# ANNEX B

## EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS

# ANNEX B-1

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF BRAZIL

**Article 6.2 of the DSU and the Panel's Terms of Reference**

1. The first issue that Brazil would like to raise in its written submission refers to arguments made by the European Union concerning Article 6.2 of the DSU and the Panel's terms of reference. Brazil has a systemic interest in such issue and submits the following remarks to the Panel's consideration.

2. In light of the two functions of a panel request – enabling the respondent to prepare its defense and setting the panel's jurisdiction – past jurisprudence has distinguished the threshold question of whether a request fulfills those functions satisfactorily from the substantive issues dealt in the dispute. As per the Appellate Body (AB), DSU Article 6.2 only requires the complainant to indicate "the *nature* of the measure and the *gist* of what is at issue".[1] The complainant must articulate its claims clearly in the panel request, but need not develop legal arguments at that point.[2] Whereas defects in panel requests cannot be "cured" by later clarification, panels are entitled to rely on the parties written submissions in order to interpret the panel request and define the precise scope of its jurisdiction.

3. In brief, the European Union (EU) argues that a number of claims articulated by China concerning the "Basic AD Regulation" are outside the Panel's terms of reference, since there is no connection between the measure at issue – which relates to the imposition of individual AD *duties* – and the corresponding legal provisions – which relate to: the determination of an individual *margin* of dumping (Article 6.10), the proper *level* of anti-dumping *duties* (Article 9.3), the level of anti-dumping duties where *sampling* is used (Article 9.4), and the *administration* of laws, regulations, decisions and rulings.

4. In Brazil's view, the approach proposed by the EU conflates the threshold examination of the Panel Request (relating to its "due process" and "jurisdictional" functions) with the substantive analysis of China's claims (which takes into account the arguments and the evidence produced by the parties throughout the proceedings). From the Panel Request, Brazil understands China to argue that the aforementioned legal provisions relate – each from a different perspective – to the basic measure China challenges. Brazil considers that this understanding of the "*gist* of what is at issue" is confirmed by China's First Written Submission.

5. In addition, based on the thorough rebuttal of all China's claims as contained in the EU's FWS, Brazil fails to see any compromise to EU's due process rights. Moreover, case law has stated that the burden of proof lies on the respondent to establish such compromise.[3] At a minimum, it has been made clear that the "mere assertion" that the panel request does not perform its "due process" function is not enough to exclude claims from the terms of reference.[4] Although the European Union has certainly presented "supporting arguments" to back its assertions, Brazil's view, as explained before, is that those arguments relate to the substantive analysis of the claims China advanced rather

[1] See *US – Continued Zeroing* (AB Report, paragraph 169, emphasis added).

[2] See *Canada – Wheat* (Panel Report, paragraph 6.10).

[3] See *EC – Computer Equipment* (AB Report, paragraphs 58-65), *Korea – Dairy* (AB Report, paragraphs 114-131), and *Canada – Wheat* (Panel Report, paragraph 6.10).

[4] See *US – OCTG Sunset Reviews* (Panel Report, paragraph 7.71).

than to the threshold examination pertaining to the consistency of the Panel Request with Article 6.2 of the DSU.

6. One example of this conflation between the two distinct analyses can be seen where it is stated that "China's Panel Request fails to explain *how* the 'provisions' of Article 9(5) of Council Regulation No 384/96 are not administered in a uniform, impartial and reasonable manner" (emphasis in the original).[5] This is essentially the argument rejected by the Panel in *Canada – Wheat*, when it found that the US was not required to set forth in its panel request *why* and *how* the challenged measure was inconsistent with Article XVII of the GATT 1994.[6]

**Analysis of consistency of Article 9(5) of the Basic AD Regulation "as such" with the AD Agreement**

7. Another important issue raised in this dispute is the alleged inconsistency of Article 9(5) of the Basic AD Regulation with provisions of the ADA, namely Articles 6.10, 9.2, 9.3 and 9.4. It is Brazil's understanding that, in light of the ADA, of China's Protocol of Accession and of WTO jurisprudence, the requirements of Article 9(5), seen in its overall context, are consistent with the Agreements and with their underlying economic logic.

8. First of all, it may be recalled that the ADA deals, in distinct provisions, with the determination of dumping margins (Articles 2 and 6.10) and with the imposition of anti-dumping duties (Article 9). Although complementary, these provisions do not create obligations vis-à-vis one another.

9. As regards the dumping margin, Article 2 and its paragraphs contain rules about determination of normal value, export price and comparability. Article 6.10 establishes that the investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer". Article 6.10 also contemplates exceptions in this regard, allowing, for example, for "sampling" in cases where the number of exporters or producers is so large as to make the determination of individual margins impracticable.

10. Such methodologies, however, are only applicable in situations where prices and costs – the parameters for determining both the normal value and export price – are established according to market-economy (ME) rules.

11. For this reason, Article 2.7 of the ADA and its references establish an important exception to the methodologies generally accepted by the ADA. In brief, it states that whenever ME rules do not prevail in the country of the investigated exporters or producers, the investigating authority may resort to a methodology that does not take into account internal costs and prices of that country.

12. In the particular case of China, this conclusion is further supported by paragraph 15(a)(ii) of its Protocol of Accession. Pursuant to this provision, authorities investigating exports of Chinese products may use, in determining the margin of dumping, a different methodology than the one established in Article 2 of the ADA, unless the investigated Chinese producer demonstrates that, in its specific case, ME conditions prevail. However, the relevant provisions (GATT 1994 Article VI, ADA and China's Accession Protocol) offer no guidelines as to what such methodology should be. Therefore, the investigating authority of a Member may enjoy a level of discretion in establishing its methodology.

13. It should be noted that, if the investigated company is able to demonstrate that it does not suffer significant interference from the State, it is entitled to an individual dumping margin as

[5] EU's FWS, paragraph 67.
[6] See *Canada – Wheat* (Panel Report, paragraph 6.10).

provided by ADA Article 6.10, calculated within the methodologies of Article 2. This consequence is logical, given that, if price comparability as required by Article 2.4 is not affected, ME treatment should be applicable.

14. In non-market economies (NMEs), it can be presumed that decisions of companies involving production and marketing are closely dependent from governmental decisions, as the individual companies' objectives intersect, at least to a significant extent, with the objectives of that State. This commonality of objectives would allow investigating authorities to consider NME-based exporters and producers involved in anti-dumping investigations as a single entity and, therefore, subject to a single dumping margin. An analogy can be found, in ME countries, in the case of distinct companies which are part of the same conglomerate. Drawing on WTO jurisprudence[7], it has been accepted, in many situations, for the investigating authority to consider distinct companies as a single producer/exporter.

15. In the case of NMEs, the burden of proof shifts towards the investigated exporter to establish its exception from country-wide treatment. Thus, the fact that the EC maintains legislation with clear and specific criteria for eligibility to that exception does not run counter any AD provision, and seems to provide adequate opportunity for Chinese exporters to discharge their burden of proof properly.

**Determination of anti-dumping duties: scope and limits**

16. Another issue to be addressed is the determination of the anti-dumping duty. The imposition of an anti-dumping duty requires that the investigating authority finds positive dumping margins that are above *de minimis*, according to the methodology described above.

