ANNEX C

ORAL STATEMENTS, OR EXECUTIVE SUMMARIES THEREOF, OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING WITH THE PANEL

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA

I. THE REQUEST FOR PRELIMINARY RULING OF THE EUROPEAN UNION

1. With respect to Article 17.6(i) of the Anti-Dumping Agreement ("ADA") as it relates to investigating authorities, China would first like to stress that the issue presents two completely separate questions. One is whether or not the language of the Article, introducing to the ADA the concepts of "bias" and "proper establishment of facts," contains any substance beyond that already contained in, for example, the "positive evidence" and "objective examination" language contained in Article 3.1. The other concerns the relationship between the broad standards[1] set by Article 17.6(i) and those parts of an investigation *not* arising under a provision with some sort of fairness or due process language already built into it. Notably the resolution of the second question will ultimately determine, among others, the question of whether or not an authority's conduct throughout certain key parts of an anti-dumping investigation is completely unreviewable.

2. With respect to the first question, China notes that the broad standards set by Article 17.6(i), namely those referring to a proper establishment and unbiased and objective evaluation of the facts, quite clearly apply to the *entire matter* before the Panel, not only certain stages of the investigation under review. This is made clear by the chapeau of Article 17.6, referring to the matter before the DSB.

3. Next, China notes, with clear support from the Appellate Body ("AB") in *US - Hot Rolled Steel*, that even though the language of the provision only explicitly defines the Panel's discretion to overturn the decisions made by authorities with respect to issues of fact, the Article *impliedly* and *necessarily* defines the limits of the discretion of authorities, as triers of fact. Namely, that authorities' conclusions *cannot* be overturned if they comply with the broad standards set by the Article, but in the event that they do not, then those conclusions must be overturned.[2]

4. It is not entirely clear whether the EU denies that the limits of the Panel's discretion are inextricably linked to that of the authorities in spite of the AB's clear pronouncement to that effect, or whether the EU considers that even with such link, without an *explicit obligation* on authorities to act in conformity with the standards set by Article 17.6(i), there can be no basis on which to claim a violation for the failure to conduct an investigation in conformity therewith. Either position is untenable and renders the broad standards set by the Article a nullity with respect to everything except the aspects of an investigation the related provisions of which *already* have some built-in due process or fairness language, such as those relating to the determination of injury in Article 3.1.

5. China considers that when the AB in *US - Hot Rolled Steel* said that the provision relates to the authorities' "establishment and evaluation of the facts under *other provisions* of the [ADA],"[3] it was clearly referring to the "other provisions" pursuant to which facts could be established and evaluated. The EU's argument, on the other hand, seems to depend on the premise that the "other provisions" referred to are those which - before the Uruguay Round-addition of Article 17.6(i) - *already* contained some fairness or due-process related language, of which the language in

[1] Note that "broad standards" is the language of the AB. See AB Report in *US - Hot Rolled Steel*, para. 56.
[2] Id.
[3] Id. Emphasis added.

Article 17.6(i) is meant to serve as a mere "reminder".[4] In China's view, however, the chapeau of the Article, along with common sense, supports the conclusion that the standards set by the Article were meant to set limits on both the authorities' conduct and the Panel's review thereof with respect to the *entire dispute.*

II. CLAIMS CONCERNING THE ORIGINAL AND REVIEW REGULATIONS

II.1 CLAIMS CONCERNING DUMPING

6. China first wishes to correct the EU's unfounded assertion that since paragraph 151 of the Working Party Report was not included in the Accession Protocol, the WTO members were indicating that they did not regard the statement as representing an existing legal obligation. Such an assertion reduces to nullity the conclusions summarized in the Working Party Report concerning the terms of China's accession negotiated in the 21 meetings between 1996 and 2001. The express acceptance of the WTO Members in Paragraph 151 of the Working Party Report to comply with the provisions of that paragraph in implementing subparagraph (a)(ii) of section 15 of the Accession Protocol, is an integral part of Paragraph 15(a)(ii) of the Accession Protocol and China's agreement to the temporary derogation therein.

7. With respect to the analogue country selection, the substance of China's claim is that when WTO Members resort to the temporary derogation provided for in the second supplementary provision of Article VI:1 GATT 1994, it should not result in a breach of Articles 2.1, 2.4 and 17.6(i) of the ADA and Article VI:1 GATT 1994.

8. The factors described by China in its FWS of necessity resulted in Brazilian prices not being 'comparable prices' to the Chinese export prices for the purpose of Articles 2.1 of the ADA and VI:1 GATT 1994. Therefore, the inherently incomparable Brazilian normal value precluded a fair comparison within the meaning of Article 2.4 of the ADA. The EU's view that it is enough for an investigating authority to just take a random analogue country and claim that it provides 'comparable' prices/costs for the purpose of the normal value establishment, is unacceptable. This is because if the analogue country selection leads to the establishment of a normal value which is not comparable to the export price to begin with, Article 2.4, first sentence, is automatically violated as there can be no fair comparison and the concept of 'price comparability' is overturned at its root.

9. Article 2 of the ADA aims to achieve price comparability based on a fair comparison. The very reason for different methodologies in Article 2.2 and the special rule in the second supplementary provision of Article VI:1 GATT 1994 was to establish a comparable normal value appropriate for price comparability and thus suitable for achieving fair comparison. The fair comparison obligation would serve no purpose if, to begin with, a normal value based on analogue country data is not appropriate and is unsuitable for the purpose of fair comparison.

10. Having explained the basis of its claim, China further submits that the issue of the degree of appropriateness of Brazil as the analogue country (*i.e.* most appropriate or best) is not the subject of the claim and the EU's arguments in this regard are irrelevant to the dispute.

11. China considers that investigating authorities are obliged to follow certain criteria in the analogue country selection. Based on the words and the negotiating history of the second supplementary provision of Article VI:1 GATT 1994, the existence of fair and adequate competition in the analogue country is essential in determining whether the analogue country prices are appropriate for price comparability. Moreover, the WTO members in paragraph 151 of the Working Party Report accepted that an analogue country selected should have *"significant producers of comparable merchandise"* and be either *"at a level of economic development comparable to that of*

[4] Para. 13, EU's FWS.

