ANNEX B

WRITTEN SUBMISSIONS, OR EXECUTIVE SUMMARIES THEREOF, OF THE THIRD PARTIES

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF BRAZIL

A. ARTICLE 17.6(I) IMPOSES AN OBLIGATION ON THE PANEL AND NOT UPON WTO MEMBERS

1. In its First Written Submission, China raises several independent claims based on Article 17.6(i) of the Anti-Dumping Agreement ("ADA"), all of them based on its understanding that this provision is addressed not only to panels but creates an implicit obligation upon investigating authorities ("IA") as well. Brazil is of the view that Article 17.6(i) establishes an obligation solely upon panels, in the course of their assessment of the conduct of IAs during the investigation.

2. This obligation imposed on panels, however, does not lead to the conclusion that the obligation to conduct assessments in an unbiased and objective manner, which is an obligation also imposed on the IAs, emanates from Article 17.6(i) itself. Rather, Brazil understands that such obligation is found in other provisions throughout the ADA, such as in Article 3.1 of the AD Agreement.

3. In conclusion, Brazil considers that Article 17.6(i) of the ADA imposes an obligation solely upon panels, and therefore cannot constitute an independent basis for a claim of violation by a WTO Member.

B. CONSISTENCY OF ARTICLE 9(5) OF THE BASIC AD REGULATION "AS SUCH" WITH THE ADA

4. One of the key issues raised in this dispute is the alleged inconsistency of Article 9(5) of the EU Basic Anti-Dumping Regulation (Basic AD Regulation) *as such* with Articles 6.10, 9.2, 9.3 and 9.4 of the ADA as well as with Articles I, X:3(a) and XVI:4 of the GATT 1994.

5. Article 2 of the ADA lays down rules in relation to the determination of normal value, export price and comparability between the two prices in order to calculate dumping margins. Article 6.10 of the ADA states that the investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer". However, the methodology used to calculate dumping margins laid down in Article 2 and Article 6.10 of the ADA, as well as the exceptions to that methodology, only apply where prices and costs – the core measures for determining the normal value and the export price – are established according to market-economy rules. It ensues that the determination of either the normal value or the export price for NMEs may ordinarily be subject to an exceptional regime.

6. Regarding normal value, this exceptional regime for NMEs is confirmed in Article 2.7 of the ADA and is further supported by paragraph 15(a)(ii) of China's Protocol of Accession. Under these provisions, for exporters or producers operating in NME conditions, the IA may depart from a methodology which exclusively takes account of domestic costs and prices. This will apply in cases where NME producers fail to show that market economy conditions prevail in their industry or their individual operations. On the other hand, where investigated companies are able to show that market economy conditions prevail in their industry and/or their individual operations, they may be entitled to

individual dumping margins, calculated in accordance with the standard methodology specified in Article 2 of the ADA.

7. Brazil notes that the investigating authority enjoys a certain degree of discretion not only in establishing its methodology for the calculation of the dumping margin in case of NME countries but also in establishing the criteria that exporters from NME countries must fulfil in order to be subject to the exceptional regime of market economy treatment. Brazil also considers that WTO Members are not prevented from treating collectively legal entities located in NME countries as a single producer/exporter for the purposes of dumping determinations. Therefore, whether or not a particular company should be classified as a distinct company or as a single producer/exporter in conjunction with other companies under Article 6.10 of the ADA largely depends on the assessment of the facts in each case.

C. THE FAIR COMPARISON REQUIREMENT OF ARTICLE 2.4 OF THE ADA DOES NOT APPLY IN THE SELECTION OF THE ANALOGUE COUNTRY

8. With regard to the selection of the analogue country, China considers that the selection procedure applied by the EU, as well as the particular selection of Brazil in the case under analysis, precluded a fair comparison between the Chinese export prices and the analogue country's normal value.

9. In what pertains to this subject, Brazil understands that there are no specific WTO rules governing the choice of the analogue country in anti-dumping investigations for the purpose of calculating the normal value. It should be noted that neither the GATT nor the ADA indicate which method should be used in order to establish the normal value in such a context.

10. The sole guidance provided by the GATT and the ADA is that the normal value used should render a fair comparison with the export price possible. Therefore, insofar as the investigating authority selects an analogue country which allows it to obtain a comparable, and thus appropriate, normal value, it should not be found to be in breach of WTO rules. It can be concluded that, in the selection of an analogue country, the IA has certain discretion to set its own parameters of appropriateness, as long as they are unbiased and objective.

11. The definition of the analogue country to be used in an investigation is taken at a stage that precedes the (fair) comparison of the export price and the normal value. Thus, the fair comparison rule pertaining to this latter stage cannot be interpreted so as to apply to the choice of the analogue country as such. Indeed, once the analogue country has been selected, the IA is required to make proper adjustments on the normal value and/or the export price, in accordance with the parameters established in Article 2.4 of the ADA. These adjustments ensure a fair comparison between the export price and the normal value, as they will compensate for the differences found in the analogue and exporting countries.

12. In any event, the options available to IAs as to the selection of an analogue country are further limited as a result of limited availability of cooperating industries in analogue countries. This fact further highlights the inherently imperfect character of the selection of an analogue normal value and the need to ensure fair comparison through subsequent adjustments to the normal value and the export price, wherever these are warranted in order to ensure compliance with Article 2.4 of the ADA.

13. Therefore, Brazil considers that Article 2.4 of the ADA does not apply at the stage of selecting an analogue country as such and thus cannot form the basis for claims in relation to fairness in such a selection process.

D. PRODUCT UNDER CONSIDERATION

14. In its First Written Submission, China makes a series of claims related to the EU establishment of the "product concerned/like product". Although the ADA defines the like product by reference to the "product under consideration", the latter is nowhere defined within the ADA. Based on this absence of definition of what is the product under consideration, the panels in *US – Softwood Lumber V, Korea – Paper AD Duties* and *EC – Salmon* considered that there is no requirement of likeness within the "product under consideration", and that there is no guidance in the AD Agreement on the way in which the 'product under consideration' should be determined.

15. China claims that when the EU decided to exclude certain STAF, it acknowledged that STAF was not a like product. China further submits that by defining the product under consideration with reference to its price, and considering that STAF having a CIF price lower than EUR7.5 was to be included, the EU failed to correctly define the "product under consideration".

16. Brazil submits that the EU's decision to exclude certain STAF and to maintain certain other STAF was a decision by the IA defining the scope of the product under consideration. There is no discipline in the ADA governing how the product under consideration should be defined. Brazil considers that IAs have a large degree of discretion under the WTO discipline in their decision to exclude a subset of a certain type of goods from the scope of the "product under consideration".

E. SAMPLING FOR INJURY DETERMINATION

17. China argues, *inter alia*, that the EU acted inconsistently with Articles 3.1 and 6.10 of the ADA and VI:1 of the GATT 1994 as it used different sampling procedures for selecting domestic producers and exporting producers, and that the domestic producers' sample was neither statistically valid nor did it represent the largest percentage of volume that could reasonably be investigated.

18. Brazil recalls that Article 6.10 of the ADA deals with the criteria and methodological guidelines to be applied when sampling is used for the purpose of dumping determinations. Such criteria and methodologies are not applicable for sampling in the context of injury determinations.

19. The only parameters established by the ADA with regard to sampling in the context of injury assessment are those established in Article 3.1, i.e. that an injury determination should be based on "positive evidence" and on "objective examination" as interpreted by WTO jurisprudence.

20. In support of its claims concerning Article 6.10, China recalls the EU's statement in *EC – Salmon* that this article "may serve as a very good guidance for the determination of whether sampling of domestic industry was conducted in compliance with Article 3.1".