17. In the light of Article 9 of the ADA, which pertains to the "Imposition and Collection of Anti-Dumping Duties", it can be inferred that: (i) the imposition of an anti-dumping duty by a Member is voluntary. Therefore, the existence of a positive dumping margin does not necessarily imply the imposition of an anti-dumping duty; (ii) however, if the Member's authority decides to impose an anti-dumping duty, it shall be equal to or less than the dumping margin; (iii) there is no explicit obligation to determine an individual anti-dumping duty per exporter/producer; and, (iv) it is desirable that the imposed anti-dumping duty be less that the dumping margin, if such lesser duty is adequate to remove the injury to the domestic industry (*lesser duty rule*).

18. In what regards the determination of anti-dumping duties, the ADA does not set any specific rule pertaining to the methodology of such determination, except that the result shall not be higher that the dumping margin.

19. Finally, it is important to highlight that the obligation stated in Article 9.2 of the ADA, in what refers to the naming of the concerned suppliers, does not establish any other obligation than the naming itself. In other words, the fact that the investigating authority has to name the concerned suppliers (or the supplying countries) does not mean, under any hypothesis, that this authority is obliged to determine individual dumping margins to each of the suppliers. As shown above, the applied dumping duty needs only to conform to the established dumping margin, being permitted that it be the same to all listed suppliers, as long as it be less than such margin.

[7] See *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia* (Panel Report, paragraph 7.161).

# ANNEX B-2

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF COLOMBIA

1. Colombia thanks the Panel and the Parties for this opportunity to present its views in this proceeding. While not taking a final position on the specific facts of this case, Colombia provides its views on some of the legal claims advanced by the Parties to the dispute. First, Colombia will address in this submission the alleged violations to Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "*GATT 1994*"), and Articles 6.10 and 9.2 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*ADA*") by the European Union, through the imposition of specific requirements for the application of individual treatment to producers and exporters from non-market economy countries in anti-dumping proceedings, as provided in article 9 (5) of Council Regulation (EC) No. 384/96, as amended. Second, the challenges raised by China against the definitive anti-dumping duty on imports of certain iron and steel fasteners from China with respect to: i) the determination of domestic industry in light of Articles 3.1 and ii) Article 4.1 of the *ADA*; and the determination of "like product" in light of Articles 2.1 and 2.6 of the *ADA*.

2. In line with the above mentioned, *the second interpretative note to paragraph 1 of Article VI of the GATT 1994* reflects the position of the *GATT* member States, later accepted by the WTO Members, by means of which the price comparability of States with non-market economies can be done on a different basis to the one of States with market economies. This rule is included, for purposes of systematic interpretation, in Article 2.7 of the *ADA*. This differential treatment, entails a lawful differentiation between Member States of the WTO, which is not contrary to the provision of Article I:1 of the *GATT 1994*.

3. This differential treatment has been accorded to certain States in their process of accession to the WTO. This is the case of China, whose Protocol on Accession has specific provisions[1] related to the effects of its production conditions over price comparability in anti-dumping proceedings undertaken by other WTO Member States. It is very important to bear in mind that section 15 of the Chinese Protocol on Accession provides that WTO Member States before 2016 can decide to unilaterally recognize that China is a country that meets the conditions of a market economy and thus render inapplicable the transitional provisions for alternative price comparability in anti-dumping proceedings established in that section.

4. The first measure at issue identified by China is Article 9(5) of Council Regulation (EC) No. 384/96[2], as amended, since according to the claimant, should be declared incompatible, "as such", with certain provisions of the *GATT 1994* and the *ADA*.

5. Rather than focus on the procedural discussion held by the parties, Colombia will elaborate on the substantive legal debate on this first measure. In this respect, China claims that article 9(5) of the Council Regulation (EC) No. 1255/09 is providing a differential treatment that is contrary to Article I:1 of the *GATT 1994*. The European Union considers that the claim brought by China regarding a violation of Article I:1 of the *GATT 1994*, depends on the consistency of Article 9(5) of the Council Regulation (EC) No. 1255/09 with the *ADA*. Therefore, pursuant to the lex specialis

[1] Section 15 of China's Protocol on Accession to the WTO (WT/L/432).
[2] China's First Written Submission, Exhibit CHN-1.

principle, Article II:2(b) of the *GATT 1994* and the *General Interpretative Note to Annex 1A of the WTO Agreement*, since the challenged measure is consistent with the *ADA*, it could not breach Article I:1 of the *GATT 1994*.

6. Colombia agrees with the arguments presented by the European Union, and additionally considers that it can also be said that the conditions required in Article 9(5) of Council Regulation (EC) No. 1255/09, are under the scope of application of the *second interpretative note to the first paragraph* of Article VI of the *GATT 1994*, and thus of Article 2.7 of the *ADA*. Hence, in Colombia's view, Article 9(5) of Council Regulation (EC) No. 1255/09 is consistent with Article I:1 of the GATT.

7. China claims that establishing additional requirements to the determination of individual dumping margins and individual anti-dumping duties, by means of Article 9(5) of Council Regulation (CE) No. 1255/09 constitutes a breach of the European Union's obligations under Articles 6.10 and 9.2 of the *ADA*. The European Union first rebutted that Article 9(5) of the Council Regulation (EC) No. 1255/09 is not subject to the scope of application of Article 6.10 of the *ADA*. Alternatively, the European Union claims that the general rule enshrined in Article 6.10 of the *ADA*, is subject to at least two exceptions: i) the use of sampling, and ii) the general identification of various producers under a single entity. Based on the second exception, the European Union considers that Article 9(5) of the Council Regulation (EC) No. 1255/09 fully complies with Article 6.10 of the *ADA*.

8. Colombia considers that the view of the European Union is correct, and points out that it cannot be overseen, that when conducting the assessment of the relation between the producers and the State (i.e. via a requirement like the one set forth in Article 9(5) of the Council Regulation (EC) No. 1255/09), the national authority and the producers involved in the investigation are bound by the provisions of Article 6.8 of the *ADA*. Hence, Colombia considers that Article 9(5) of the Council Regulation (EC) No. 1255/09 is consistent with the obligations arising from Article 6.10 of the *ADA*.

9. China considers that the obligation contained in Article 9.2 of the *ADA* relative to individually naming all the suppliers of the product concerned, tantamount to an obligation of individually collecting and imposing anti-dumping duties. Under this understanding, China deems that Article 9(5) of the Council Regulation (EC) No. 1255/09 prevents the application of individual anti-dumping duties, on a company to company basis, and is thus contrary to Article 9.2 of the *ADA*. The European Union rebuts China's claim in a two-fold manner. On the one hand it claims that Article 9(5) of the Council Regulation (EC) No. 1255/09 does not fall within the purview of Article 9.2 of the *ADA*, since this provision deals with the collection and not with the determination of anti-dumping duties; and on the other hand it claims that in any case the challenged measure is consistent with Article 9.2 of the *ADA*, since its application renders the duty *appropriate* and *effective*.

10. While agreeing with the arguments of the European Union, Colombia considers that Article 9(5) of the Council Regulation (EC) No. 1255/09 is consistent with the obligations arising from Article 9.2 of the *ADA*.