China" or otherwise be *"an appropriate source for the prices or costs"*. This acceptance reiterates in more explicit terms the need to establish a comparable normal value. Therefore, the comparability of the socio-economic standards, production structures and costs are important criteria for ensuring that the analogue country selected leads to the establishment of comparable prices. Additionally, the absence of domestic sales by cooperating producers of an important product type (e.g. children's footwear as found in the present case) demonstrates the clear absence of comparable prices. Therefore, China has rightly argued that Brazil was not an appropriate analogue country. The EU's claim that it considered competitiveness in the Brazilian market and 'variety of footwear types' traded besides the 'volume of representative sales' is defeated by facts on record. The facts show respectively that the EU had no data available for the period prior to the 35 per cent import duty rate increment, to make a comparative evaluation of the effect on domestic sales and competition afterwards. Furthermore, children's footwear which was a significant part of the exports from China was not produced by any cooperating Brazilian producer implying therefore that the claim of considering the variety of footwear traded was indeed a farce.

12. Furthermore, compared to the Review Regulation[5], in its FWS, the EU has changed its reasoning for the disparity in sending the analogue country questionnaires to Indian and Indonesian producers, and even this ex-post rationalization is not supported by facts. The EU's unsubstantiated statement that "*in practice, Indian and Indonesian companies had more time to respond than those in Brazil*"[6] is also contradicted by the factual information in the Note for the File dated 6 February 2009.[7] Finally, the collusion between the Italian and Brazilian footwear associations which the EU failed to investigate is not remedied by the assertion that the data of the Brazilian producers was not distorted. The reason being that it cannot be excluded that the two footwear associations colluded to encourage carefully selected Brazilian producers to cooperate, with the aim of ensuring the finding of high dumping margins.

13. Similarly, in the context of the original investigation claims, in trying to justify what the EU recognizes in its FWS is a "considerable emphasis" on the criterion of the representativity of domestic sales, the EU confuses the very distinct steps of (1) selecting an appropriate analogue country and (2) selecting the data to be used (prices or cost) for calculating normal value on the basis of the data collected in the previously selected analogue country.

14. China has also provided evidence indicating that the procedure for the analogue country selection in the original investigation was biased. Regrettably, the EU attempts to distract the Panel's attention from the substance of China's claims, e.g., by claiming that China presented no evidence to indicate that any party to the investigation made any complaint regarding the EU's efforts to gather information from exporters in the analogue country. However, Chinese exporting producers *did* in fact request the EU to undertake more extensive and diligent efforts to secure producer cooperation and better assess the appropriateness of India and Indonesia as analogue countries.[8] In response to China's claims, the EU makes a number of assertions, but does not adduce any evidence to support them, despite the clear endorsement by the AB of the rule that the party which asserts a fact, whether the complainant or *respondent*, is responsible for providing proof thereof.[9] Thus, the burden of proving that there were fewer (known) producers in Indonesia lies with the EU, not China. Similarly, China is being accused of having provided evidence which is "sketchy in the extreme", but at the time of its FWS, the EU itself was unable to confirm the date of submission of the confidential version of the questionnaire of a Brazilian exporter. Furthermore, the record shows that the question - which deadline was granted to the Brazilian exporters to respond to the questionnaire - was just one out of the many questions and arguments raised by interested parties to which the EU has failed to answer or

[5] Recital 52, Review Regulation.
[6] Para. 188, EU's FWS.
[7] Exhibit CHN-8.
[8] Exhibit CHN-91, page 20.
[9] AB Report, *US - Wool Shirts and Blouses*, p. 14.

which it has failed to consider, and therefore shows that the EU's establishment of the facts was not proper.

II.2 CLAIMS CONCERNING INJURY AND CAUSATION

15. In the context of the injury claims, the EU's assertion that China's claims II.2-II.5 suffer from a legal error is incorrect. *In US - OCTG Sunset Reviews*, the Panel based on the reasoning applied by the AB in *US – Corrosion-Resistant Steel* (with regard to the determination of 'dumping' in expiry reviews), held that to the extent that an investigating authority relies on a determination of injury when conducting a sunset review, the obligations of Article 3 would apply to that determination.[10]

16. China has submitted arguments in its FWS accompanied by excerpts from the Review Regulation which will be elaborated in the Second Written Submission, that the EU made a detailed injury determination.[11] For instance, the EU analyzed whether there was a significant increase in the allegedly dumped imports per Article 3.2 of the ADA. It further evaluated the price effect of the allegedly dumped imports by making a new undercutting calculation based on a sample of the Chinese exporters and EU producers selected in the review investigation. The EU also conducted a cumulative injury assessment pursuant to Article 3.3, evaluated the injury indicators pursuant to Article 3.4 and made a causal link analysis per Article 3.5. Finally, the EU relied upon that injury determination entirely to the exclusion of any additional analysis for concluding the likelihood of continuation of injury which was contained in a mere five recitals of the Review Regulation. Consequently, the violations of the Article 3 provisions are claimed in the context of the injury determination and not the likelihood analysis under Article 11.3. China is not "forcing the Panel to disregard Article 11.3 of the ADA in the consideration of all the injury-related determinations in the Regulation"[12], as claimed by the EU, but is just following the approach suggested by the Panel in *US - OCTG Sunset Reviews*.

17. Having clarified the legal basis of its injury-related claims, China wishes to reiterate that there was a lack of fundamental fairness and objectivity in the procedure for the injury determination of which the sampling of the domestic industry was the first step, because the complainant producers were not required to complete sampling forms which resulted in the fact that the relevant 'positive evidence' for sampling was not available at the time of sample selection. The EU has deviated from China's fundamental argument that the production and sales data of the individual complainant producers for the Review Investigation Period which was claimed to be the key basis of the sample selection in the Notes for the File[13] and the Review Regulation[14] was not available in the complaint, in the standing forms or pre-10 October 2008 CEC submissions. The EU's post-sample selection justification regarding the representativeness of the sample cannot rectify the failure to comply with Articles 3.1 and 17.6(i) at the time of sample selection.[15]

18. China notes that the EU has not provided any evidence to support its assertion that the relevant sampling information was available to it and that there was no need or practical purpose for sending sampling forms to the complainants. The EU's contention that the information that would have been sought through the sampling forms was already available,[16] is simply factually incorrect.