21. Brazil, however, considers that the above statement does not prevent an IA from taking an approach which departs from the methodology established in Article 6.10 of the ADA. While a methodology mirroring the one contained in Article 6.10 should be seen as complying with the requirements of "positive evidence" and on "objective examination" under 3.1 of the ADA, this does not lead to the conclusion that a different methodology is *a priori* inconsistent with Article 3.1.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF COLOMBIA

I. INTRODUCTION

1. Colombia thanks the Panel and the Parties for this opportunity to present its views in the present proceeding. Colombia intervenes in this case given its systemic interest in the application of several provisions of the GATT 1994 and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "ADA").

2. While not taking a final position on the specific facts of this case, Colombia will provide its views on some of the legal claims advanced by the Parties to the dispute. First, Colombia will address the issue of how anti-dumping duties should be imposed over products originating from non-market economy countries under the rules of Article VI of the GATT 1994 and ADA, in light of the most favoured nation obligation provided in Article I:1 of the GATT 1994. Second, it will refer to the possibility of claiming that a measure as such breaches Article X:3(a). Then it will comment on the rules that national authorities should follow when undertaking an anti-dumping duties review. Fourth, Colombia will review the definition of domestic industry within the context of the injury determination. Fifth, comments will be made on the other factors of attribution for the injury determination in order to conclude that there is no causal link between dumping and injury, in accordance with Article 3.5 of the ADA. Then Colombia will comment on the elements that should be taken into account in order to analyze likeness in a dumping investigation. Finally, Colombia will review the way in which conditions of competition may affect the accumulation in dumping investigations, in accordance with Article 3.3 of the ADA.

II. TREATMENT TO NON-MARKET ECONOMY COUNTRIES IN ANTI-DUMPING INVESTIGATIONS

3. In the present case, China claims that Article 9(5) of Council Regulation (CE) No. 1225/2009 (the "AD Base Regulation") is contrary to the European Union's (the "EU") obligations under Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the ADA, Article XVI:4 of the *Marrakech Agreement* and Articles I and X:3(a) of the GATT 1994.

4. Colombia considers that based on the *second interpretative note* to paragraph 1 of Article VI of the GATT 1994, the WTO Members have the possibility to use particular methodologies, such as the reconstruction of the normal value through an analogue country, to calculate the normal value of goods subject to a dumping investigation from non-market economy countries.

5. Thus, for Colombia it is clear that WTO Members are allowed to differentiate the way in which the normal value is calculated for countries with a market economy than that from those non-market economy countries.

6. Colombia invites the Panel to determine if in the particular circumstances of the case, the differential treatment that the EU grants to China and other countries, given that those countries do not have a market economy, is allowed under Article 2.7 of the ADA and the *second interpretative note* to paragraph 1 of Article VI of the GATT 1994. In this sense, Colombia suggests that if the

Panel concludes that Article 9(5) of the AD Base Regulation is consistent with the EU's obligations under the ADA, it should find that there is no breach of Article I:1 of the GATT 1994.

7. Given the debate advanced by the Parties with respect to the interpretation of the term "unconditional" under Article I:1 of the GATT, Colombia invites the Panel to recall prior panel reports[1] in order to clarify how that concept must be construed.

8. Colombia wishes to close its comments with respect to China's claims against Article 9(5) of the AD Base Regulation based on Article I:1 of the GATT 1994, recalling that Member's obligations on anti-dumping investigations with respect to China are subject to section 14 of China's Accession Protocol[2], which must be read in light of paragraph 151 of the Working Party Report on China's Accession to the WTO. [3]

III. CAN THERE BE A BREACH OF THE WTO MEMBERS' OBLIGATIONS UNDER ARTICLE X:3(A) WITH A MEASURE AS SUCH?

9. In the present dispute, China claims that Article 9(5) of the AD Base Regulation is contrary, as such, with the EU's obligations under Article X:3(a) of the GATT 1994.[4]

10. Thus, Colombia invites the Panel to analyze if given the particular circumstances of the case at hand, it is acceptable that even though China's claim was made against Article 9(5) of the ADA as such, China bases its arguments of the EU's breach of its obligations under Article X:3(a) of the GATT 1994 on examples related to the application of the measure at issue.

IV. RULES APPLICABLE TO ADMINISTRATIVE AND EXPIRY REVIEWS OF ANTI-DUMPING DUTIES

11. Among the claims that China addresses against Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 (the "AD Review Regulation"), Colombia finds specially interesting the legal debate surrounding claims II:2 to II:5, relative to how the review of the anti-dumping duties was made by the EU.

12. Article 11.4 of the ADA provides that review procedures are subject to the procedural rules of Article 6 when applicable. Prior panel reports[5] have clarified that Article 3, excluding Article 3.3 of the ADA, is applicable to administrative and expiry reviews. Finally, WTO document TN/RL/GEN/10 collects the Members' proposal with respect to sensitive issues of administrative and expiry reviews whose regulation should be clarified.

13. Colombia invites the Panel to take into account the mentioned proposal, as a non-legally binding complement, in the interpretation process of Article 11 of the ADA. Colombia considers that this proposal can be especially relevant to clarify the debate between the Parties as to how the EU undertook and concluded on the extension of the definitive anti-dumping duties, reviewed in the AD Review Regulation.

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[1] Panel Report, *Canada – Autos*, para. 10.23; and, Panel Report, *Colombia –Ports of Entry*, paras. 7.361 and 7.367.

[2] WT/L/432, dated 23 November 2001.

[3] WT/ACC/CHN/49, dated 1 October 2001.

[4] China's First Written Submission, paras. 91, 92 and 296-312.

[5] Panel Report, *US – DRAMS*, footnote 501.

V. DOMESTIC INDUSTRY

14. China alleges in claim II:4 that the EU breached its obligations under Article 3.4 of the ADA by including, in the injury analysis made on the AD Review Regulation, information of producers that were not part of the European domestic industry.[6] In addition, China claims that the EU did not undertake an objective examination based on positive evidence pursuant to Articles 3.1 and 17.6(i) of the ADA; since it did not exclude from the injury assessment, information of producers that no longer produced in the EU or outsourced its production out of the territory of the EU.[7] In reply, the EU claims that China did an erroneous representation of the facts and thus there was no link between China's claims and the facts of the case.[8]

15. Colombia invites the Panel to review the way in which prior panels and the Appellate Body have applied Articles 3.1, 3.4 and 4.1 of the ADA, in order to determine if the EU fulfilled its obligation to determine injury based on an objective examination of the positive evidence, and if such information was properly collected from the European domestic industry.

VI. FACTORS OF ATTRIBUTION IN THE ANALYSIS OF THE LINK BETWEEN DUMPING AND INJURY

16. With respect to the injury determination in this case, China holds that in the EU's review of the definitive anti-dumping duties (Claim II.5), the investigating authority did not safeguard that the injury caused to the European footwear industry by other factors, was not attributed to the dumped imports.

17. Bearing the discussion advanced by the parties, Colombia invites the Panel to take into account what has been said by the Appellate Body[9] in order to conclude if the EU investigating authority, during its investigation, effectively made the distinction between the dumped imports adverse effects and the harmful effects caused by other factors over the European domestic industry.

VII. LIKENESS UNDER THE ADA AGREEMENT

18. China alleges in its claim III:4 that by means of Council Regulation (EC) No. 1472/2006 of 5 October 2006 (the "Definitive AD Regulation"), the EU acted inconsistently with its obligation under Article 2.6 of the ADA, read together with Articles 3.1 and 4.1 of such agreement.[10]

19. The Parties discussion with respect to likeness under this claim, raises two different issues to be solved by the Panel: (i) under what conditions national authorities must choose which is the considered product; and (ii) to what extend is there an obligation of assessing the injury and identifying the domestic industry, with regard to similar products.

20. In relation to the first question, Colombia invites the Panel to analyze the issue in light of what was said by the Panel in *EC - Salmon (Norway)*[11], according to which each investigating authority is free to choose the products under consideration.