11. The second measure challenged by China is Council Regulation (EC) No. 91/2009[3], through which the European Union has imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China. According to China this measure violates numerous substantive and procedural provisions of the *ADA*, but Colombia's submission will focus on the alleged violations of Articles 3.1 and 4.1 (relative to the definition of the domestic industry), and, 2.1 and 2.6 (relative to the like product determination) of such instrument.

[3] See China's First Written Submission, para. 122 and Exhibit CHN- 4.

12. China claims that the European Union's determination of the "domestic industry" violates Articles 4.1 and 3.1 of the *ADA*. Particularly by not attending the limitation to the investigating authorities' discretion established on Articles 4.1(i) and 4.1(ii) of the *ADA*. Additionally, China claims that the European Union did not include domestic producers whose collective output of the like product constituted a major proportion of the total domestic production. Finally, China claims that the sample used by the European Union to determine the injury, is not a major proportion of the total domestic productions.

13. In response to these claims the European Union contends that they are flawed mainly because: pursuant to Article 4.1 of the *ADA*, it is possible to determine the domestic production through the identification of a "major proportion" of it. The European Union did this through sampling a percent, which in its view constitutes a "major proportion" of the domestic industry. The European Union also notes that Article 4.1 does not impose an obligation on sampled producers to represent a major proportion of *total* domestic production.

14. Colombia shares the interpretation of the European Union when considering that the purpose of Article 4.1 of the *ADA* is to ensure that the domestic industry is defined in such a way that either all eligible producers (domestic industry as a whole) are included *or* those producers that represent "a major proportion" of the eligible domestic production. It is Colombia's view that for the purposes of the injury determination in an investigation, the national authorities should interpret the concept of "domestic industry" according to both articles 3.1 and 4.1 of the *ADA*; however this does not prevent authorities of sampling during an investigation, bearing in mind that such sampling is sufficiently representative of the domestic industry. In this regard, it is required from the authorities to perform both the investigation, and the injury determination in an objective manner based on positive evidence. In the context of Articles 3.1 and 4.1 of the *ADA*, this means that the decisions taken during these stages should be justifiable and credible.

15. China claims that the finding of the European Union expressed in Council Regulation (EC) No. 91/2009, that all fasteners produced and sold in the European Community, in China or in the analogue country (India) are like, is contrary to the provisions of Article 2.1 and 2.6 of the *ADA*. This claim is grounded in the fact that according to China, Article 2.6 of the *ADA* establishes that the like product analysis has to be narrowly construed, and in the case at hand, the European Union did not respect such a threshold by not recognizing the differences between standard (those produced in China) and special fasteners (those produced in the European Union) for the purposes of determining and applying the anti-dumping duties.

16. In response to China's claims, the European Union clarifies that the Articles 2.1 and 2.6 of the *ADA* do not contain specific obligations regarding the determination of the *product concerned* or the *like product*, since they merely indicate the circumstances in which dumping occurs and the definition of a like product. It also claims that the like product determination was between fasteners (standard and special) produced by the domestic industry, produced and sold in China, produced in the analogue country, and produced in China and sold in the European Union. Thus, China's claims lack factual and legal grounds.

17. Colombia will comment on the flexibility that national authorities enjoy in order to select, based on the evidence available in the investigation, which is the *product concerned* and although not fully discussed by the European Union, which is the standard of likeness that should be applied in anti-dumping investigations in accordance with the WTO law. The determination of the *product concerned* is not subject of a specific obligation under Articles 2.1 and 2.6 of the *ADA*. Rather, when analyzing the likeness comparison between the *product concerned* (freely fixed by the national authority) and the *like domestic product* for the purposes of establishing the existence of dumping, national authorities are bound to follow the terms and conditions set in both Articles 2.1 and 2.6 of the *ADA*. It is Colombia's view that the application of Article 2.6 should be framed in a reasonable

context. Indeed, the definition of the scope of 'like product' in an anti-dumping investigation could not be limited to either identical products or a single group of products sharing just physical characteristics with the product under consideration. Colombia observes that this provision actually entails the possibility of using, not just the "physical characteristics" criteria, but also other criteria of likeness accepted in the context of the GATT 1994 and the different covered agreements, bearing that the investigating authorities construed such criteria in a reasonable manner trying to preserve the scope and spirit of the ADA.

18. As a final point and in order to recap, Colombia considers that this case raises important questions on the interpretation of Articles I:1 of the *GATT 1994* as well as various provision of the *ADA*. While not taking a final position on the merits of the case, Colombia requests this Panel to carefully review the scope of the claims in light of the observations made in this submission. Colombia reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

# ANNEX B-3

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

### I. ISSUES PERTAINING TO THE CALCULATION OF INDIVIDUAL DUMPING MARGINS AND THE IMPOSITION AND COLLECTION OF INDIVIDUAL ANTI-DUMPING DUTIES

1. In the present case, the People's Republic of China ("China") suggests that Article 15(a)(ii) of the *Protocol on the Accession of the People's Republic of China* ("*China Accession Protocol*") and paragraph 151 of the *Report of the Working Party on the Accession of China* ("*Working Party Report*") do not permit the European Union to act inconsistently with Articles 6.10, 9.2, 9.3, and 9.4 of the *Agreement on Implementation of Article VI of the GATT* (the "*AD Agreement*") through Article 9(5) of Council Regulation (EC) No. 384/96, as amended, and as codified and replaced by Council Regulation (EC) No. 1225/2009 (the "Basic AD Regulation").

2. In Japan's view, Article 15(a)(ii) of the *China Accession Protocol* raises two questions in the present case: (i) whether items (a)-(e) provided in Article 9(5) of the Basic AD Regulation may be deemed to be conditions to show that "market economy conditions prevail in the industry"; and (ii) whether the calculation of a country-wide dumping margin and AD duty based on a comparison between the normal value established for an analogue country with the average export price of the cooperating exporting producers in the country concerned may be considered as "a methodology that is not based on a strict comparison with domestic prices or costs in China".

3. Japan considers that the European Union did not violate Articles 6.10, 9.2, 9.3, and 9.4 of the *AD Agreement* through Article 9(5) of the Basic AD Regulation if: (i) pursuant to the first question, items (a)-(e) in Article 9(5) of the Basic AD Regulation may be considered as conditions to show that "market economy conditions prevail in the industry" under Article 15(a)(ii) of the *China Accession Protocol*; and (ii) pursuant to the second question, the calculation of a country-wide dumping margin and AD duty by comparing the normal value established for an analogue country with the average export price of the cooperating exporting producers in the country concerned may be considered as "a methodology that is not based on a strict comparison with domestic prices or costs in China" under Article 15(a)(ii) of the *China Accession Protocol*.

4. Japan asks that the Panel clarify the relationship between Article 15(a)(ii) of the *China Accession Protocol* and Article 9(5) of the Basic AD Regulation, and that it carefully take into account the issues raised above in its consideration of Article 15(a)(ii) of the *China Accession Protocol*, Articles 6.10, 9.2, 9.3, and 9.4 of *AD Agreement*, and Article 9(5) of the Basic AD Regulation.

5. In addition, Japan queries whether satisfying the criteria listed in paragraph 151 of the *Working Party Report* is sufficient for a WTO Member to use "a methodology that is not based on a strict comparison with domestic prices or costs in China" pursuant to Article 15(a)(ii) of the *China Accession Protocol*.