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[10] Panel Report, *US - OCTG Sunset Reviews*, paras. 7.273-7.275.

[11] See also recital 219, Review Regulation; para. 254 of EU's FWS. In both these contexts the EU notes made an injury analysis and that it investigated the existence of injury.

[12] Para. 244, EU's FWS.

[13] See Note for the Files dated 29 October 2008, 9 December 2008, and 9 March 2009.

[14] Recital 21, Review Regulation.

[15] Para. 279, EU's FWS.

[16] Para. 263, EU's FWS.

As done on previous occasions for instance in *EC - Salmon*, China requests the Panel to ask the EU to demonstrate what information in the file of this investigation supports its arguments.[17]

19. Concerning the representativity of the sample, China notes that it posits the application of Article 6.10 of the ADA with regard to the sample of the domestic industry on two grounds. First, China's arguments are based on the ruling of the Panel in *EC - Salmon* that a determination of injury is a collective assessment for the entire domestic industry as a whole *and "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 requirements of Article 3.1 of the AD Agreement"*.[18] Second, China relies on that Panel's reasoning that whether any other factor besides the production volume would be equally or more relevant to ensure that the sample adequately represents the domestic industry has to be assessed on a case-specific basis. Thus, the *EC - Salmon* Panel's finding that it *saw "no basis to impose the criteria of Article 6.10 on sampling in the context of injury"* cannot be read as a prohibition on the use of these criteria in the injury context. Hence, China considers that if the volume of production or sales is the key factor taken into account by the investigating authority as done by the EU, then it must comply with the sampling criteria in Article 6.10 which would ensure that the sample is representative of the entire domestic industry as a whole and satisfies the requirements of Article 3.1. The EU however failed to select a sample accounting for the 'largest percentage of volume' of production, sales and included in the sample one or more companies that had small production volumes. China reiterates its request to the Panel to use its investigatory powers under Article 13.1 of the DSU to request the EU to disclose the number of employees per sampled company. China believes that such data is likely to further evidence that the EU in fact included some very small companies in the sample, contrary to its stated position in the Note for the File.

20. China reiterates that in the original investigation the EU by its own admission selected the domestic industry sample based on the production volume of the complainants. Likewise, in the review investigation, through the various Notes for the File, the EU made clear that *"the baseline for the [sample] selection was founded on a ranking of the producers with the highest production volume in the IP."*[19] Therefore, the sample of the EU producers selected should have accounted for the largest percentage of volume of production which was not the case as it included even small producers in that sample and producers that outsourced production to non-EU countries.

21. With regard to the definition of the domestic industry in the review investigation, China submits that it is only in the FWS that the EU has explicitly mentioned, albeit in direct contradiction to the Note for the File[20] issued during the investigation and on the basis of reference to one recital of the Review Regulation (which is certainly not self-explanatory), that the domestic industry consisted of complainants and non-complainants. China requests the Panel not to accept the post-investigation definition of the domestic industry as claimed by the EU. The contrary would permit investigating authorities to maintain a safety valve by leaving the text of the determination vague and switching the definition of the domestic industry depending on the situation to ensure that they are protected against any allegation of a breach of the ADA even though they expressly violated the provisions of that

[17] In *EC - Salmon*, the Panel noted that: *"[w]e consider it imperative that there be some indication in the published determination, or at least some information on the matter in the files of the investigating authority which can be identified for a reviewing panel, on the basis of which that panel can determine how the facts were established, beyond the undisputed good faith and hard work of the staff of the investigating authority*." para. 7.667.

[18] *Ibid.*, at paras. 7.128 and 7.130.

[19] Note for the file dated 9 March 2009. Exhibit CHN-27. Also Note for the File dated 29 October 2008 mentions that 'eight large producers' were sent the anti-dumping questionnaire. Exhibit CHN-25.

[20] Note for the File dated 9 March 2009.

agreement in the course of the injury determination. This would make the Article 3.1 and 3.4 provisions practically ineffective.

22. China also notes that such a radical change in the definition of the domestic industry in the review investigation as compared to the original investigation would have required a detailed explanation in the Review Regulation. This is because Article 11(9) of the EU's Basic AD Regulation requires that "*[i]n all review…investigations…the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty*."

23. However, in case the Panel were to accept the EU's new definition of the domestic industry, China submits that a sample representing 3.1 per cent of the total domestic industry production and consisting only of the complainants cannot possibly be considered representative of the entire domestic industry which then included the non-complainant producers accounting for around 65 per cent of the EU production. By selecting a sample of the domestic industry from the complainant producers' pool only, the EU violates Articles 3.1 and 17.6(i) of the ADA.

24. Irrespective of the different domestic industry definition now claimed by the EU, China emphasizes the breach of Article 3.4 in the EU's evaluation of the macro-economic indicators. The EU has asserted that producers who imported over 25 per cent of their output from the countries concerned and had delocalized production were not part of the EU production.[21] However, in contradiction to this assertion, the EU evaluated the injury indicator 'production' based on the Prodcom data, and the remaining indicators on the basis of national associations' data which included the data of even those producers that are related to Chinese/Vietnamese producers and/or are major importers of Chinese or third country outsourced footwear. Thus Prodcom and national associations' data did include the data of producers not part of the EU production and therefore the domestic industry.