21. On the second issue, Colombia considers that there is a clear obligation to undertake a likeness assessment between the product under consideration and the domestic product[12] in order to

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[6] China's First Written Submission, para. 550.
[7] China's First Written Submission, paras. 553-560.
[8] EU's First Written Submission, paras. 293-305.
[9] Appellate Body Report, *United States – Hot Rolled Steel*, paras. 222 and 223.
[10] China's First Written Submission, paras. 962-1004.
[11] Panel Report, *EC – Salmon (Norway)*, para. 7.43, 7.51, 7.52, 7.76. This same position was held by the Panel in *US – Softwood Lumber V*, para. 7.153.

determine if there has been dumping and in order to identify the domestic industry. Colombia considers that an investigating authority, when assessing whether two products are alike in order to determine if there is dumping, must follow Article 2.6 of the ADA and, if necessary, take relevant elements of the likeness test in other covered agreements. In that vein, it is possible to bear aspects like physical characteristics of the products, uses or applications, substitutability, distribution channels, consumer preferences and tastes, among others.[13]

22. Bearing in mind that in the present case, China's claim is directed to point out likeness between the products under consideration and other products, the Panel should evaluate in the case at hand, whether that classification affects the likeness analysis for the purpose of injury determination and the identification of the domestic industry involved.

VIII. THE CONDITIONS OF COMPETITION IN THE ASSESSMENT OF CUMULATION OF DUMPING INVESTIGATIONS

23. The claimant alleges that the Definitive AD Regulation is contrary to the EU's obligations under Article 3.3 of the ADA given that the cumulative evaluation of the importations is inadequate based on the conditions of competition between imported and like domestic products.[14]

24. Colombia considers that in order to assess this issue, the Panel should take into account the opinion of the Appellate Body[15] and prior panels[16] on how the conditions for accumulation under Article 3.3 of the ADA must be met. In addition, Colombia invites the Panel to take this opportunity to further clarify how the conditions of competition between the products subject to the investigation are to be analyzed in order to decide upon the appropriateness of accumulation.

IX. CONCLUSION

25. Colombia considers that this case raises important questions on the interpretation of several provisions of the ADA and the GATT 1994. 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.

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[12] Panel Report, *EC – Salmon (Norway)*, para. 7.51.
[13] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.
[14] China's First Written Submission, paras. 1055 - 1064 and 1146 - 1166.
[15] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 109.
[16] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.224 and 7.240.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. In this Written Submission, Japan focuses on the following issues; (i) whether Article 9(5) of the *Basic AD Regulation* is consistent with Article 6.10 of the *AD Agreement*; (ii) whether selection of samples would be sufficient to determine likelihood of continuation or recurrence of injury under Article 11.3 of the *AD Agreement* in light of general duties under Article 3 thereof; and (iii) whether certain information should have been disclosed to interested parties in accordance with Articles 6.2 and 6.4 of the *AD Agreement*.

II. THE CONSISTENCY OF ARTICLE 9(5) OF THE *BASIC AD REGULATION* WITH ARTICLE 6.10 OF THE *AD AGREEMENT*

1. Permissible Conditions to Qualify an Individual Exporter/Producer for Assignment of an Individual Margin of Dumping

2. The first sentence of Article 6.10 of the *AD Agreement* provides that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer." The term "shall" and the phrase "as a rule" in this sentence clarify that this provision is mandatory.

3. The second sentence of this Article provides for the exceptional situation in which an authority "may" limit the number of producers to be examined for determining a margin of dumping, i.e. where the number of exporters, producers, importers or types of products is so large as to make individual examination impractical. When taking into account the individualized calculation of margin of dumping for each known exporter or producer as a mandatory rule, the term "may" in this sentence indicates that the second sentence sets forth exceptions to the first sentence.[1]

4. It should be noted that the *AD Agreement* sets forth no other exceptions to this mandatory rule under the first sentence of Article 6.10. Accordingly, an authority must determine individual margins of dumping for each known exporter or producer unless the authorities find the number of the known exporters or producers is so large as not to allow for individual calculations as provided in the second sentence of Article 6.10.[2]

2. The Identification of an "Exporter" and the Obligation to Examine Such an Exporter under Article 6.10 of the *AD Agreement*

5. However, neither Article 6.10 nor any other provisions of the *AD Agreement* sets forth any explicit criteria to identify an "exporter" or a "producer". In this regard, the panel in *Korea – Certain Paper* provides insight that "Article 9.5 as context strongly suggests that the term 'exporter' in Article 6.10 should not be read in a way to require an individual margin of dumping for each

[1] *See* Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 116.

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

independent legal entity under all circumstances."[3] In other words, the importing Member has a certain amount of discretion to define the meaning of these terms, taking into account the context of Article 6.10 and other provisions of the *AD Agreement*. On this basis, depending on the particular factual situations of a given case, the authority may find that a group of multiple legal entities constitutes a single exporter.

6. However, the issue of the authority's identification of an exporter must be distinguished from the obligation to determine an individual margin of dumping for the exporter. Once the authority determines what constitute an "exporter", the obligation to determine individual margins of dumping attaches to the authority with respect to the exporters it has identified. In this case, the authority must calculate individual margins of dumping for such exporters unless the exception in the second sentence of Article 6.10 applies.

7. Japan respectfully requests that the Panel carefully review how criteria in the *Basic AD Regulation* function in anti-dumping investigations in light of the mandatory rules to determine an individual margin of dumping for each known exporter or producer and the exceptions thereof as discussed above.

III. SELECTION OF SAMPLES IN DETERMINING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY IN AN EXPIRY REVIEW AND MATERIAL INJURY IN AN ORIGINAL INVESTIGATION

1. An Authority's Duty in Making Injury Determinations under Article 3.1 of the *AD Agreement*

8. Article 3.1 of the *AD Agreement* sets forth "a Member's fundamental, substantive obligation"[4] with respect to injury determinations. In particular, this provision requires the authorities to make injury determinations upon "positive evidence" and "objective examination". According to the Appellate Body in *US – Hot-Rolled Steel*, "[t]he word 'positive' means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible", and "an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation."[5]

9. Furthermore, Japan notes that an authority is generally required to establish the facts properly, and evaluate facts in an unbiased and objective matter in all steps of anti-dumping investigations. The Appellate Body clarified this general obligation and held that it arises from Article 17.6(i) of the *AD Agreement.*[6] However, it is noted that this provision primarily sets out rules applicable to panels, and does not impose any obligations directly on the authorities.[7]

2. Disciplines on the Authority's Determination of the Likelihood of Continuation or Recurrence of Injury

10. The starting point to review the WTO consistency of an authority's determination in expiry reviews or sunset reviews in general terms is Article 11.3 of the *AD Agreement.*[8] In this regard, the panel in *US – Corrosion Resistant Sunset Review* held that "it is clear that the investigating authority has to determine, *on the basis of positive evidence*, that termination of the duty is likely to lead to

[3] Panel Report, *Korea – Certain Paper*, para. 7.159.
[4] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[5] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193-194 (footnotes omitted).
[6] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[7] Appellate Body Report, *Thailand – H-Beams*, para. 114.
[8] Appellate Body Report, *US – Corrosion Resistant Sunset Review*, para. 103.

continuation or recurrence of dumping and injury."[9] Moreover, the Appellate Body further clarified the general obligations under Article 11.3 by stating that "[t]he words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review *must act with an appropriate degree of diligence* and *arrive at a reasoned conclusion on the basis of information gathered* as part of a process of reconsideration and examination."[10]

11. Although the above citations were made with respect to the determination of *likely dumping* under Article 11.3, Japan is of the view that this rationale is equally applicable to the determination of *likely injury* in sunset reviews. This provision sets forth rules on the determination of dumping and injury in parallel, stating "determine, in a review …, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury". Thus, Japan believes that there is no difference in the applicability and meaning of the terms "review", "determine" and "likely" between the determination of dumping and injury in sunset reviews. Therefore, in injury determinations in sunset reviews, an authority also must *act with an appropriate degree of diligence* and arrive at *a reasoned conclusion* on the basis of *positive evidence*.