6. With respect to the obligation to determine an individual dumping margin, Japan considers that the first sentence of Article 6.10 of the *AD Agreement* establishes an obligation to determine an individual dumping margin for each individual exporter or producer concerned, with *only one*

exception to that rule. That exception is specified in the second sentence of Article 6.10, which permits sampling "where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable". This view is consistent with past WTO jurisprudence.[1]

7. Japan agrees with the European Union's view that it is permissible to calculate a single dumping margin for legally distinct but related entities to the extent that they may be considered a single "exporter" or "producer" within the meaning of the first sentence of Article 6.10. That is also in line with the panel's considerations in *Korea – Ceramic Paper*.[2] However, this issue relates to the definition of an "exporter" or a "producer" within the meaning of Article 6.10 of the *AD Agreement*; it has no bearing on the relationship between the first and second sentences of Article 6.10.

## II. ISSUES PERTAINING TO THE CONDUCT OF ANTI-DUMPING INVESTIGATIONS

(i) "Domestic Industry" – Articles 4.1 and 3.1 of the *AD Agreement*

8. In Japan's view, China's arguments relating to Article 4.1 of the *AD Agreement* raise the following key issues: whether the European Union violated Article 4.1 of the *AD Agreement* (i) by excluding from the definition of the domestic industry all those companies that did not support the investigation[3]; (ii)since the domestic industry, as defined by the European Union, did not include domestic producers whose collective output of the like product constituted a major proportion of the total domestic production[4]; and (iii) since the sample selected by the European Union does not represent a major proportion of total domestic production because the European Union selected a sample of domestic producers, namely 6 producers amounting to only 17.5 per cent of the total EU production, and whether European Union violated Article 3.1 of the *AD Agreement* since this sample cannot be regarded as representative of the total domestic production.[5]

9. **As regards the first issue**, Japan's primary concern is ensuring fairness in the investigation process. Japan believes that domestic producers that do not support an AD complaint but fully cooperate in an AD investigation may not be excluded from the definition of the domestic industry. European Union's interpretation of "domestic industry" could allow investigating authorities to define the domestic industry in a results-oriented way. This would be inconsistent with the obligation of Article 3.1 of the *AD Agreement* to conduct an "objective examination" of injury.

10. The Appellate Body in *US – Hot-Rolled Steel*[6] and in *EC – Bed Linen (Article 21.5 – India)*[7] recognized that investigating authorities must conduct an impartial investigation without favouring the interests of any interested party. Moreover, investigating authorities are not entitled to conduct their investigation in such a way that an affirmative injury determination becomes more likely.

11. In addition, there is a general obligation to conduct AD investigations in an unbiased and objective manner. This is borne out by Article 17.6(i) of the *AD Agreement*.

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[1] *See* Panel Report, *Argentina Ceramic Tiles*, paras. 6.89, 6.90; Panel Report, *Argentina Poultry Anti-Dumping Duties*, para. 7.214.

[2] *See* Panel Report, *Korea – Certain Paper*, para. 7.161.

[3] First Written Submission of China, paras. 233-245.

[4] First Written Submission of China, paras. 246-268.

[5] First Written Submission of China, paras. 273-282.

[6] Appellate Body Report, *US – Hot Rolled Steel*, para. 196.

[7] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114, *quoting* Appellate Body Report, *US – Hot Rolled Steel*, para. 192.

12. Moreover, the European Union's approach is structurally problematic to the extent that it allows *domestic producers* themselves to tailor the "domestic industry" by designating those companies for which injury is more likely to be found as supporting the complaint, whereas those companies for which injury is less likely to be found as not supporting the complaint.

13. **As regards the second issue**, Japan agrees neither with China's argument that 27 per cent of domestic production *a priori* does not constitute a "major proportion" nor with the European Union's argument that 25 per cent is *a priori* sufficient to reach the "major proportion" threshold.[8] The panel in *Argentina – Poultry Anti-Dumping Duties* found that the "major proportion" requirement of Article 4.1 of the *AD Agreement* does not mean that the domestic industry has to account for at least 50 per cent of domestic production, but that an "*important, serious or significant*" proportion of production is sufficient.[9] In Japan's view, it is sufficient that the investigating authority assess what constitutes a major proportion on a case-by-case basis in an *unbiased* and *objective* manner.

14. **As regards the third issue**, although there are no clear provisions in the *AD Agreement* that permit investigating authorities to engage in sampling of the domestic industry[10], the *AD Agreement* allows authorities to conduct sampling on the domestic industry where there are so many domestic industry members that individual examination of all of them would be impracticable.[11] The requirement imposed by Article 4.1 of the *AD Agreement* that the collective output of the domestic industry must constitute at least a "major proportion" of total domestic production must be clearly distinguished from the requirements for the selection of a sample.

15. Japan believes that the second sentence of Article 6.10 would be helpful also in the context of sampling for the injury determination. In Japan's view, the primary requirement for the selection of a sample for the injury determination is that, the sample must be *sufficiently representative* of the domestic industry.[12]

(ii) "Product under Consideration" and "Like Product" – Articles 2.1 and 2.6 of the *AD Agreement*

16. Japan asks the Panel to first *carefully* examine whether the European Union correctly defined the "product under consideration", taking into account the arguments and exhibits of both parties.

17. Next, Japan asks the Panel to carefully consider whether the European Union properly compared products that were "like" the "product under consideration" with the product under consideration. In particular, Japan asks the Panel to carefully consider whether the products produced and sold in the analogue country (India) in the dumping context were "like" the products produced in China and exported to the European Union.

18. Whether two products are "like" is determined pursuant to Article 2.6 of the *AD Agreement*. Article 2.6 defines "like product" to mean "a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".

19. In this respect, Japan considers the finding of the panel in *Indonesia – Autos* in the context of a case under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") as

[8] *See* First Written Submission by the European Union, para. 340 et seq.
[9] *See* Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.
[10] Footnote 13 of the *AD Agreement* appears to provide for the possibility of sampling domestic producers before initiation of an anti-dumping investigation.
[11] Panel Report, *EC – Salmon (Norway)*, para. 7.129.
[12] Panel Report, *EC – Salmon (Norway)*, para. 7.130.

equally applicable under the *AD Agreement*, which note the statement of the Appellate Body in *Alcoholic Beverages* (1996).[13]

20. In the present case, Japan asks the Panel to take into consideration all factors and to make its best judgment as to whether the products produced and sold in the analogue country (India) are "like" the product under consideration under the *AD Agreement*.

(iii) Injury Determination: Volume of Dumped Imports – Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement*

21. In Japan's view, China's arguments relating to Articles 3.1, 3.2, 3.4 and 3.5 of the *AD Agreement* raise two key issues: (i) whether the European Union violated Articles 3.1 and 3.2 of the *AD Agreement* by failing to exclude the imports of two Chinese exporting producers, found to be not dumping, from the volume of dumped imports[14]; and (ii) whether the European Union violated Articles 3.1 and 3.2 of the *AD Agreement* by including in the volume of dumped imports all imports from non-sampled exporting producers that were not individually examined.[15]

22. As **regards the first issue**, Japan believes that "dumped imports" in Article 3 means that the injury determination set forth in Article 3 must reflect the authorities' assessment of only "dumped imports", and not imports that were not found to have been "dumped."[16]

23. It follows that, to the extent that the European Union considered non-dumped imports as having been "dumped" for the injury and causation analyses, it violated Articles 3.1 and 3.2 of the *AD Agreement* in light of past WTO jurisprudence.