25. The EU's whole evaluation of 'production' based on Prodcom data for EU-27 as being equal to the domestic industry production is based on the erroneous assumption that out of 18,000 producers, only two non-complainant producers needed to be excluded from the definition of the Union production and industry on account of their relation to Chinese exporters and significant imports. This assumption is refuted by facts and the Review Regulation. The latter states that the EU made the evaluation only for the complainant producers, as to whether or not they were related to exporting producers in the countries concerned, had delocalized production, or were major importers of the product concerned from the countries concerned/third countries.[22]

26. Considering the EU's definition of the domestic industry in its FWS, the breach of Article 3.4 and lack of objective evaluation is in fact more pronounced. This is because 'production' was evaluated based on 100 per cent production in the EU as reported in Prodcom, whereas the indicators production capacity, sales, employment, growth were evaluated based on the data of eight national associations accounting for 80 per cent of the EU production.[23]

27. Additionally, the lack of positive evidence for the injury evaluation is not remedied by the fact that the eight Member States' associations were verified, when the data reported by them[24] was clearly stated as being based on 'estimates' for the lack of official statistics[25] and was not specific to the like product. Moreover, concerning production, the Prodcom data clearly includes estimates and reports production on an yearly basis at the 8-digit CN code level which includes the data for the

[21] Recital 339 Review Regulation.
[22] Recital 195 Review Regulation.
[23] Para. 303, EU's FWS.
[24] For injury indicators such as production, sales volume, production capacity.
[25] Responses of ANCI, Polish Chamber of Shoe and Leather Industry.

products not under investigation as well. Therefore, one is left to guess how the EU evaluated the Review Investigation Period production figures for the like product.

28. Finally, with respect to the causation analysis in the original investigation, China has argued that the EU's interpretation of the non-attribution language effectively renders that provision null. In spite of the EU's boilerplate proclamation that it "carefully analysed" other known factors, and they "in isolation or seen together would [not] be such as to break the causal link between the dumped imports and the injury suffered by Union producers," China considers that the Regulations demonstrate that for the "other known factors" that did have *some* acknowledged injurious effect, the EU declined to consider those factors for non-attribution which did "not *on its own* appear to be a factor that would break the causal link." This causal link standard with respect to *individual factors* is unacceptable. It would mean that even if, for example, two variables each accounted for half of the injury caused to the domestic industry, in terms of the depressive effects on prices, neither of those two variables would by themselves sever the causal link, as a result of which there would still be causation. Under such interpretation, the non-attribution requirement would have no value.

29. Furthermore, with respect to certain other factors, such as the steep appreciation throughout the Investigation Period of the EURO generally and *vis-à-vis* the currency in which most competing imports are priced in particular, the EU posits that such a factor would not even be *eligible for consideration* or analysis because China cannot "shift responsibility for the injury suffered by the EU producers away from the exporters and onto an extraneous event[26]". China considers that the very purpose of the non-attribution analysis is to *identify the extraneous events causing injury for which the exporters are not actually responsible.* The EU justifies its stance on these issues through its wide discretion on the methodology according to which other factors are analyzed, but China submits that the EU is confusing the selection of an analytical methodology with the legal standard to which the results of that analysis are held in order to be given actual effect.

II.3 CLAIMS CONCERNING PROCEDURAL ISSUES

30. While there are numerous procedural and transparency issues shrouding the EU's original and review determinations, at this stage China wishes to highlight a few key issues. With reference to the review investigation, the EU blatantly disregards the Panel's ruling in *Guatemala - Cement II* in the context of Article 6.1.2 by asserting that *"when a company supplies information, described as non-confidential, which is of a type that would normally be accorded confidentiality, the European Union authorities will check that company's intentions on the point before making it available to other interested parties",* thereby justifying a one month delay in placing the information in the non-confidential file.[27] China submits that, first, it is not for the investigating authorities to judge confidentiality of information in the specific context of a non-confidential document submitted by a party. Second, in the absence of a duly substantiated request for confidentiality by the party submitting the information, *'the requirement to protect confidential information'* in Article 6.1.2 cannot be invoked to justify the failure to promptly make available that information to other interested parties.[28] The latter point also underlines the fallacy of the EU's interpretation that the period for assessing the prompt availability of information runs from the moment the non-confidentiality status of the document/information is ascertained to the satisfaction of the investigating authority.

31. With respect to the express conditions for according confidentiality under Article 6.5, the EU erroneously claims in the context of the review investigation that for information that is 'by nature' confidential, good cause is shown by *"simply placing data of this kind in the appropriate part of the submission."*[29] Such an interpretation makes Article 6.5 totally unnecessary and if accepted, would

[26] Para. 476, EU's FWS.
[27] Paras. 358, 359, EU's FWS.
[28] Panel Report, *Guatemala - Cement* II, paras. 8.142-8.143.
[29] Para. 447, EU's FWS.

permit parties to submit blank non-confidential questionnaire responses. Moreover, the EU's contention that confidentiality requested in the expiry review request for the names of the complainants is enough to cover all other submissions of the complainants and supporters and for all other sets of information for which neither confidentiality was requested nor good cause was demonstrated, completely belittles the provisions of Article 6.5. It also discredits the *Guatemala - Cement II* Panel's ruling that authorities may not grant confidential treatment to information on their own initiative in the absence of a good cause demonstration by the party concerned.[30]

32. Besides having failed to require the concerned sampled EU producers in the review investigation to state reasons why non-confidential summaries could not be provided for the information in the injury questionnaire responses submitted in confidence, based on a misunderstanding of Article 6.5.1, the EU explains in its FWS why non-confidential summarization was not possible, when it was actually incumbent on the parties concerned to do so.

33. In the original investigation, by the EU's own admission, certain information was never supplied to interested parties.[31] In this respect, the EU stated that *"(i)n addition to the protection normally provided to confidential business information the European Union was in this case motivated to extend confidential treatment in order to protect the identities of the Complainants …"*. China submits that such a "motivated extension" of confidential treatment, is contrary to Article 6.5.

34. As was already submitted during the administrative procedure[32], the EU is not able to confirm why certain documents pertaining to the original investigation were not included in the non-confidential file. Interested parties were not granted access to the questionnaire response of the EU producer "n.10" and the more than 500 missing declarations of support. The EU seems to hold the peculiar view that it may select a "sample" of information submitted by interested parties for inclusion in the file and that it may unilaterally decide to withhold information duly submitted by interested parties on the ground that the interests of other interested parties would not have been served by its disclosure.[33]

III. CLAIMS CONCERNING ARTICLE 9(5) OF THE EU BASIC AD REGULATION

35. China considers that the EU has violated the basic MFN principle, which requires WTO Members to treat like products equally, irrespective of their origin. China begins from the premise that Article 9(5) of the Basic AD Regulation constitutes a rule or formality in connection with importation since it effectively determines whether or not individual anti-dumping duties will be imposed upon the product concerned upon importation to the EU. Furthermore, individual duties clearly constitute an "advantage" within the meaning of the Article because receipt of an individual duty ensures that an exporter is not subjected to a duty higher than its own dumping margin.