3. Applicability of Article 3 to Sunset Reviews

12. The Appellate Body held that the definition of "injury" in footnote 9 of the *AD Agreement* applies to injury determinations in sunset review by virtue of the phrase "under this Agreement".[11] However, because of the absence of any explicit cross-reference, and the differences in the nature and purposes of original investigations and sunset reviews[12], it also held that "investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination."[13] Having said that, the non-applicability of specific provisions of Article 3 and the absence of any provisions specifying the methodology to make injury determinations in sunset reviews under Article 11.3 do not necessarily mean that an authority has unfettered discretion. As we referred to before, an authority still must determine its injury based on "positive evidence" and an "objective examination" in sunset reviews.[14]

4. China's Arguments on Specific Factual Issues

13. With respect to the Commission's own sampling methodology to collect data on the injury of the domestic industry, China alleges that its selection of sampling of European Union producers was inconsistent with Article 3.1 of the *AD Agreement*.[15] China also argues that the European Union producers' samples selected in the expiry review by the Commission were neither statistically valid nor represented the largest percentage of volume that could reasonably be investigated.

14. The *AD Agreement* has no specific provisions prohibiting particular sampling methods, or setting forth any specific methodologies for sampling to collect positive evidence. As the panel in *EC – Salmon (Norway)* explained, sampling is legitimate to the extent that the authority satisfies its general obligations. Specifically, it held that "[a] sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the

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[9] Panel Report, *US – Corrosion Resistant Sunset Review*, para. 7.271 (emphasis added), affirmed by Appellate Body Report, *US – Corrosion Resistant Sunset Review*, para. 114.

[10] Appellate Body Report, *US – Corrosion Resistant Sunset Review*, para. 111 (emphasis added).

[11] *See* Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 276.

[12] *See* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

[13] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 280 (emphasis in original).

[14] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 284.

[15] *First Written Submission by China* submitted to this Panel on 24 September 2010 ("China FWS"), paras. 463-487.

requirements of Article 3.1 of the AD Agreement."[16] Therefore, the Commission's sampling methodology would be consistent with the *AD Agreement* provided that the sampled information was "sufficiently representative of the domestic industry as a whole".

IV. CHINA'S ALLEGED INCONSISTENCY OF DISCLOSURE BY THE COMMISSION OF CERTAIN INFORMATION WITH ARTICLES 6.2 AND 6.4 OF THE *AD AGREEMENT*

15. China argues that the Commission "failed to make available the information used by it for the selection of the European Union producers' sample" in the expiry review[17], and that such failure is inconsistent with Articles 6.4 and 6.2 of the *AD Agreement*.[18] China also argues that the Commission acted inconsistently with Articles 6.2 and 6.4 of the *AD Agreement* in the expiry review because the Commission failed to disclose timely or sufficiently information regarding the revised production and sales data of the complainant producers and the sampled producers, regarding the analogue country selection procedure and the data submitted by some of them, and regarding the Community interest questionnaire responses.[19]

1. Inconsistency with Article 6.4 Leads to Inconsistency with Article 6.2

16. Contrary to Article 6.2 which provides for "a fundamental due process"[20] requirement, Article 6.4 requires the authority to disclose all information that is (i) "relevant to the presentation of their cases," (ii) "not confidential," and (iii) "used by the authorities." According to Article 6.4, if information satisfied the above three conditions, the authority must disclose it in a "timely" fashion. Failure to meet the legal obligation to disclose information under Article 6.4 would result in the failure to afford interested parties "a full opportunity for the defence of their interests." As such, a "violation of Article 6.4 also would constitute the violation of Article 6.2."[21]

17. In this regard, while China's alleged inconsistency of the Commission's certain non-disclosure or delayed disclosure of certain information is related to the expiry review, Article 11.4 provides that the provisions of Article 6 regarding evidence and procedures also apply to sunset reviews under Article 11.3. The panel in *US – Oil Country Tubular Goods Sunset Reviews* confirmed this conclusion by stating that "Article 6.2 generally deals with the right of interested parties to defend their interests in an investigation and, by operation of Article 11.4, in a sunset review."[22] Therefore, both Articles 6.2 and 6.4 are supposed to apply to expiry reviews.

2. The Legal Requirements of Disclosure of Information under Article 6.4

(a) The Source of Information Is Not Relevant to Article 6.4

18. As a preliminary matter, Japan would like to point out that none of conditions under Article 6.4 address the source of the information, or the procedures through which an authority obtains the information. So far as the information satisfies the above-mentioned conditions, no matter who submits the information or how particular information is obtained, such information must be disclosed to interested parties in a timely fashion[23].

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[16] Panel Report, *EC – Salmon (Norway)*, paras. 7.129-7.130 (footnotes omitted).
[17] China FWS, para. 675.
[18] China FWS, para. 676.
[19] China FWS, paras. 667-668.
[20] Panel Report, *Guatemala – Cement II*, para. 8.179; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 8.179.
[21] *See* Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 149.
[22] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.234.
[23] *See* Panel Report, *EC – Salmon (Norway)*, para. 7.775.

(b) Condition of "Relevant to the Presentation of Their Cases"

19. As the first condition, information must be "relevant to the presentation of their cases" to trigger the disclosure obligation under Article 6.4. Since the term "their" in this provision indicates the interested parties, the relevance of the information must be viewed in light of interested parties, not in light of whether the authority finds such information useful in its determination.[24] In that case, the authority would not be able to know fully which information is relevant to an interested party's case until it becomes aware of the party's argument. Moreover, to the extent that the authority reviews and maintains the information in connection with an anti-dumping investigation, such information may satisfy the first condition "relevant to the presentation of their cases".[25]

(c) Condition of "Not Confidential"

20. The second condition is that the information is "not confidential", as specifically defined in Article 6.5. According to this provision, information, "which is by its nature confidential" or "which is provided on a confidential basis" by the submitter, is outside of the scope of Article 6.4, and thus would not be subject to the "timely" disclosure to interested parties requirement.[26] However, Japan would like to note that where the party submitting information did not request confidential treatment of the information, the authority must have sufficient basis to find that such information is still confidential "by nature". The mere possibility of confidentiality in this kind of case would not provide a sufficient basis to withhold the information.[27]

(d) Condition of "Used by the Authorities"

21. The third condition is "that is used by the authorities." The phrase "which is used", rather than "which form the basis for the decision" as provided in Article 6.9, is significant. This difference clarifies that information, on which an authority did not base its decision and thus was not required to disclose under Article 6.9, still falls within the Article 6.4's disclosure requirement. In other words, the information that is required to be disclosed under Article 6.4 could be understood to be broader than the one under Article 6.9. In this context, Japan agrees with the panel in *EC – Salmon (Norway)*, which states that "it seems clear to us that whether information is 'used' by the investigating authority must be assessed by reference to whether it forms part of the information relevant to a particular issue that is before the investigating authority at the time it makes its determination."[28]

(e) Timeliness of Disclosure to Be Consistent with Article 6.4

22. If particular information satisfies the above three conditions, the authority must also give the interested parties "timely opportunities" to see the information. Although the *AD Agreement* does not define the meaning of the term "timely," Article 6.5 clarifies that the timeliness is related to interested parties' opportunity to prepare its presentation on the basis of this information.[29]

3. Conclusion

23. Regarding the above China's claim, Japan respectfully requests that the Panel review the underlying facts of the individual items of information in light of legal requirements as discussed above.

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[24] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145.
[25] Panel Report, *EC – Salmon (Norway)*, para. 7.769.
[26] Panel Report, *EC – Salmon (Norway)*, para. 7.773.
[27] Panel Report, *Guatemala – Cement II*, para. 8.143.
[28] Panel Report, *EC – Salmon (Norway)*, para. 7.769.
[29] Panel Report, *EC – Salmon (Norway)*, para. 7.769.