24. As **regards the second issue**, Japan believes that the European Union did not violate Articles 3.1 and 3.2 of the *AD Agreement* by including in the volume of "dumped imports" all imports from non-sampled exporting producers that were not individually examined. That is because the European Union found that *all sampled exporting producers* were engaged in dumping[17], and accordingly, its determination that all non-sampled exporting producers that were not individually examined were also engaged in dumping may be considered as based on "positive evidence" and an "objective examination" without additional inquiry.

25. Investigating authorities have a right to apply sampling in the circumstances described in the second sentence of Article 6.10 as long as they "satisfy the requirements of 'positive evidence' and an 'objective examination', without having to investigate *each producer or exporter* individually".[18]

26. In Japan's view, these requirements are not violated where the findings concerning the sample are extrapolated to all non-sampled producers that were not individually examined.[19] Indeed, the approach of extrapolating the findings of the sample to all companies that were not individually examined is "unbiased" and does not "favour the interests" of any interested party in the investigation.

[13] Panel Report, *Indonesia – Autos*, para. 14.174.
[14] First Written Submission of China, paras. 402-408.
[15] First Written Submission of China, paras. 409-417.
[16] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303. Panel Report, *EC – Bed Linen*, para. 6.138. Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 111, 112 and 115.
[17] First Written Submission by the European Union, para. 535.
[18] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 117.
[19] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 137.

27. Moreover, Japan stresses that there is no requirement anywhere in the *AD Agreement* that *requires* investigating authorities to take into account information from outside the sample when extrapolating the findings of the sample to non-examined producers outside of the sample.[20]

(iv) Injury Determination: Causation and Non-Attribution Factors – Articles 3.1 and 3.5 of the *AD Agreement*

28. Under Article 3.5 of the *AD Agreement*, as explained by the Appellate Body in *US – Hot-Rolled Steel*, investigating authorities must *separate and distinguish* the injurious effects of the dumped imports from the injurious effects of other known factors.[21]

29. Japan considers it of paramount importance that the principle of "separating and distinguishing" the effects of other known factors be upheld in every anti-dumping investigation. Accordingly, Japan requests that the Panel carefully review whether the European Union adhered to this principle in the present case.

(v) Procedural Issues – Article 6.1.1 of the *AD Agreement*

30. Japan shares the European Union's view that Article 6.1.1 of the *AD Agreement* applies only to the initial questionnaire (*i.e.*, the initial dumping questionnaire)[22]; the *AD Agreement* does not require that investigating authorities provide respondents with a minimum 30-day period to reply to all possible information requests, "questionnaires" or claim forms.[23]

31. Indeed, given the procedural and practical time restraints of an anti-dumping investigation, it would be unreasonable and unworkable to impose a minimum 30-day period for respondents to be able to submit information other than the response to the initial questionnaire.[24]

32. In effect, Article 6.1.1 of the *AD Agreement* is a mere application of the general principle reflected in the chapeau of Article 6.1 of the *AD Agreement* that respondents must be given sufficient time to present their views in writing. Thus, while the chapeau of Article 6.1 of the *AD Agreement* reflects the understanding that it may be necessary to impose different deadlines on a case-by-case basis for responding to certain information requests in the course of an anti-dumping investigation, Article 6.1.1. of the *AD Agreement* requires that there must in any event be a minimum time period for responding to the initial questionnaire.[25]

33. Japan stresses that information requests other than the initial questionnaire, *e.g.*, a sampling questionnaire and MET/IT claims, should not be considered subject to the 30-day period imposed by Article 6.1.1 of the *AD Agreement*.

[20] Panel Report, *EC – Salmon (Norway)*, para. 7.634 and fn. 780.
[21] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 222-223 (emphasis added).
[22] First Written Submission by the European Union, para. 783.
[23] *See* Panel Report, *Egypt – Steel Rebar*, para. 7.276.
[24] Appellate Body Report, *US – Hot Rolled Steel*, para. 73.
[25] Panel Report, *Egypt – Steel Rebar*, para. 7.277.

# ANNEX B-4

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF NORWAY

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## I. INTRODUCTION

1. As a third party to this dispute, Norway would in the following like to address certain interpretative issues, discussed in the First Written Submissions of China and the EU.

## II. THE DETERMINATION OF THE DOMESTIC INDUSTRY

2. Norway will first address the EU's exclusion of certain categories of domestic EU producers, that produced the domestic "like product" during the relevant period, from the determination of the domestic industry. The EU seems to argue that an investigating authority has the discretion to exclude whichever producers it wishes, provided that the remaining producers represent a "major proportion" of the industry.[1] Norway strongly disagrees that Article 4.1 of the *Anti-Dumping Agreement* permits such a determination, which would prevent an objective examination of the industry, as required by the *Anti-Dumping Agreement*. The only category of producers that may be entirely excluded from the industry according to Article 4.1 is "related" producers. The focal point of Article 4.1 is the totality of the domestic industry, ensuring that the determination made is representative of the domestic industry as a whole.[2] The injury determination is one of the pre-conditions for the imposition of anti-dumping duties, which protect all domestic producers. An authority cannot impose duties unless that is warranted by the need to protect the domestic producers, as a whole, and not just a select group of them.

3. Accordingly, the investigating authority cannot define the industry "on a selective basis" that involves examination of just "one part" of the industry.[3] Nor can it define the industry in such a way that an injury determination becomes "more likely" or such that it "favours the interests of any interested party"[4], something that would typically be the case if the domestic industry is restricted to the complainants only. The panel in *EC – Salmon* thus found that Article 4.1 does not permit the exclusion from the domestic industry of a group of producers who did not express a view during the investigation.[5]

4. Hence, it is Norway's firm view that an investigating authority cannot exclude categories of producers from the definition of the domestic industry, whether these categories are based on the production of a particular type or model of the "like product" or their opposition or silence in respect of the investigation.

## III. THE DETERMINATION OF THE PRODUCT SCOPE

5. China claims that the EU failed to determine the "product under consideration" and the "like product" consistently with Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*.[6] Norway points to consistent jurisprudence that establishes that investigating authorities must make determinations consistently with any definitions in the covered agreements.[7] Panels and the Appellate Body have furthermore frequently interpreted words that were not defined in the covered agreements.[8] The notion that Articles 2.1 and 2.6 do not impose obligations should therefore be rejected.

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[1] First Written Submission of the EU, paras. 296-297.
[2] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190.
[3] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 190 and 211.
[4] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 193 and 196.
[5] Panel Report, *EC – Salmon*, para 7.122.
[6] First Written Submission by China, para 300.
[7] Appellate Body Report, *US – Lamb*, para. 96, Panel Report, *Argentina – Poultry*, para. 7.338, Panel Report, *EC – CVDs on DRAMS*, paras. 8.1 (a), 8.1 (b) and 8.1 (c).
[8] Panel Report, *US – Hot-Rolled Steel*, para. 7.108 and Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 139.