36. The EU has not provided any legal basis for the proposition that the status of the Chinese economy may have an effect on the nature of the imports originating in China such that they could not be considered like products, as compared to imports from other countries, and therefore the EU's argument with respect to the GATT I.1 claim fails.

37. Nor has the EU provided any legal basis for the proposition that the status of China's economy could affect whether an exporter is eligible for the calculation of an individual dumping margin and/or subsequent imposition of an individual duty. This is nevertheless a fundamental premise on which the EU's defenses relating to China's Article 6.10 and 9.2, 9.3 and 9.4 claims rest.

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[30] Panel Report, *Guatemala - Cement* II, paras. 8.220-8.221.
[31] Para. 762, EU's FWS.
[32] CHN-87, p. 8.
[33] Para. 781, EU's FWS.

38. With respect to the Article 6.10 claim, China considers that Article 9(5) is inconsistent with the ADA because it provides that specific conditions must be met before exporting producers from "non-market economy" countries can receive an individual dumping margin. This is impermissible because the face of the text, as well the context of other provisions of the ADA, clearly indicate that sampling is the only exception to the rule that individual exporters are to be granted individual dumping margins. The EU argues, contrary to consistent case law, that a departure from the rule contained in Article 6.10 is in theory permissible in other situations as well. In support of this view, the EU relies principally on the identification of what it considers to be other "exceptions" to the rule. China considers these to not actually be exceptions at all, but rather circumstances otherwise provided for in the ADA, and China will fully address them point by point in its Second Written Submission.

39. In any case China notes that even in the event that the Panel were actually willing to create a judicially-made exception to what the EU has conceded is, at a minimum, a "clear preference"[34] for individual margins, the EU has not even begun to adduce evidence demonstrating a need, compelling or otherwise, for what would be a unique derogation from the norm.

40. Next, China will address the EU's alternative argument to the "exceptions" issue, that the reasoning of the Panel report in *Korea - Paper* justifies the "IT regime" instituted by Article 9(5). China considers that any analogy between the two does not obtain for a multitude of reasons, a few of which China will identify here. First, the EU wrongly presumes that the aim of the *Korea - Paper* test was to identify the "actual source of price discrimination," and justifies the IT regime on the basis that it shares that aim. The EU uses the phrase "actual source of price discrimination" 18 times throughout its FWS, but the Panel report did not frame it this way even once because the relevant portion of the report is meant to address the risk of the *circumvention of duties*, and that only.

41. Even if the IT criteria *were* limited to those relating directly to a high risk of circumvention of duties by WTO Members, the Panel in *Korea - Paper* was clear that the burden of proving this risk, as a factual matter, was on the authorities. The authorities were explicitly <u>not</u> given the discretion to operate under a legal presumption that exporters were related, which is precisely what the EU has done here.[35]

42. China will now address the Article 9.2 claim. With respect to the parties' disagreement over the definition of the word "impracticable" within the text of the Article, China considers that the word clearly refers to situations in which there is a high number of exporters. This should be clear from the face of the Article itself, and even more so when read in light of the similar structure of Article 6.10, which provides an exception to the principle that exporters should receive an individual dumping margin, only in the case of sampling.

43. With respect to the EU's alternative argument that it may consider the State to be a single supplier within the meaning of Article 9.2, China considers that Article 9(5) is inconsistent with Article 9.2 for many of the same reasons that it cannot be considered analogous with the *Korea - Paper* test. Namely, the factual inquiry impermissibly shifts the burden of proof as to relation with the State and most of the IT criteria go far beyond what would be necessary to identify whether the State were indeed the true single "supplier" of a good.

44. Mr. Chairman, Members of the Panel, the Delegation of China thanks you very much for your attention and will be at your disposal for answering any questions you may have.

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[34] *Id.* at 82.
[35] Panel Report in *Korea - Paper*, para. 7.161.

ANNEX C-2

OPENING STATEMENT OF THE EUROPEAN UNION

I. INTRODUCTION

1. Mr. Chairman, Members of the Panel, we would like to thank you for agreeing to serve on this Panel and thank the Secretariat for all the work they have done and will do in facilitating your task.

2. In this dispute China has launched a great number of claims in respect of a provision of the European Union's Basic Anti-Dumping Regulation and of two measures taken in respect of certain footwear originating in China. We have responded to these claims in our First Written Submission in great detail. We do not intend to repeat today all the points we have made in that Submission, although we of course remain ready to explain and elaborate upon any of them should the Panel so require. Rather, we will focus only on certain specific points and also on some general remarks about China's claims, and the way they are presented in its Submission. We will also address some of the matters raised in the submissions of the Third Parties.

II. CHINA'S "AS SUCH" CLAIM AGAINST ARTICLE 9(5) OF THE BASIC AD REGULATION

3. Regarding China's "as such" claims against Article 9(5) of the Basic AD Regulation, China blatantly ignores the actual scope of the measure at issue and follows incorrect interpretations of the relevant provisions of the covered agreements.

4. In view of Articles 6.2 and 7.1 of the *DSU*, the European Union considers that the Panel's mandate with respect to China's "as such" claim is to examine the conformity of the concrete aspects of the specific measure described by China in its Panel Request with the relevant provisions of the covered agreements invoked by China.