ANNEX B-4

THE THIRD PARTY WRITTEN SUBMISSION OF TURKEY

A. INTRODUCTION

1. Turkey thanks the Panel for giving the opportunity to present its views in this proceeding. Turkey is not in the intention to present an opinion on the specific factual context of this dispute and takes no position what so ever as to the defense and allegations presented by the parties on whether the specific measure at issue is inconsistent to the subject provisions of the WTO Agreements. Turkey wishes to contribute, by expressing its opinion on some systemic issues regarding the interpretation and implementation of the subject legal texts.

2. The dispute between the European Union (hereinafter referred to as "EU") and the People's Republic of China (hereinafter referred to as "China") covers several issues regarding the application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as "ADA"). However, the Republic of Turkey (hereinafter referred to as "Turkey") has chosen to focus on three issues namely individual treatment assessments, analogue country selection and sampling.

B. SETTING A THRESHOLD IN ORDER TO PROVIDE FOR INDIVIDUAL TREATMENT

3. Article 6.10 of the ADA states that "*The authorities, **as a rule**, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation"*. Turkey understands individual treatment, i.e. calculation of individual dumping margin for each known exporter/producer is a **general rule**. In line with the understandings of China and the EU, Turkey also understands that the second sentence of Article 6.10, which is in regard to the sampling process, is an exception to the general rule provided in the first sentence.

4. The legal question here is whether sampling is the sole exception to the general rule of IT, or can Members require some conditions to be met in their domestic legislation in order to provide IT. In their submissions the parties to this dispute have provided opposite views on this issue. While the EU, in its submission asserts that Article 6.10 does not contain a strict rule requiring investigating authorities to always determine dumping margins on an individual basis with only one exception (i.e sampling), China argues that sampling is the sole exception to the IT rule, and therefore Members are not allowed to import additional exceptions to Article 6.10 of the ADA.[1]

5. Turkey is of the view that sampling may not be the sole exception to the general rule envisaged in Article 6.10 of the ADA, because of the reasons explained in the following;

6. First of all, the ADA provides rules for economies operating under market economy conditions. There are no specific rules or exceptions provided in the ADA for economies that are not operating under market economy conditions. Taking into account this structure of the ADA, Turkey believes that it would not be appropriate to look for a non-market economy exception in Article 6.10 itself. For economies where costs and consequently prices (for both domestic and export sales) are determined or affected significantly due to state intervention instead of being freely determined by

[1] EU First Submission, paras. 80-82; China First Submission, para. 189.

market forces, it is expected that there will be exceptions to general rules of ADA on the calculations of normal value and export price. In fact, paragraph 2 of the Additional Article VI of the GATT 1994 and China's Accession Protocol supports this interpretation.

7. Paragraph 2 of the Additional Article VI of the GATT 1994 provides a special provision for calculation of prices regarding countries that do not operate under full market economy conditions. This provision mentions that *"It is recognized 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 for the purposes of paragraph 1, 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*."

8. In parallel with this general provision, China's Working Party Report (WT/ACC/CHN/49) has a similar paragraph particularly for the Chinese market. According to paragraph 150 of the Report, "*China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate*".

9. Taking into account the abovementioned paragraph, it is acknowledged by the WTO Members that China is not operating in full market economy conditions yet and is still in a transition process towards a full market economy. It is also understood that due to the special conditions, i.e. state intervention, in China, both domestic and export sales prices are not freely determined by market economy forces. Under these conditions it may be difficult to make a strict comparison with domestic and export prices.

10. Paragraph 1 of Article 31 of the 1969 Vienna Convention on the Law of Treaties states that *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its* ***object*** *and* ***purpose****."* (emphasis added). When the object and purpose of paragraph 2 of the Additional Article VI of the GATT 1994 and paragraph 150 of the Report are considered in the light of their purposes and objects; it is reasonable to understand 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. Therefore, accepting that export sales prices may not be determined by market forces as well as domestics sales prices, without making distinction between these two types of sales in non-market economy countries, is in conformity with the object and purpose of these two foregoing paragraphs.

11. Second, taking into account the relevant case law, it is hard to conclude that sampling is the sole exception to the general rule of IT. In *US - Corrosion Resistant Steel*, the Appellate Body (AB) stated that:

> *"The first sentence of Article 6.10 requires investigating authorities, "as a rule", to determine an individual margin of dumping "for each known exporter or producer concerned of the product under investigation"…..However, even in these investigations, we have recognized that investigating authorities are not always required to calculate separate dumping margins for each exporter or producer."*[2]

[2] AB Report, *US - Corrosion Resistant Steel Sunset Review*, para. 154.

12. In addition, the panel in *Korea - Certain Paper* also stated that:

> *"Article 9.5 requires that the IA determine individual margins for exporters and producers who did not export during the POI. …… Nevertheless, Article 9.5 as context strongly suggests that the term "exporter" in Article 6.10 should not be read in a way to require an individual margin of dumping for each independent legal entity under all circumstances."*[3]

13. It can be understood from the foregoing cases that the panel *Korea - Certain Paper* and the AB did not find it inconsistent with Article 6.10 of the ADA to treat several distinct legal entities as a single entity if the conditions require so.

14. Third, in its submission, the EU provides couple of examples, where the preference mentioned in Article 6.10, first sentence, may not apply.[4] If the Panel finds any of these examples as an exception to the general rule in Article 6.10, first sentence, then it should also accept that sampling is not the only exception to the general rule and there could be other situations, including circumstances where thresholds is set for individual treatment, that the investigating authorities may not determine individual margin of dumping and accordingly, individual dumping duties for each known exporter or producer.

15. Consequently, in the light of above explanations, Turkey considers that a Member can legally set out a threshold reflecting special circumstances in terms of the variables affecting production, sales and prices to provide IT under Article 6.10.

C. ANALOGUE COUNTRY SELECTION

16. Article 2.1 of the Anti-Dumping Agreement states that "*For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country*."

17. A plain interpretation of Article 2.1 clearly indicates that an investigating authority has to work on two data groups (normal value and export price) to determine whether dumping is present for the product under consideration. 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.

18. Most of the time, the normal value is determined by looking at sales of the like product in the ordinary course of trade in the domestic market of the exporting country. However, as envisaged in Article 2.2 of the ADA, in some situations (e.g. particular market situation), domestic prices and the exporting prices do not permit a proper comparison. In order to overcome these difficulties, the ADA provides an alternatives ways to find a comparable price, the purpose of which is to identify a normal value. In fact, the term "comparable price" is used both in first and the second paragraph of the Article 2 of the ADA.

19. Furthermore, Additional Article VI.2 of GATT 1994 and paragraph 15(a) of the Protocol of Accession of China (Accession Protocol) point out difficulties in determining the comparable price and permit to use a methodology that is not based on a strict comparison with domestic prices or costs in China with the export prices.

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[3] Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, para. 7.159.

[4] EU First Submission, para. 86.

20. In this regard, Additional Article VI.2 of GATT 1994 states that:

> *"It is recognized 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 for the purposes of paragraph 1, 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."*

21. In Addition, Paragraph 15(a) of the Accession Protocol of China to WTO provides that:

> *"In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:*
>
> *(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;*
>
> *(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."*

22. It is an undisputed fact that Ad. Article VI.2 of GATT 1994 together with paragraph 15(a) of the Accession Protocol provide derogation from the provisions of the Anti-Dumping Agreement regarding the determination of normal value. In this context a WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the investigated producers cannot clearly show that they are operating in market economy conditions. Turkey considers that selecting an analogue country is the most reasonable method for determining the normal value when the investigated companies are not operating under market economy conditions. Furthermore, from the submission of the Parties, Turkey understands that use of the analogue country procedure is not disputed between the parties. What is disputed between the parties is the selection of analogue country procedure and the selection of Brazil as an analogue country

23. Turkey would like to point that investigating authorities sometimes face difficulties in selecting analogue country. Companies to which analogue county questionnaires are sent sometimes may not co-operate with the investigating authorities. Even if they respond properly, verification of the data is another problem that the investigating authorities have to face with. The responding countries are mostly reluctant to open their data and premises for verification since they are not party of the investigation.