6. According to Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*, the pricing comparison must be made between home and exported products that are "*identical*", or, by way of exception, "closely resembling" products. Hence, where an authority wishes to group multiple products together in a single investigation, Article 2.6 requires that *any* given category of the "like product" must be "like" *each and every* category of the product under consideration. Article 2.6 contains no exception, or other qualifying language, that allows an authority to establish likeness with respect to one category of the product under consideration, but not with respect to other categories.

7. The term "product under consideration" thus has an ordinary meaning that does not permit the bundling of "non-like" products. The authorities can of course choose to sub-divide the investigated product into models for purposes of comparison. However, in that event, the different models cannot involve different products that are not like. Rather, the models must all be sub-categories of a group of products that meet the definition of likeness.[9] The authorities must thus ensure likeness within the entire group of sub-products that constitutes the investigated product.

8. If this was not so, the importing Member could manipulate the product scope of an investigation to secure dumping and injury determinations that would not otherwise be possible. As a result, the carefully drafted disciplines on dumping and injury determinations could be easily undermined, contrary to the object and purpose of the *Anti-Dumping Agreement*, and the *GATT 1994*.

9. It is Norway's view that all models of the "product under consideration" are required to be "like" each other. To the extent that the Panel finds that standard and special fasteners are not in fact "like" each other, this would in Norway's opinion entail a breach of Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*.

## IV. THE DETERMINATION OF INJURY

10. Norway will address the claim that the EU improperly considered the displacement of EU products by imports from China in some market segments as being relevant. Article 3.1 of the *Anti-Dumping Agreement* requires the investigating authority to determine the impact of the dumped products on the domestic producers of the "like products". In this case, the EU had determined the product scope to be standard and special fasteners. Once this is determined, the product scope remains constant throughout the investigation.[10] The reference in Article 3.1 to the "like product" entails an obligation to look at the product as a whole, not certain segments or models within the product.[11]

11. It follows from this that injury cannot be found to result from a displacement of sales from one segment to another, within the same "like product". It would be contrary to Article 3.1 to find the displacement of sales from one segment to another to be a factor in the determination of injury.

## V. THE EXAMINATION OF THE VOLUME OF DUMPED IMPORTS

12. Norway will first comment on the EU's failure to exclude imports from two Chinese producers that were found not to have dumped, in the volume of dumped imports.[12] As the text of Articles 3.1, 3.2 and 3.5 shows, it is only the *dumped* imports that are to be included in the determination of injury. The *Anti-Dumping Agreement* does not provide any exceptions to this rule.

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[9] Appellate Body Report, *EC – Bed Linen (AB)*, para. 58.

[10] Panel Report, *EC – Tube or Pipe Fittings*, para 7.149.

[11] Appellate Body Report, *US – Softwood Lumber V*, para. 99 and Panel Report, *EC – Salmon*, para. 7.54.

[12] First Written Submission by China, paras. 397 and 402.

Several panels and the Appellate Body have confirmed this interpretation.[13] In *EC – Salmon*, the panel rejected the EC's argument that the inclusion of imports from companies with *de minimis* margins in the volume of dumped imports for injury analysis was appropriate as the exclusion of these imports would not have had any significant effect on the injury analysis.[14] The panel stated that the term "dumped imports" in Article 3 of the *Anti-Dumping Agreement* could not be interpreted so as to allow the inclusion of imports attributable to producers/exporters for which a *de minimis* margin had been calculated, and therefore found the EC to have acted inconsistently with Articles 3.1 and 3.2.[15]

13. Hence, the imports of the two Chinese producers that were found not to be dumping should clearly have been treated as non-dumped, and should have been excluded from the volume of dumped imports.

14. Secondly, China argues that the EU erred in treating the imports of all non-sampled and non-examined Chinese exporting producers as being dumped, for purposes of the injury determination.[16] Article 3.1 of the *Anti-Dumping Agreement* requires an "objective examination" of "the volume of the dumped imports", based on "positive evidence". Importantly, the text does not contain any exceptions from this obligation. Jurisprudence has confirmed the strict nature of Article 3.1.[17] By automatically considering that the volume of imported products from all non-sampled and non-examined producers is at dumped prices, it becomes more likely that an investigating authority will find that the domestic industry is injured. In light of this, the Appellate Body has stated that such an approach, which is applied irrespective of whether there are examined or sampled exporting producers found *not* to be dumping, cannot be objective.[18] Accordingly, the panel in *EC – Salmon* found that the investigating authority erred in concluding that all examined producers were dumping, as one producer had been found not to be dumping, and further extrapolating this conclusion to all imports.[19]

15. This is parallel to the case before this Panel. Whether it is established through sampling or through individual examination that there are producers that are not dumping is irrelevant for the determination. The investigating authority faces the same uncertainty regarding the non-sampled and non-examined exporting producers in both cases. The expansion of the investigation from the original sample to allow two more companies individual treatment, and the results from the investigation of these companies (being that no dumping took place), implies that an automatic extrapolation from the original sample was not warranted. Further evidence would be required before an extrapolation from the original sample would be justified.

## VI. PROCEDURAL REQUIREMENTS

16. Norway will not go into the factual details of the case, but rather outline how to interpret the requirements of Articles 6.2, 6.4 and 6.9 of the *Anti-Dumping Agreement*.

17. Article 6.2 of the *Anti-Dumping Agreement* sets out that all interested parties shall have a "full opportunity for the defence of their interests", throughout the anti-dumping investigation. As opposed to what the EU's approach seems to be[20], it is Norway's view that when an investigating authority

[13] Panel Report, *EC – Bed Linen*, para. 6.138; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 115; Panel Report *Argentina – Poultry*, para. 7.303, Panel Report, *EC – Salmon*, paras. 7.627-7.628.

[14] Panel Report, *EC – Salmon*, para. 7.627.

[15] Panel Report, *EC – Salmon*, para 7.628.

[16] First Written Submission by China, para. 410.

[17] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 192, 193 and 196, Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133.

[18] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

[19] Panel Report, *EC – Salmon*, para. 7.634.

[20] First Written Submission of the EU, paras. 684-687.

violates Article 6.4 and/or 6.9, it also violates Article 6.2 of the *Anti-Dumping Agreement*. The requirements of Articles 6.4 and 6.9 – the opportunity to see all relevant and used information and the proper disclosure of essential facts – serve, among others, the purpose of enabling interested parties to defend their interests as set forth in Article 6.2.

18. Article 6.4 of the *Anti-Dumping Agreement* confers on interested parties a right of access to evidence in the non-confidential record of the investigation. The Appellate Body has ruled that the relevance of information must be assessed from the perspective of the interested parties.[21] An authority cannot, therefore, second-guess whether a particular document could be "relevant" to an interested party's "presentation". The Appellate Body has also held that the phrase "used by the authorities" in Article 6.4 refers to information that the authority must *evaluate* in making its determinations.[22] An authority must evaluate all of the information submitted to it that relates to its determinations, and cannot ignore any of it.[23]

19. Article 6.9 of the *Anti-Dumping Agreement* requires the investigating authority, before the final determination is made, "to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". Panels have held that the requirement to disclose essential facts cannot be complied with simply by providing access to all information in the file.[24] Rather, the investigating authority must actively identify the facts on which it will rely in making its determination.[25] Panels have distinguished "facts" from "reasons".[26] The duty of disclosure thus relates to *evidence*. As to what evidence the investigating authority has an obligation to disclose, the words "essential" and "form the basis of" indicate that the duty relates to the important facts that provide the foundation on which the final determination is constructed.[27]

20. Under the second sentence of Article 6.9, disclosure must occur "in sufficient time for the parties to defend their interests". Absent disclosure of the essential facts, interested parties cannot make effective comments on the factual basis for the authority's intended decision.