5. The *specific measure* in this case, as defined by China's Panel Request, is a very concrete legislative provision, i.e., Article 9(5) of the Basic AD Regulation. The *concrete aspects* provided for by Article 9(5) and that China described in its Panel Request are that, in case of imports from non-market economy countries: (i) an individual anti-dumping duty shall be specified for suppliers that can demonstrate, on the basis of properly substantiated claims, that they fulfil the five criteria listed in that provision; and, otherwise, (ii) the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier. The Panel is thus not called upon to examine matters merely because they may be somehow "connected" to the Article 9(5) determination as to who the relevant supplier is. Thus, it is not called upon to examine matters pertaining to the calculation or individual determination of dumping margins, or to the way in which the level of anti-dumping duties is established. It is limited to the matters specifically identified by China in its Panel Request.

6. Moreover, the European Union has already laid out the reasons why the Panel should reject most of China's claims. Firstly, contrary to the requirements under Article 6.2 of the *DSU*, China's Panel Request failed to present the problem clearly. Secondly, on the substance, the specific measure described by China in its Panel Request does not fall within the scope of the obligations contained in

Articles 9.2[1], 6.10, 9.3 and 9.4 of the *Anti-Dumping Agreement* and in Article X:3(a) of the *GATT 1994*.

7. In any event, like the vast majority of third parties expressing a view on this issue[2], the European Union considers that China's claims against Article 9(5) are based on an erroneous understanding of the relevant provisions in the *Anti-Dumping Agreement*, the *GATT 1994* and China's Protocol of Accession.

8. Article 6.10 of the *Anti-Dumping Agreement* allows for a single dumping margin to be determined for the actual producer and the source of the price discrimination, even if there are several exporters involved. This is in essence the situation that prevails in non-market economy countries, and particularly in China[3], where State control over the means of production and State intervention in the economy including international trade and export activities imply that exports are best regarded as emanating from a single producer. It follows that the imposition of anti-dumping duties on a single supplier, i.e., China, despite the existence of several exporters which do not act independently from the State, in other words non-IT suppliers, is also permitted by Article 9.2 of the *Anti-Dumping Agreement*. In this respect, the calculation of dumping margins and the imposition of anti-dumping duties on a country-wide basis in cases of imports from non-market economy countries do not differ significantly from the situation where the investigating authority is confronted with several exporters who are *all* dependent on a single producer, that producer being the actual source of the price discrimination.

9. Even assuming that Article 9.2 of the *Anti-Dumping Agreement* can be read as containing the principle to impose individual anti-dumping duties for each known exporter or producer, the imposition of country-wide anti-dumping duties is nevertheless permitted in cases where such imposition on an individual basis would result in the measure being *ineffective*. This is precisely the situation that arises because of China's non-market economy status. Indeed, the objective of offsetting or preventing dumping (stated in Article VI:2 of *GATT 1994*) would be undermined if individual duties were to be imposed on suppliers whose export activities were not sufficiently independent of the State (i.e., the actual producer of the product concerned).

10. Article 9(5) of the Basic AD Regulation mirrors the language of Article 9.2 of the *Anti-Dumping Agreement* as far as possible, and establishes a mechanism for imposing anti-dumping duties in situations where market-economy conditions are absent which accurately addresses the actual source of dumping in each case (i.e., either the independent MET/IT supplier, or the State and its export branches as one supplier).

11. Thus, Article 9(5) is fully in conformity with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. The European Union observes that China's claims under Articles 9.3, 9.4 and 18.4 of the *Anti-Dumping Agreement*, Articles I:1 and X:3(a) of the *GATT 1994* and Article XVI:4 of the *WTO Agreement* are entirely dependent on a finding that Article 9(5) "as such" infringes Article 9.2 of the *Anti-Dumping Agreement* and, to some extent Article 6.10 of the *Anti-Dumping Agreement*. Since this is not the case, the Panel does not need to examine those claims.

III. ARTICLE 17.6(I) ADA

12. We now turn our attention – very briefly – to China's claims based on Article 17.6(i) of the *Anti-Dumping Agreement*. As the European Union has already explained, China's claims based on

[1] EU First Written Submission, footnote 123.

[2] U.S. Third Party Written Submission, paras. 3–17; Japan's Third Party Written Submission, paras. 12–13; Brazil's Third Party Written Submission paras. 12–26; Colombia's Third Party Written Submission, paras. 7–12; Turkey's Third Party Written Submission, paras. 5–15.

[3] EU First Written Submission, paras. 71–73.

this provision are not suitable to be pursued in dispute settlement proceeding. But rather than repeating our reasons for adopting this position, at this juncture we would like to focus on the significance of China's claims for the present proceeding and the European Union's rights of defence.

13. In this respect, we also refer to the Third Party Written Submission of Brazil, specifically to Brazil's view that "Article 17.6(i) is a procedural rule, relating to the WTO dispute settlement process, that does not impose self-standing obligations" upon investigating authorities.[4] While this statement supports the position that the European Union takes before the Panel, that is not why we mention it here. Our present concern is that, should the Panel indeed consider that Article 17.6(i) imposes direct obligations on WTO Members, the European Union would consider it necessary to enter into a discussion before the Panel about the extent and scope of such obligations. Should Article 17.6(i) be interpreted as entailing such direct obligations, their extent would have to be determined, taking due account of other relevant provisions[5] establishing, to use Brazil's language, other related "procedural rules" provided in the *Anti-Dumping Agreement*, including the second sentence of Article 17.6(i). China has never taken a stance on this issue. And yet this was one of the reasons why the European Union raised this issue as a preliminary matter – namely to understand what case we have to answer on this issue.

IV. GENERAL REMARKS

14. Our next remarks are of a more general nature. The fact that China is challenging three distinct legal instruments, and that with regard to each of the two operative measures it is making a lengthy list of challenges, is a reason for paying special attention to the issue of whether those challenges are expressed clearly. Unfortunately, a reading of China's Submission shows it to be characterised by confusion rather than clarity of expression.

15. A minor but quite avoidable source of confusion becomes apparent right at the outset. The two operative measures, the Definitive Regulation and the Review Regulation were adopted in 2006 and 2009 respectively. Put at its simplest, the first 'sets the scene' for the second. Certain aspects of the second, such as the choice of PCNs or the denial of market-economy treatment, do not make sense unless one knows the details of the first. Nevertheless, for no apparent reason China has chosen to set out its case against the two measures in the opposite order, that of 2009 before that of 2006.