24. Turkey would also like to emphasize that there is no clear-cut provision in the ADA regarding the selection procedure of analogue country. In this regard, Turkey considers that to some extent members have the flexibly to adopt their own rules and procedures on this issue.

25. The critical question here is whether the selected analogue country should be an appropriate or the most appropriate country. Taking into account the difficulties regarding the selection of

analogue country and the fact that the rules and procedures on this issue is not prescribed in the Anti-Dumping Agreement, Turkey considers that the standard applied in regard to the selection of the analogue country should be "an appropriate country " standard, not "the most appropriate country" standard. Therefore, if it can be determined that the selected country is proper in order to determine the normal value, then the investigating authorities are not required to search for the most appropriate country to select as analogue country. Turkey believes that although the level of economic developments should be taken into account in determining the analogue country, this should not be regarded as a mandatory condition for "an appropriate country" standard.

26. In this context, if Brazil is an appropriate country under the internal standards set forth by the EU, there is no need to search for the *more or most appropriate country*, since the standard is "an appropriate country" standard. However, Turkey refrains from making comments on whether the selection of Brazil is appropriate for the footwear industry since it is the question of the concrete case. Turkey would like to share its opinion about what the threshold question should be on this issue.

27. With regard to the arguments whether the "fair comparison principle" prescribed under Article 2.4 applies to the selection procedure of the analogue country, Turkey considers that Article 2.4 does not govern the analogue country selection process. In Turkey's view, the "fair comparison principle" prescribed under Article 2.4 requires the authorities to compare the "normal value" and "export price" in a fair manner. However this requirement is related with the comparison stage of these two prices and not related with the calculation stage of the normal value or the export price. Since there is no comparison, there is no "fair comparison" requirement as well before the stage of determining the normal value and export price. However, once the normal value and the export price are determined, the investigating authorities are bound by the "fair comparison" rule prescribed under the Article 2.4 of the Anti-Dumping Agreement. The analogue country selection process is related with determining the normal value stage, not related with the comparison stage.

28. Consequently, Turkey considers that the fair comparison principle set out under Article 2.4 does not govern the calculation of normal value or export price, it just covers the stage of comparison of these two prices. The determination of whether Brazil is an appropriate analogue country is not an issue that can be argued in the context of fair comparison principle.

D. SAMPLING

29. Article 6.10 of the Anti-Dumping Agreement provides that:

> *"The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."*

30. It is understood from the above mentioned article that while the general rule is to calculate individual dumping margins for every known exporter/producer, sampling is an exception to that general rule when the number of exporters/producers/importers/types of products is too large to make such an individual treatment.

31. China claims that by not examining the Market Economy Treatment (MET) application of the non-sampled companies, EU violated Article 6.10 of the Anti-Dumping Agreement. According to China, an investigating authority has to evaluate separately all the MET applications, even if sampling is recoursed and the companies in question are not included in the sampling process.

32. Turkey considers that this interpretation is incompatible with the spirit of the sampling exception. When it is impractical to examine all the co-operated companies, by applying sampling the investigating authorities have opportunity to examine only a limited group of exporters in order to reach a determination in a timely manner on whether dumping exists.

33. Therefore once the sampling is applied, the investigating authorities make the examination of whether dumping exists according to the data of the only sampled companies. This means that the investigating authorities limit their examination only to a group of companies. The MET/IT determinations constitute the part of this examination that is limited to group of sampled companies. In other words the investigating authorities have to examine only the MET/IT application of the companies that are included in the sample.

34. Especially, when a product in a fragmented industry such as footwear is subject to an anti-dumping investigation, it is actually not possible to examine all the co-operated companies' applications since there may be hundreds of producers/exporters. That is the reason why sampling is prescribed under the Article 6.10 as an exception to the individual treatment.

35. Consequently Turkey considers that the sampling rule prescribed under Article 6.10, which is as an exception to the individual treatment principle, does not oblige the investigating authorities to examine separately all the MET applications of the companies which are not included in the sampling process. Therefore, according to Turkey's view when sampling is recoursed, the investigating authorities have to examine only the responses of the companies that are included in the sample regardless of whether they applied for MET/IT.

E. CONCLUSION

36. Turkey appreciates this opportunity to present its views to the Panel. Turkey reserves the right to make further comments during the first substantive meeting with the Panel.

ANNEX B-5

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

I. CHINA'S CLAIMS REGARDING ARTICLE 9(5) OF COUNCIL REGULATION NO. 1225/2009

1. China argues that Article 9(5) of Council Regulation No. 1225/2009 ("Basic AD Regulation") of the European Union is inconsistent as such with Article 6.10 and, as a consequence, with Articles 9.2, 9.3, and 9.4 of the AD Agreement. The United States disagrees with China's legal arguments because they are based on misunderstandings of the relevant provisions 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. Article 6.10 requires that an investigating authority calculate an individual margin of dumping in respect of each known "exporter" or "producer." Before assigning an individual dumping margin to a particular firm, however, the investigating authority must decide whether that firm is an "exporter" or "producer." The AD Agreement neither defines "exporter" or "producer", nor sets out criteria for the investigating authority to examine to determine whether a particular entity constitutes an "exporter" or "producer." Therefore, there is nothing in the text of Article 6.10 that requires an investigating authority to calculate an individual margin of dumping for each company solely on the basis of the company's assertion that it is an exporter or producer. Instead, 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. The facts of a particular case may therefore support a finding that the nature of the relationship or operations of two or more legally distinct entities are so closely connected that the entities effectively constitute a single "exporter" or "producer" within the meaning of Article 6.10. The reasoning of the panel in *Korea – Paper* directly supports this interpretation of Article 6.10 of the AD Agreement.

3. 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. During China's accession negotiations, Members expressed concerns about the influence of the government of China in the commercial practices and decisions of enterprises in China. The *Protocol of the Accession of the People's Republic of China* ("Protocol") recognizes the pervasiveness of government interference in the Chinese economy. The presumption under the Protocol is that, absent a demonstration to the contrary by Chinese producers, government interference will prevent market principles from functioning in the Chinese industry manufacturing the product under consideration. Given this presumption of government interference, it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in China without first confirming, at the very least, that the company functions as an exporter separate from and independent of influence by the government. For all these reasons, an investigating authority may apply criteria to determine whether an individual company is an exporter or producer without acting inconsistently with Article 6.10 of the AD Agreement.

4. China argues that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 9.2, 9.3, and 9.4 of the AD Agreement because, with respect to those firms that do not qualify for individual treatment, Article 9(5) prevents the Commission from imposing or applying an individual anti-dumping duty for each exporter or producer that was part of the sample or provided the necessary information to the investigating authority. The United States submits that China's argument is premised on misunderstandings of Article 9 of the AD Agreement, and that China's interpretation of Article 9 does not result in the obligation for which China argues.

5. Article 9 discusses the *imposition* of anti-dumping duties with respect to *products*, not individual exporters or producers, and the concept of *imposing* anti-dumping duties on an individual exporter or producer, as advanced by China, is found nowhere in Article 9 of the AD Agreement. Furthermore, 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. Nothing in Article 9 prohibits such treatment; nor does Article 9 set out criteria for an investigating authority to examine before concluding that a particular firm or group of firms constitutes a single entity.

6. In any event, China's claims pursuant to Article 9 of the AD Agreement appear to be dependent on its claims under Article 6.10. For the reasons discussed above, China's arguments pursuant to Article 6.10 of the AD Agreement are based on an incorrect understanding of that provision. As a result, there is no basis to support China's consequential claims under Article 9 of the AD Agreement.

7. China argues that the EU does not administer the provisions of Article 9(5) in a uniform, impartial and reasonable manner in accordance with Article X:3(a) of the GATT 1994. However, Article 9(5) does not appear to address the administration of any other legal instrument. Instead, Article 9(5) appears to provide substantive rules on how anti-dumping duties are to be imposed under certain circumstances. 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).