## VII. CONCLUSION

21. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

[21] Appellate Body Report, *EC – Tube or Pipe Fittings (AB)*, para. 145.
[22] Appellate Body Report, *EC – Tube or Pipe Fittings (AB)*, para. 145.
[23] Panel Report, *EC – Salmon*, para 7.771.
[24] Panel report, *Guatemala – Cement II*, para. 8.230.
[25] Panel report, *Argentina – Ceramic Tiles*, para. 6.125.
[26] Panel report, *Argentina – Poultry*, para. 7.225.
[27] Panel report, *EC – Salmon*, para. 7.807.

# ANNEX B-5

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF TURKEY

### I. INTRODUCTION

1. Turkey takes no position as to the defense and allegations presented by the parties. Turkey wishes to contribute by focusing on two major issues, namely Market Economy Treatment and Individual Treatment Assessments within the framework of dumping margin calculation.

### II. MARKET ECONOMY TREATMENT (MET)/INDIVIDUAL TREATMENT (IT) ASSESSMENTS WITHIN THE FRAMEWORK OF DUMPING MARGIN CALCULATION

2. According to Article 2.1 of the Anti-Dumping Agreement, an investigating authority has to work on two data groups (normal value and export price) to determine whether dumping is present. Accordingly, the investigating authority is legally obliged to make a fair comparison based on the rules and standards stipulated in Article 2.4 of the Anti-Dumping Agreement between normal value and export price.

3. Furthermore, GATT 1994 Article VI, Ad Article VI.1, paragraph 2 and Articles 2.2 and 2.3 of the Anti Dumping Agreement point out certain sources which the investigating authority shall take into consideration if either the normal value or the export price can not be determined from the data provided by the producer/exporter due to the reason that the internal sales do not permit a proper comparison or because of the absence or unreliable nature of export prices.

4. In Turkey's view, Ad Article VI.1, paragraph 2 of GATT 1994 and Anti Dumping Agreement Article 2.2 permits the investigating authority to rely on an unbiased calculation method in order to determine the normal value in the event of exports from a country in which the prices are not set by dynamics of a free-market economy.

5. In addressing the IT assessment, it is understood that Article 9.5 of the EU Basic Regulation envisages the use of the export price of the producer/exporter itself if it can fulfill the criteria stipulated in the Article. If the exporter/producer fails, however, the EU investigating authority has the option to employ weighted average export price of cooperating producer/exporter companies for comparison.[1]

6. Therefore, the IT assessment is not solely an evaluation whether the producer/exporter has properly proved that it is fulfilling the criteria of Article 9.5, but a legal instrument directly affecting the calculation of the dumping margin by determining data group to be used as the export price which has been argued to be an indispensable component of the dumping margin calculation pursuant to the GATT 1994 Article VI and Article 2.2 of the ADA.

7. In this regard, both the MET and IT assessment are instruments that directly relate to the *calculation of the dumping* margin which provides the investigating authority with alternative routes on the question of which group of data will be used to determine the *normal value* and *export price*.

[1] EU First Written Submission, para. 23.

## III. SETTING A THRESHOLD IN ORDER TO PROVIDE FOR INDIVIDUAL TREATMENT

8. It can be clearly understood from Article 6.10 of the Anti Dumping Agreement that individual treatment, i.e. calculation of individual dumping margin for each known exporter/producer is a **general rule**. However there are always exceptions to general rules when the conditions prevail. The PRC rightly mentions that the second sentence of the Article 6.10, i.e. sampling, provides an exception to the general rule of individual treatment.

9. The legal question here is whether sampling is the sole exception to the general rule of IT, or Members can require in their domestic legislation some conditions to have met in order to provide IT. Turkey is of the view that this may not be the sole exception.

10. The Anti Dumping Agreement provides rules for economies operating in market economy conditions. There are no specific rules or exceptions for economies that are not operating under market economy conditions. It is not reasonable to look for a non-market economy exception in Article 6.10 itself.

11. Furthermore, Ad Article VI.1, paragraph 2 of GATT 1994 provides a special provision for the calculation of prices regarding countries that do not operate under full market economy conditions. This provision mentions that, in the case of imports from a country which has a complete or substantially complete monopoly of its *trade* and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

12. When the object and purpose of Ad Article VI.1, paragraph 2 of GATT 1994 and paragraph 150 of PRC's Working Party Report (WT/ACC/CHN/49) are considered; it is understood that these paragraphs are included as an exception to the general rule of "strict comparison with domestic prices" for counties that are not operating in full market economy conditions.

13. Moreover, taking into account the AB Report in the *US – Corrosion Resistant Steel*, and Panel Report in the *Korea – Certain Paper cases*, Turkey understands that treating several distinct legal entities as a single entity, in the event where the conditions require to do so, is approved by case-law and sampling is not the only exception to the general rule of IT.

## IV. CONCLUSION

14. Turkey reserves its rights to make further comments at the third party session of the first substantive meeting of the Panel. Turkey thanks the Panel for the opportunity to present its views in this proceeding and welcomes any questions that Panel may have.

# ANNEX B-6

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES

1. The United States addresses in this submission the proper interpretation of the following provisions: (1) Article 6.10 and Article 9 of the *Agreement on Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement"); (2) Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); (3) Article 5.4 of the AD Agreement; (4) Articles 2.1 and 2.6 of the AD Agreement; (5) Article 3.1 of the AD Agreement; and (6) Articles 6.1.1, 6.2, 6.4, and 6.5 of the AD Agreement.

### I. ARTICLE 9(5) OF COUNCIL REGULATION NO. 1225/2009 UNDER THE AD AGREEMENT

#### A. ARTICLE 6.10 OF THE AD AGREEMENT

2. According to China, Article 6.10 of the AD Agreement requires an investigating authority to calculate an individual margin of dumping for every interested party that identifies itself as an exporter or producer. China misunderstands the obligations found in Article 6.10 of the AD Agreement.

3. The United States notes that the AD Agreement neither defines "exporter" or "producer", nor sets out criteria for the investigating authority to examine before concluding that a particular firm or group of firms constitutes an "exporter" or "producer". Therefore, an investigating authority is permitted to conclude, based on the facts on the record, which entities constitute an individual "producer" or "exporter" as a condition *precedent to* calculating an individual dumping margin. This includes the right of the investigating authority to establish those factors that may be relevant to identifying an "exporter" or "producer", including by reference to the actual commercial activities and relationships of companies rather than their status as legally distinct entities. The reasoning of the panel in *Korea – Paper* directly supports this interpretation of Article 6.10 of the AD Agreement.

4. An inquiry into the relationship between companies and the reality of their respective commercial activities is particularly relevant in the context of producers and exporters from a non-market economy. In a non-market economy, such as China, the government's interference in the functioning of market principles could lead to the government making business decisions for the individual companies, the government forcing the companies to harmonize their business activities to fulfill the government's objectives, or the government shifting production between the companies. Consistent with the panel report in *Korea – Paper*, each of these factors would support a finding by the investigating authority that companies should be treated as a single exporter and subject to a single dumping margin.