16. More seriously, China creates confusion by making little distinction between the bases of its challenge on the two measures. Instead of recognising the distinct legal context of the Review Regulation, specifically the fact that, as an expiry review, it is governed by Article 11.3 of the *Anti-Dumping Agreement*,[6] China approaches both measures as though they were initial investigations. Yet, as we explained at length in our Submission, it is Article 11.3 of the *Anti-Dumping Agreement* which governs the reviews and not, for instance, Article 3. China's reliance on the latter provision constitutes a legal error which, on its own, invalidates China's claims.

17. The imprecise nature of many of China's claims creates additional confusion. Thus, in many cases the European Union is accused of misbehaviour without any reference to particular rules of the *GATT 1994* or the *Anti-Dumping Agreement*. Again, in claims regarding supposed procedural errors, for example regarding allegations of improper delays on the part of the investigating authorities, China repeatedly confuses the applicable provisions of Article 6 of the *Anti-Dumping Agreement*.

18. Also in the context of its procedural claims, China treats the criteria for according confidential treatment as though they were self-standing rules rather than ones that only had meaning within the

[4] Brazil's Third Party Submission, para. 9. To the same effect, see also Japan's Third Party Submission, para. 22.

[5] See EU Request for a Preliminary Ruling, para. 80, third sentence, in particular.

[6] To the same effect, see also U.S. Third Party Written Submission, paras. 21-25.

particular obligations of transparency that are created by the *Anti-Dumping Agreement*. Here again it includes lists of items that it finds unsatisfactory without indicating in which particular respects they are alleged to infringe WTO rules. As the respondent Member the European Union will defend itself against properly formulated claims. It is the responsibility of China, as the complainant Member, to identify with precision the specific obligations that it alleges the European Union to have infringed.

19. Finally, China adds to the confusion created by its Submission through arguments that are at times opportunistic and inconsistent. For example, the meaning that it proposes for the term 'information' in Article 6 of the *Anti-Dumping Agreement* fluctuates throughout the Submission, according to what best suits China's current purpose.

20. The task of the Panel in adjudicating on this dispute, and that of the European Union in upholding the legality and correctness of its actions, have been unnecessarily complicated by these aspects of China's submission. We will nevertheless seek to set out our arguments in as straightforward a way as possible.

21. There will, no doubt, be opportunities to raise these issues in the course of the panel proceedings. For the remainder of this short statement we intend to discuss matters for which such opportunities are more limited.

V. LEGAL INTERPRETATIONS ADVANCED BY THIRD PARTIES

22. To be specific, at this point we would like to consider the submissions made by the Third Parties.

23. We are, of course, heartened to see that, for the most part, the comments and arguments presented in these submissions support or agree with the positions taken by the European Union.

24. At this moment, we will therefore concentrate on a few points in the submissions where we take a somewhat different view to that presented by Third Parties, as we consider it useful to highlight this before the Panel.

25. First, we would comment upon the Submission of the United States, and in particular on its observation (at paragraph 30) that:

> Article 4.1 of the AD Agreement requires that the domestic industry account for at least a "major proportion" of the production of the like product and does not permit an investigating authority to exclude a portion of the domestic industry that is an "important, serious, or significant" proportion of domestic production.

26. Since the matter is not, as far as we can see, crucial to the present dispute, we will not devote much time to it. Suffice it to say that the authoritative source relied upon by the United States to uphold its observation (paragraph 7.341 of the Panel Report *Argentina – Poultry Anti-Dumping Duties*) in fact supports the opposite contention, as it specifically envisages that there may be more than one 'major proportion' of an industry.

27. The second point that we want to bring to the Panel's attention is more closely connected with the matters at issue in this dispute. It concerns the interpretation that Japan maintains (at paragraph 50 of its Submission) should be given to Article 6.4 of the *Anti-Dumping Agreement*. The Panel will recall that this provision states that:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the

> authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

28. At this point in its Submission Japan addresses the scope of this obligation and concludes 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 Article 6.4's disclosure requirement.'

29. The justification for this conclusion is that Article 6.9 of the *Anti-Dumping Agreement*, which also contains a disclosure obligation, refers to facts 'which form the basis for the decision whether to apply definitive measures'. The implicit assumption is that if the Agreement intended the obligation in Article 6.4 to cover information that 'formed the basis' for the authorities' decision, it would have employed that term and it would not have spoken of information that was 'used' by them. However, in adopting this argument Japan effectively interprets the latter term to mean information that was 'available' or 'known' to the authorities. Applying the same logic that Japan adopts one could say that if that had been its intention the Agreement could have used either of those terms. However, it did not do so.

30. Japan quotes the Panel Report *EC – Salmon (Norway)* in support of its interpretation, but the quotation that it gives does not explain how a matter that the authorities *should* use in an investigation becomes one that they *do* use, which is what Article 6.4 addresses.

VI. CONCLUSION

31. Mr. Chairman, members of the Panel, that concludes the opening remarks of the European Union. While it is of course the responsibility of China, as the complainant, to establish a case against us, and not for us to disprove one, we will nevertheless actively engage in demonstrating to the Panel the lawfulness of the European Union's anti-dumping legislation, and of the anti-dumping action it has taken in respect of certain footwear from China. In this regard, we look forward to the opportunities that will be presented by the further stages of these proceedings, and in particular to responding to your questions. Thank you for your attention.

ANNEX C-3

CLOSING STATEMENT OF CHINA

1. China wishes to extend its sincere gratitude to the panel and the secretariat for its attention during the past days. In its opening statement yesterday, China addressed several aspects pertaining to this dispute. Notably pertaining to Article 17.6(i), certain claims raised in the context of the original and review investigations and the 'as such' claims. In this closing statement China will not repeat its arguments and will remain brief. China will highlight certain key points which have been the subject of some debate in the last two days.