II. CHINA'S CLAIMS RELATING TO THE EU DETERMINATIONS OF INJURY AND LIKELIHOOD OF INJURY

8. China has asserted that the provisions of Article 3 of the AD Agreement apply to so-called sunset reviews under Article 11.3 of the AD Agreement. The Appellate Body has explained on two occasions that the obligations set forth in Article 3 of the AD Agreement do not apply to likelihood-of-injury determinations in sunset reviews conducted under Article 11.3 of the AD Agreement. As the Appellate Body observed, the AD Agreement distinguishes between "determinations of injury" addressed in Article 3 and determinations of likelihood of "continuation or recurrence . . . of injury", addressed in Article 11.3. Article 11.3 contains no cross-references to Article 3 that would make Article 3 provisions applicable to sunset reviews. Nor does Article 3 indicate that whenever the term "injury" appears in the AD Agreement, a determination of injury must be made following the provisions of Article 3. Of course, some of the factors and analyses called for by Article 3.1 may be relevant in a sunset review conducted pursuant to Article 11.3. However, as the Appellate Body has found, the necessity of considering such factors or conducting such analyses "in a given case results from the requirement imposed by *Article 11.3* - not Article 3."

9. China also claims that the EU acted inconsistently with Article 3.1 of the AD Agreement. While it takes no position on the merits of China's factual allegations, the United States does maintain that an investigating authority acts inconsistently with Article 3.1 of the AD Agreement when it limits

the universe of domestic producers from which it obtains information to complainants for purposes of its examination of injury. As the Appellate Body has recognized, "an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation." An investigating authority's inclusion of only complainant firms in its examination of the domestic industry, particularly when non-complainants have a meaningful presence in the industry, would appear to show an *ab initio* selection bias that favours the domestic industry and does not meet the requirement that the investigating authority conduct an objective examination. It also would be inconsistent with the definition contained in Article 4.1 of the AD Agreement for an investigating authority to limit the domestic industry for purposes of the injury analysis to complainant producers or to those producers that have expressed support for the petition solely on the basis of the producers' position regarding the anti-dumping application.

10. China claims that the EU acted inconsistently with Article 3.3 of the AD Agreement by cumulating imports from China and Viet Nam. The United States disagrees with the legal premise of China's argument that an authority must establish that imports from different countries have similar volume and market share trends in order to demonstrate that cumulation is "appropriate in light of the conditions of competition between the imported products," as required by Article 3.3.

11. China makes a variety of claims that the EU's original injury determination was inconsistent with the third sentence of Article 3.5 of the AD Agreement. China appears to suggest that an injury authority must attempt to measure the "magnitude" of injury attributable to every known factor causing injury. Any such suggestion is inconsistent with the language of Article 3.5, as well as with the reasoning of the Appellate Body with respect to that language. Article 3, while it requires authorities to examine many quantitative factors in conducting an injury analysis, does not establish any formula(s) for authorities to quantify injury, *per se*. Nor does it require authorities to attempt to measure the magnitude of injury, aside from specifying that an authority must find the injury to be "material." Because the AD Agreement does not require any quantitative measure of the magnitude of either any overall injury sustained by the domestic industry or the injury caused by dumped imports, it necessarily does not require measures of the magnitude of injury caused by factors other than dumped imports. Thus, there is simply no basis in the text or context of Article 3 of the AD Agreement for the obligation that China would seek to impose that authorities provide a "good-faith estimate" of the magnitude of the injury caused by factors other than dumped imports.

12. China claims that the EU acted inconsistently with Article 6.8 of the AD Agreement "by failing to apply facts available . . . when faced with incorrect and misleading information from the sampled European Union producers" in the expiry review. Even assuming *arguendo* that the producers supplied "incorrect and misleading information," China's claim is not supported by the language of Article 6.8. The use of the word "may" in Article 6.8 indicates that, while authorities have the ability to use facts available under appropriate circumstances, they are not required to do so. If Article 6.8 were intended to impose a mandatory obligation on authorities, it would have used the word "shall."

III. CHINA'S PROCEDURAL 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. The United States 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."

14. China claims that the EU acted inconsistently with Article 6.1.1 of the AD Agreement by providing less than 30 days for interested parties to submit responses to MET and IT claim forms. 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 producers should be given at least 30 days to respond to every such request made in the course of an investigation. However, as the panel in *Egypt – Rebar* explained, the context of Article 6.1.1 reveals that the term "questionnaire" for purposes of the AD Agreement refers to one *particular* request for information made by the investigating authority. The original anti-dumping questionnaire in an investigation is the single document contemplated by the term "the questionnaire" in paragraphs 6 and 7 of Annex I. The opportunity provided by an investigating authority to permit Chinese companies to claim market economy treatment or individual treatment is a precursor to the issuance of the actual anti-dumping questionnaire, and therefore not subject to the obligations in Article 6.1.1. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, China's investigating authorities appear 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 of a minimum 30-day response period to questionnaires in CVD investigations. In a recently completed countervailing duty investigation on grain-oriented electrical steel from the United States, the Chinese investigating authorities issued multiple requests for information to the U.S. Government following the original questionnaire, including new subsidy allegation and supplemental questionnaires. For *none* of these requests for information, attached as Exhibit US-1, did China provide an initial period of 30 days to respond.

15. China asserts that the EU acted inconsistently with Article 6.9 of the AD Agreement by providing only three business days for parties to respond to what China refers to as "the Additional Final Disclosure Document" that the EU issued in its original injury investigation. However, because Article 6.9 does not specify the manner in which authorities are to make disclosures, individual authorities may use different means to implement the requirements of the provision. Some authorities may make one single, massive disclosure to interested parties. Other authorities may make many disclosures to interested parties during the course of an investigation; as a result, such an authority's final disclosure may be relatively modest in size and significance. The United States believes that what constitutes a "sufficient time" for an interested party to defend its interests and respond to the disclosure will depend on the size, significance, and nature of the disclosure.

IV. ARTICLE 17.6(I) OF THE AD AGREEMENT DOES NOT IMPOSE OBLIGATIONS ON WTO MEMBERS

16. China claims the EU acted inconsistently with its obligations under Article 17.6(i) of the AD Agreement. The Panel should reject these claims, because Article 17.6(i) does not impose obligations on WTO Members. As is clear from the text, Article 17.6(i) is addressed to panels – "the panel shall determine." To interpret Article 17.6(i) as imposing an obligation on Members is to read into that provision words that are not there, something that may not be done under customary rules of interpretation of public international law. Rather than repeat the arguments of the EU on this issue in its request for a preliminary ruling, the United States will make only one additional point. The United States notes that prior to its report in *US – Hot-Rolled Steel*, which both China and the EU discuss, the Appellate Body addressed this issue in *Thailand – H-Beams* and found that Article 17.6 does not impose obligations on WTO Members.

ANNEX B-6

THIRD PARTY WRITTEN SUBMISSION OF VIET NAM

I. INTRODUCTION

1. Viet Nam welcomes this opportunity to present its views in these proceedings involving the *European Union – Anti-Dumping Measures on Certain Footwear from China.* Viet Nam believes these proceedings relate to the understanding of certain articles of the Anti-Dumping Agreement (ADA) and the GATT 1994 in which Viet Nam has systemic interests.

2. In this third party submission, Viet Nam will focus on the following issues:

(i) Whether Article 9.5 of the Regulation No. 384/96 on anti-dumping measures against imports from countries which are not member of the European Union (AD Basic Regulation (amended and codified by Regulation No. 1225/2009) is inconsistent with the Anti-Dumping Agreement (ADA) and the GATT 1994;

(ii) Whether selection of Brazil as the analogue country is inconsistent with the ADA and the GATT 1994;

(iii) Whether anti-dumping duty on Chinese exports was not imposed and collected by the European Union (EU) on a non-discriminatory basis.