5. Furthermore, given the presumption of government interference reflected in paragraph 15 of Part I of the *Protocol of the Accession of the People's Republic of China* ("Protocol"), it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in a non-market economy country without first confirming, at the very least, that the company functions as an exporter separate from the government. Otherwise, if the exporter's prices

were set by the government, there would be no objective basis for assigning that company its own dumping margin.

B. ARTICLE 9 OF THE AD AGREEMENT

6. As an initial matter, the United States notes that Article 9 discusses the *imposition* of antidumping duties with respect to *products*, not individual exporters or producers. In this regard, the concept of *imposing* antidumping duties on an individual exporter or producer, as advanced by China, is found nowhere in Article 9 of the AD Agreement.

7. Furthermore, it does not follow from China's interpretation of Article 9 that an investigating authority would necessarily be required to impose or apply an individual antidumping duty for each company. As in the case of its Article 6.10 claim, China fails to recognize that the decision as to whether a group of companies functions as a single entity is one that an investigating authority must make *before* it can know how duties should be applied to those companies' imports. If it concludes that multiple companies are closely related and function as a single entity, an investigating authority may apply a single duty to all of those companies' imports, even under China's reading of Article 9.

## II. ARTICLE 9(5) OF COUNCIL REGULATION NO. 1225/2009 UNDER ARTICLE X:3(A) OF THE GATT 1994

8. To the extent that China is challenging Article 9(5) under Article X:3(a) of the GATT 1994, the United States submits that this measure does not fall within the scope of Article X:3(a). The Appellate Body has recognized that laws and regulations themselves may be challenged under Article X:3(a) only *where they reflect the administration* of an instrument set out in Article X:1. However, Article 9(5) appears to provide substantive rules on how antidumping duties are to be imposed rather than embody the administration of any other legal instrument. The United States therefore agrees with the EU that, under these circumstances, Article 9(5) itself cannot be found to breach GATT Article X:3(a).

## III. ARTICLE 5.4 OF THE AD AGREEMENT

9. While it takes no position on the merits of China's factual allegations, the United States shares China's view that, pursuant to Article 5.4, an investigating authority may not initiate an investigation unless it has conducted an examination of the evidence and determined that the requisite industry support exists. This determination and the underlying examination must take place *prior to* the authority's decision whether to initiate an investigation, and thus must be based on evidence available to the investigating authority prior to initiation. It would be neither consistent with the terms of Article 5.4 nor logical for an investigating authority to take into account facts that are revealed *subsequent to* its initiation decision in order to bolster its examination of the degree of industry support that is required *prior to* initiation.

## IV. ARTICLES 2.1 AND 2.6 OF THE AD AGREEMENT

10. While it takes no position on the merits of China's factual allegations, the United States disagrees with China's understanding of the definition of "like product" in antidumping proceedings. The United States notes, first, that as a purely definitional article, Article 2.6 itself imposes no obligation on WTO Members. This provision alone therefore provides no basis for a finding of inconsistency.

11. Second, Article 2.6 calls for a comparison between the "*product* under consideration" and the "like *product*". As recognized by the panels in *US – Softwood Lumber AD Final* and *EC – Salmon*, there is no requirement that each *individual* item within the "like product" be "like" each *individual*

item within the imported product subject to consideration. This is confirmed by the context of Article 2.6, including Articles 2.4 and 6.10.

## V. ARTICLE 3.1 OF THE AD AGREEMENT

12. As the Appellate Body has recognized, "an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, *without favoring the interests of any interested party, or group of interested parties, in the investigation*". In light of this understanding of Article 3.1, an investigating authority's inclusion of only supportive domestic firms, to the exclusion of other domestic firms, in its examination of the domestic industry appears to show a selection bias *ab initio*. Furthermore, where an investigating authority has failed to conduct an "objective examination" as required by Article 3.1, that error permeates the investigating authority's analyses of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5, respectively. Similarly, once an investigating authority defines which entities comprise the "domestic industry" that will form the basis for its injury analysis, an "objective examination" requires that the authority seek and, to the extent possible, use a consistent data set reflecting the performance of those entities.

## VI. CHINA'S CLAIMS UNDER ARTICLE 6 OF THE AD AGREEMENT

13. China claims that the EU violated certain disclosure and procedural requirements found in Article 6 of the AD Agreement. While it takes no position on the merits of China's factual allegations, the United States respectfully requests the Panel to take into account the following general points in assessing the claims of China under Article 6 of the AD Agreement.

### A. ARTICLES 6.2 AND 6.4

14. The Appellate Body has recognized that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority. The United States therefore agrees with China that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation. Failure to provide such access would not only be inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, an interested party is necessarily denied "a full opportunity for the defense of their interests".

15. In an antidumping investigation, the ability of an interested party to defend its interests is especially critical with respect to information related to the calculation of normal value and the price comparisons that are conducted. The United States therefore agrees with China that where such information is not disclosed, and the interested parties are therefore not able to see relevant information, those parties may be denied a full opportunity to defend their interests as required by Article 6.2 of the AD Agreement.

### B. ARTICLE 6.5

16. China also raises a claim with respect to Article 6.5 of the AD Agreement, which requires that information which is by nature confidential, or which is provided on a confidential basis by parties to an investigation, shall be treated as such by the investigating authorities upon a showing of good cause. While it takes no position on the merits of China's factual allegation, the United States agrees with China that, where an investigating authority accepts information being submitted as confidential, the authority's failure to so treat that information, in particular by disclosing it to interested parties other than each of the exporting producers that furnished the information, is inconsistent with Article 6.5 of the AD Agreement.

C. ARTICLE 6.1.1

17. The United States agrees with the EU that China's claim under Article 6.1.1 of the AD Agreement is premised on a fundamental misunderstanding of the scope of that provision. China appears to assume that the term "questionnaires" in Article 6.1.1 encompasses *any* request for information made by an investigating authority, as a result of which an exporter or foreign producer should be given at least 30 days to respond to every such request made in the course of an investigation.

18. However, as the panel in *Egypt – Rebar* explained, the context of Article 6.1.1, in particular paragraphs 6 and 7 of Annex I to the AD Agreement, reveals that the term "questionnaire" for purposes of the AD Agreement refers to the original antidumping questionnaire in an investigation. Given the breadth of information requested in this initial antidumping questionnaire, it is logical that the Agreement seeks to provide a minimum time period for respondent firms to collect the information needed to be responsive to the investigating authority. The obligation in Article 6.1.1 to provide thirty days for reply therefore applies only to the original antidumping questionnaire and not to the MET and IT claim forms that are the subject of China's claim under this provision.

19. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, at least China's investigating authority appears to recognize that the 30-day time period for reply does not apply to every request for information made by an investigating authority. Article 12.1.1 of the SCM Agreement is worded almost identically to Article 6.1.1 of the AD Agreement, setting out the requirement for 30 days to respond to questionnaires in CVD investigations. In an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, the Chinese Bureau of Fair Trade for Imports and Exports (BOFT) has issued multiple requests for information to the US Government following the original questionnaire. For *none* of these requests for information, attached at Exhibit US-1, did China provide an initial period of 30 days to respond.