled to a separate rate is inconsistent with the requirements of Articles 6.10 and 9.2 and 9.4 of the Anti-Dumping Agreement.

II The USDOC's "targeted dumping" methodology violates Article 2.4.2 of the Anti-dumping Agreement because it does not comply with the conditions that govern recourse to W-T comparison methodology

2. The second sentence of Article 2.4.2 of the Anti-Dumping Agreement establishes an exception whereby investigating authorities are authorized to depart from the default rule mandating the use of a symmetrical comparison methodology to determine a margin of dumping. These conditions include, among other things, the existence of a "pattern" of prices that "differ significantly among different purchasers, regions or time periods", as well as a meaningful explanation why the two "normally" used comparison methodologies are insufficient to capture such differences.

3. Article 2.4.2 second sentence must be interpreted in a manner that preserves the useful effect of these conditions. These conditions must not be converted into mere formalities that are easily satisfied by an investigating authority in many cases. However, that appears to be precisely what the United States would have the panel do.

4. Under the Nails Test, the USDOC examined the existence of pricing patterns when targeted dumping was alleged by petitioners. To determine whether a pricing pattern exists, under the Nails Test approach, the United States uses one standard deviation as one of the criteria. Whatever the discretion of an investigating authority, this would appear to be far too low a threshold for the phrases "pattern" and "differ significantly". Viet Nam would urge the panel to engage in a thorough statistical and quantitative analysis of this point. Additionally, Viet Nam assumes that, in the event that the W-T methodology may be used, it may only be applied to the transactions found to "differ significantly", that is, within the pattern. Outside of the pattern, one of the two "normal" transactions shall be used.

5. Also, Viet Nam is concerned that the USDOC' practice reduces to an empty formality the requirement to provide an "explanation" as to why the two "normally" applicable methodologies cannot be used. First, the U.S. fails to provide any explanation with respect to the T-T methodology, contrary to the plain meaning of Article 2.4.2. Second, the explanation that the W-W methodology "conceals" certain price differences is merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T methodology with zeroing yields a higher margin than the W-W methodology without "zeroing" is not an explanation why price differences "cannot be taken into account appropriately" by the W-W methodology. When "zeroing" is applied, the margins of dumping will always be higher than if zeroing is not applied because of the absence of any offset for the margin by which export prices exceed normal value. Recourse to the W-T methodology cannot be driven, or justified, by the fact that the application of "zeroing" will always result in the highest possible dumping margin. Nothing in Article 2.4.2 supports such an interpretation when choosing among the possible methodologies for determining the margins of dumping.

6. Moreover, "zeroing" is as prohibited under the W-T comparison methodology as it is prohibited under the W-W and T-T methodologies under the second sentence of Article 2.4.2 of the Anti-dumping Agreement. Viet Nam disagrees with the United States' reading of the second sentence of Article 2.4.2 of Anti-dumping Agreement as permitting recourse to the "zeroing" methodology. The W-T comparison is an exception to the comparison methodologies in the first sentence of Article 2.4.2, but is not an exception to the fair comparison requirement of Article 2.4. Therefore, if "zeroing" is considered "unfair", it would be "unfair" and equally impermissible to "zero" when using the "targeted dumping" methodology.

III The USDOC's Single Rate Presumption for NME is inconsistent with the United State' obligations under Articles 6.10, 9.2 and 9.4 of the Anti-dumping Agreement

7. The Single Rate Presumption is, as such, inconsistent with the United States' obligation under Article 6.10 and 9.2 of the Anti-dumping Agreement. It is because under the Single Rate Presumption, the USDOC fails to determine an individual margin of dumping for each exporter or producer, and fails to specify duties for each supplier separately. The USDOC, by conditioning access to individual duties upon proof of absence of government control through the Separate Rate Test, the Single Rate Presumption, as such, also violates Article 9.4 of the Agreement.

1. The USDOC's "NME-Wide Entity" Rate is inconsistent with the requirements of Articles 6.10 and 9.2 of the Anti-Dumping Agreement

8. A presumption that all producers and exporters are part of a single NME-wide entity to which a single dumping rate is assigned, is inconsistent with the obligations established in (1) Article 6.10 of the Anti-Dumping Agreement to determine an individual margin of dumping for each exporter or producer; and (2) Article 9.2 of the Anti-Dumping Agreement to specify duties for each supplier separately.

a. The plain language of Articles 6.10 and 9.2 of the Anti-Dumping Agreement requires the calculation of individual anti-dumping margins and assessment of individual anti-dumping duties

9. Article 6.10 articulates an authority's obligation to determine individual anti-dumping margins for exporters under investigation. The plain language of Article 6.10 imposes a mandatory requirement, with an explicit exception. It is unambiguous: an authority must determine an individual anti-dumping margin for all known producers or exporters, subject to the limited and defined exception.