II. WHETHER ARTICLE 9.5 OF THE AD BASIC REGULATION IS INCONSISTENT WITH ADA AND THE GATT 1994

A. CLAIMS ON ARTICLE 9.5 OF THE AD BASIC REGULATION

3. China claims that Article 9.5, which states that companies concerned failed to meet Market Economy Treatment (MET) are required to satisfy the Individual Treatment (IT) test provided therein, violates Article(s) 6.10, 9.2, 9.3, 9.4, 12.2.2 of ADA, Article I.1 and Article X:3(a) of GATT 1994.

4. In its first written submission, the EU rebuts almost claims by China.

B. VIET NAM'S VIEWS ON VIOLATION OF ARTICLE 9.5 OF AD BASIC REGULATION

(i) Article 9.5 of the AD Basic Regulation is inconsistent with Article 6.10 of the ADA

5. Article 6.10 of ADA provides, *"the authorities, as a rule, shall determine individual margins of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest*

percentage of the volume of the exports from the country in question which can reasonably be investigated". (emphasis added)

6. It is noted that the Article 6.10 requires investigating authorities to determine individual margins of dumping for exporters or producers concerned. The sole exception is sampling where the number of exporters, producers, importers involved is so large as to make a determination impracticable. There is no provision elsewhere in the ADA that exporters or producers concerned have to satisfy additional conditions or requirements for enjoying individual margins of dumping, which is a basis for individual duty.

7. However, under Article 9.5 of Basic AD Regulation, the EU imposes a single anti-dumping duty on all exporters/producers that fail to satisfy the Market-Economy-Treatment (MET) test unless such exporters/producers prove, on the basis of positive evidence, they meet the additional conditions laid down in Article 9.5 of EU Basic Regulation. Thus, the Article 9.5 of EU Basic Anti-Dumping Regulation requires exporters and producers from non-market economy country to satisfy the additional conditions in order to qualify for Individual Treatment (IT) is inconsistent with Article 6.10 of ADA.

(*ii) Article 9.5 of the AD Basic Regulation is inconsistent with Article 9.2 of the ADA*

8. Article 9.2 ADA states that *"When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted."* (emphasis added)

9. It is in Viet Nam's views that Article 9.2 of the ADA requires the individualization of anti-dumping duty based on i) in the appropriate amounts in each case and; ii) on non-discriminatory basis. Article 9.5 of the AD Basic Regulation, however, provides that individual duty shall be specified for the exporters which can demonstrate to satisfy so-called IT requirements. These requirements are considered as extra and discriminatory conditions for exporters or producers to be allocated individual duty. Thus, imposing a country-wide anti-dumping duty on imported goods from non- market economy countries that do not qualify for IT test under Article 9.5 of the EU Basic AD Regulation, the Article 9.5 violates Article 9.2 of ADA.

(iii) Article 9.5 of AD Basic Regulation violates Article 9.3 of the ADA

10. The Article 9.3 of ADA clearly states a general principle that *"the amount of the anti-dumping duty shall not exceed the margin of dumping established under Article 2"* (emphasis added). Article 9.5 of the AD Basic Regulation, however, provides that EU will imposes a country-wide average anti-dumping duty on all producers not qualifying for IT. This application will necessarily exceed the individual dumping margin of some of the exporters/ producers included in the average duty calculation. Thus Article 9.5 EU Basic regulation violates Article 9.3 of ADA.

(iv) Article 9.5 of the AD Basic Regulation violates Article 9.4 of the ADA

11. Article 9.4 ADA provides that:

> *"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 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." (emphasis added)

12. However, under Article 9.5 of the AD Basic Regulation, dumping margin of exporter/producers not qualifying for IT will not be calculated on basis of individual evidence of exporters or producers. Thus, dumping margin of the sampled exporters or producers are not given, the investigating authorities is unable to calculate a weighted-average dumping margin of all sampled exporters or producers as stipulated in Article 2.4 ADA.

13. In addition, Article 9.4 of the ADA provides that, 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. But Article 9.5 of the AD Basic Regulation provides that unless such exporters or producers prove that they meet the additional conditions (IT criteria), exporters or producers shall not be applied individual duties. Therefore, it is inconsistent with Article 9.4 of the ADA.

(v) Article I.1 of GATT 1994

14. Article I.1 of the GATT 1994 states the most-favoured-nation treatment that *"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded to immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"* (emphasis added). This provision is also applied, certainly, to anti-dumping measures.

15. Meanwhile, under the Article 9.5 of AD Basic Regulation, an exporter or producer failed to meet IT criteria would be refused to enjoy individual duty. Article 9.5, therefore, obviously and automatically gives a less favourable treatment to members not recognized by the EU as a market economy. In the case that a member accepts the concession to be recognized as a non-market economy but not concession for a less favourable treatment, the Article 9.5 still violates the most-favoured-nation treatment.

III. WHETHER SELECTION OF BRAZIL AS THE ANALOGUE COUNTRY IS INCONSISTENT WITH ADA

A. CLAIMS ON SELECTION OF BRAZIL AS THE ANALOGUE COUNTRY

16. China claims that the selection of Brazil as analogue country was taken on the basis of a biased and not objective examination, thus contrary to Article 17.6(i) of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

17. In its response, the EU stated that in the process of selection of analogue country, Brazil is considered as the best choice to establish normal value for determining of dumping margin for Chinese exporters/producers.

B. VIET NAM'S VIEWS ON THE SELECTION OF BRAZIL AS ANALOGUE COUNTRY

18. It is noted that there existing different conditions between China and Brazil in terms of socio-economic developments and footwear industry formation. Brazil has a higher level of economic development than China and is one of the world's most protected footwear markets, with 35 per cent import tariff on footwear and non-automatic licensing. Moreover, higher labour cost in the total cost of production and other differences in cost structure between Brazil and China exacerbates this effect.

19. In addition, Article X:3 of the GATT 1994 states that measures of general application are to be administered in an impartial, objective and uniform manner. In this dispute, it would appear that the application of anti-dumping measures, through Regulation 1472/2006, was not objective or impartial when selecting Brazil due to the enormous differences in level of trade, production capacities, labour standards, costs, transport facilities, etc. Thus, the analogue-country selection is, arguably, inconsistent with Article X:3 of the GATT 1994.

IV. WHETHER ANTI-DUMPING DUTY ON CHINESE EXPORTS WAS NOT IMPOSED AND COLLECTED BY THE EU ON A NON-DISCRIMINATORY BASIS

A. CLAIMS ON IMPOSITION AND COLLECTION OF ANTI-DUMPING DUTY ON A DISCRIMINATORY BASIS

20. In its submission, China claims that the EU application of anti-dumping duties on Chinese footwear products is a *"Violation of Articles 3.1 and 9.2 of the Anti-Dumping Agreement because the anti-dumping duty on Chinese exports was not imposed and collected by the EU on a non-discriminatory basis as the duty rate established for China was higher than that for Viet Nam, although both the dumping and injury margins found for Vietnamese exporters were higher than those for Chinese exporters"* (Claim III.16)

21. In its response, the EU stated that the "lesser duty" rule is applied in imposition of anti-dumping duties on Chinese exports in the case of footwear products (which also involved Vietnamese exports). Due to the fact that it is a non-mandatory obligation bound by the Anti-Dumping Agreement, claims of China seem to be groundless.

B. VIET NAM'S VIEWS

22. The 'lesser duty' principle is provided in Article 9.1 of the Anti-Dumping Agreement:

> *The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.* (emphasis added)

23. It is noted that even though application of this principle is encouraged by the WTO language of *"desirable that the imposition be permissive in the territory of all Members"* (emphasis added), application of this principle is not obliged to members of the WTO.

24. Consequently, a member may use the notion of injury in its lesser duty rules without thereby incurring a new WTO obligation or extending an existing one. Therefore, it is groundless to claim that either the lesser duty rule itself or methodology used in application of the rule is inconsistent with the WTO regulations.