2. First, with respect to the 17.6(i) claims, China will not reiterate its arguments as to why it considers that the Article can form the basis of a claim, but would like to stress again the specific legal question presented in this case is one of absolute first impression before the Panel. In neither *Thailand - H-Beams,* which at least appears to support the EU's view, nor *US - Hot Rolled Steel,* which China considers to support its view, nor any of the other cases presented by the parties in support of their arguments on this point was an actual violation of Article 17.6(i) alleged in a Panel request. It is significant that the cases dealt with Article 17.6(i) in relation to Articles already containing embedded due process language, such as Article 3.1. None of the pertinent dicta contained therein control or relate directly to the issue before the panel.

3. Ultimately it appears as though both China and the EU agree that if the authorities are not bound to evaluate facts throughout the *entire* investigation in an objective and unbiased manner, then the efficacy of the system is at risk. China sees Article 17.6(i) as providing an overarching due-process requirement with respect to factual determinations made pursuant to the ADA, whereas the EU has stated it that considers that *each* individual provision has such a requirement "embedded" within, though without explaining how such a requirement would be given practical effect. China considers it clear which of these two is the lesser administrative evil and looks forward to clarifying its position on the issue.

4. In the course of the discussion concerning China's claims with regard to Article 9(5) of the Basic AD Regulation, the EU has argued that the "individual treatment" regime is somehow justified by Paragraph 15 of China's Protocol of Accession. When questioned, the EU was, however, unable to point to any specific wording in the Paragraph which would confirm that a Member may treat China differently with respect to the imposition of individual dumping duties, the calculation of individual dumping margins, or even the factual determination of whether state is effectively the parent company of two or more exporters. Paragraph 15 of the Protocol only deals with one very limited issue, namely the possibility, for a limited time, for WTO Members to determine normal value on the basis of data other than the domestic prices and costs in China. Nothing more, nothing less.

5. The EU raised a very specific issue during the debate concerning the scope of the applicability of Paragraph 151 of the Working Party Report on China's accession to the WTO. The EU considers that Paragraph 151(a) expressed the acceptance of only certain WTO Members, notably those that had not established and published criteria at the time of China's accession to the WTO, for determining whether market economy conditions prevailed in the industry or with respect to a company producing the like product, and the methodology that they used in determining price comparability. The words of Paragraph 151(a) however make it very clear that the acceptance contained therein was with respect to all WTO Members. It explicitly requires all Members to apply a

methodology that includes *inter alia*, "*guidelines that the investigating authorities should normally utilize*" the prices or costs in one or more market economy countries that are significant producers of comparable merchandise and that either are at a level of economic development comparable to that of China or are otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation.

6. Moving to the injury related issues, China would like to recall that in the review investigation the EU made an injury determination and entirely relied upon that determination to conclude the likelihood of continuation of injury. In particular, 153 recitals of the Review Regulation covering almost 21 pages exclusively discuss the injury determination of the EU and the likelihood analysis is contained in a mere five recitals of that Regulation that follow the 153 recitals discussing the EU's injury determination. Based on the facts contained in the Review Regulation and in light of the panel ruling in *US - OCTG Sunset Reviews*, China has claimed a breach of Article 3 provisions of the ADA and in consequence thereof a breach of Article 11.3 of the ADA.

7. The EU noted again yesterday that the domestic industry comprised of complainants and non-complainants. China does not agree with this new *ex post* definition of the domestic industry. In the event the Panel were to accept the definition of the domestic industry now claimed by the EU, China considers that a sample of the domestic industry selected only from the pool of complainants and thus comprising only of the complainants cannot possibly be considered representative of the entire domestic industry as a whole and is inconsistent with Articles 3.1 and 17.6(i) of the ADA.

8. In the specific context of the procedural claims concerning the review investigation, China notes that the EU has mentioned for the first time during the course of the first substantive meeting with this Panel that five of the eight producers sampled in the review investigation did not provide non-confidential versions of the Community interest questionnaire responses. While clearly this fact was not made known during the investigation, it was not even noted by the EU in its FWS. This shows yet again the lack of transparency of the EU's anti-dumping practice.

9. Moreover, China wishes to note that contrary to the arguments of the EU, it has been established by the panels in *Guatemala - Cement II* and *Korea - Paper*, that 'good cause' must be 'shown' by the interested party submitting the confidential information. This requirement extends to both information that is confidential by nature and that which is submitted on a confidential basis.

10. China once again thanks the Panel and the Secretariat for their attention and the pertinent questions asked during this first meeting. China remains at your disposal to provide any further information and evidence that may be required.

ANNEX C-4

CLOSING STATEMENT OF THE EUROPEAN UNION

The EU would like to thank again for agreeing to serve on this Panel and also thanks the WTO Secretariat for their efforts and assistance in this case.

We have three brief points we want to raise in our closing statement. First, as you have correctly identified in the course of this first hearing, China seems to try to expand the obligations contained in the ADA or create obligations where there are none. In this respect, we could refer to our discussion on Article 17(6)(i), Article 2.4 (fair comparison and its application to the analogue country selection), the requirements under Article 3.1 and its "automatic" inclusion in the cumulative examination in Article 3.3 ADA, or China's recognition yesterday that there are no obligations in para. 151 of China's Working Party Report. We are sure that you will identify these instances in your examination of the case.

Second, we also want to bring your attention to the issue of burden of proof. It is for China to make a prima facie case of what its claims. Also in accordance with the Panel's working procedures, today was the last time for China to bring all the evidence to support its claims. We respectfully request the Panel to take its mandate very seriously and while making an objective assessment of this case, refrain from entering into issues that China simply has decided not to address by this stage of the procedure. This is in particular the case of likelihood of injury analysis in the Review Regulation. Even if Article 3 ADA were applicable to expiry reviews and were the Panel to find that China has established a violation of it, China never explained how or on the basis of which evidence that alleged violation amounted to a violation of Article 11.3. This is both a legal ground and a factual misunderstanding of the Review Regulation.

Finally, in its closing statement we just heard China referring to para. 15 of its Protocol, saying that we have been unable to point to any specific wording which could confirm our approach under Article 9(5). This is also wrong and ignores para. 128 of our FWS which, of course, we invite China to read and comment on.

Once more thanks again for your attention and we look forward to continue assisting you in this dispute.