10. Article 9.2, like Article 6.10, imposes a general requirement that exporters and suppliers be individually identified. Unless the authority can demonstrate that the factual circumstances fit within the defined exception in each provision, it has failed to comply with the obligations within these articles.

b. The USDOC's practice of determining the NME-wide entity rate is, as such, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement

11. The USDOC's presumption of the existence of an NME-wide entity and the application of an NME-wide entity rate does not comply with the plain language of Articles 6.10 and 9.2. These provisions require an authority to determine anti-dumping margins and impose anti-dumping duties on an individual basis. The USDOC's use of an "NME-wide entity" rate is inconsistent with this unambiguous obligation.

12. The USDOC's practice violates the requirement of Articles 6.10 and 9.2 that authorities determine individual anti-dumping margins and anti-dumping duties to exporters and producers. The NME-wide entity is not an individual exporter/producer, but rather is a collection of exporters and suppliers that the USDOC collapses into a single entity without performing the collapsing analysis required under Article 6.10.

13. The USDOC's practice does not fit within the single, limited exception to the requirements of Articles 6.10 and 9.2: that it would be impracticable to individually identify exporters and suppliers.

2. The USDOC's practice of determining the NME-wide entity rate is, as such, inconsistent with Article 9.4 of the Anti-Dumping Agreement

14. Article 9.4 provides the parameters to be followed when calculating an anti-dumping duty where the administering authority has limited individual examination to only selected exporters/producers, pursuant to Article 6.10 of the Anti-Dumping Agreement. As discussed above, Article 6.10 requires the administering authority to determine an individual margin of dumping for each known producer or exporter.[1] In exceptional circumstances, the authority may limit the number of exporters/producers individually investigated.[2] Article 9.4 governs such a situation and limits the discretion of an authority when calculating the anti-dumping margins of exporters/producers not individually investigated.

15. Article 9.4, exclusively, governs the anti-dumping duty applied to companies not selected for individual examination. The article does not provide for exceptions: where examination has been limited, the calculation of the rate for all other exporters/producers is governed by Article 9.4. Article 9.4 then explicitly instructs the authority on the maximum permissible anti-dumping rates that can be applied to the exporters not individually investigated or reviewed.

16. The USDOC's failure to assign an NME-wide entity a rate consistent with the methodology required by Article 9.4 of the Anti-Dumping Agreement for all companies not individually investigated amounts to a violation, as such, of the United States' WTO obligations.

17. The USDOC's practice requires that the NME-wide entity receive a rate that is distinct from the "separate rate" that is calculated in a manner consistent with Article 9.4. The USDOC's Manual states that "[i]n an antidumping investigation, all companies other than those that have been determined to be eligible for a separate rate are part of the NME entity and receive the NME-wide rate."[3] This follows the USDOC's discussion on how rates are to be calculated for companies that are eligible for a separate rate; namely, in a manner that is generally consistent with Article 9.4 of the Anti-Dumping Agreement.

18. Under the USDOC's practice, the NME-wide entity does not receive a rate consistent with Article 9.4, despite its non-selection as an individually investigated company. The Anti-Dumping Agreement requires that companies not selected for individual examination, per Article 6.10, are to receive rates calculated pursuant to Article 9.4. The NME-wide entity qualifies as a company not selected for individual examination. The USDOC's failure to assign the NME-wide entity an Article 9.4-consistent rate is a violation, as such, of the Anti-Dumping Agreement.

IV Conclusion

19. For the reasons explained above, Viet Nam would like to urge the Panel to rule that the USDOC' "targeted dumping" methodology as well as other aspects of its approach to the W-T methodology, are inconsistent with Article 2.4.2 of the *Anti-dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994.

20. Also, Viet Nam would like to request the Panel to find that the USDOC' Single Rate Presumption, as such, is inconsistent with Article 6.10, 9.2, and 9.4 of the *Anti-dumping Agreement.*

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[1] Article 6.10 of the Anti-Dumping Agreement.
[2] Ibid.
[3] Chapter 10, Non-Market Economies (NME), Department of Commerce 2009 Antidumping Manual, p. 7.