ANNEX D

ORAL STATEMENTS, OR EXECUTIVE SUMMARIES THEREOF, OF THE THIRD PARTIES

ANNEX D-1

THIRD PARTY STATEMENT OF BRAZIL

1. Brazil would like to begin by expressing its appreciation for your service in this panel. This oral statement highlights a few points on the proper legal interpretation of certain provisions of the GATT 1994 and the Anti–Dumping Agreement (the "ADA"). Brazil recognizes that many of the issues in this dispute are factual in nature, and from the outset Brazil would like to clarify that it takes no position as to whether the European Union (the "EU") has or has not complied with its obligations under these two agreements.

2. Today, Brazil will address four issues in addition to those put forward in its written submission: (i) the relevance of Article 9 of the ADA in the context of China's claims regarding Article 9(5) of the Basic AD Regulation; (ii) the non-attribution requirement of Article 3.5 of the ADA; (iii) the publicity obligations under Article 12.2 of the ADA; and (iv) the relationship between Articles 11.3 and 3 of the ADA.

3. Brazil would like to start, however, by briefly reiterating one of the points dealt with in its written submission. Brazil notes that, according to WTO case law, Members are not prevented from treating multiple companies as a single exporter/producer under Article 6.10 of the ADA, as the Panel held in *Korea – Paper AD Duty*.[1] Brazil considers that, for companies operating in non-market economy ("NME") countries, it would be justified to classify, as a rule, exporters/producers as a single entity and, as such, subject to a single or, otherwise, common dumping margin determination, unless they are able to demonstrate their clear independence from the State. The rationale behind this method of imposing anti-dumping duties is that, in NME countries, it is the State that ultimately defines or, as a minimum, is able to define individual companies' objectives and commercial behaviour. Thus, Brazil considers that establishing a country-wide dumping margin and duty rate in the case of companies operating in NME countries is perfectly consistent with the GATT 1994 and the ADA.

4. With these remarks, Brazil wishes to further elaborate on China's claim concerning the determination of individual anti-dumping duties to each exporter being investigated. China claims that Article 9(5) of the Basic AD Regulation violates Articles 9.2, 9.3 and 9.4 of the ADA.[2]

5. In this regard, Brazil fails to see the relevance of Article 9 of the ADA to China's claims concerning Article 9(5) of the Basic AD Regulation. Article 9 of the ADA does not provide or even imply that authorities are compelled to impose individual duties upon each company nor does it prevent the authority to consider companies that are closely related as a single entity for the purposes of dumping margin determination.

6. China's assertion that Article 9.2 of the ADA creates the obligation to establish individual anti-dumping duties for each exporter/producer finds no support in the text of this provision. Article 9.2 provides, in relevant part, that duties are to be collected "in the appropriate amounts". The meaning of "appropriate amount" under this provision was interpreted by the panel in *Argentina - Poultry Anti-Dumping Duties* to mean an amount not exceeding the margin of dumping.[3] The panel also noted that a violation of Article 9.2 of the ADA is entirely dependent on a violation of

[1] See *Korea – Paper AD Duty*, Panel Report, para. 7.161.
[2] China's First Written Submission, paras. 212-278.
[3] See Argentina - Poultry Anti-Dumping Duties, Panel Report, para. 7.365.

Article 9.3, which means that an anti-dumping duty that is in conformity with Article 9.3 is necessarily "appropriate" within the meaning of Article 9.2.

7. With regard to Article 9.3 of the ADA, China's claims are based on the understanding that the dumping margin for exporters who do not receive individual treatment is not established in compliance with Article 2 of the ADA. However, China's argument seems to disregard the fact that non-market economy exporters do not have their dumping margin calculated solely on the basis of the provisions of Article 2 of the ADA in the first place. This is provided in Article 2.7 of the ADA and the second Supplementary Provision to paragraph 1 of Article VI of GATT 1994.

8. As to China's claim concerning Article 9.4 of the ADA, it is based on the assumption of a breach of Article 9.3 of the ADA, which, as explained above, is based on an incorrect reading of Article 9.

9. Brazil notes that the margin of dumping and the appropriate amount of anti-dumping duty can only be determined after the decision on whether or not companies may be regarded as single entities for dumping margin determination purposes. Thus, it would be illogical to conclude that not establishing individual duties to companies which are found to operate as a single exporter is incompatible with Article 9 of the ADA.

10. The second point Brazil wishes to address concerns China's suggestion that under the non-attribution requirement of Article 3.5 of the ADA authorities are under an obligation to estimate or, somehow, to quantify, the impact of factors other than dumped imports on injury[4], an interpretation of Article 3.5 that Brazil does not share.

11. Brazil considers that in order to comply with Article 3.5 of the ADA, investigating authorities must identify, separate and distinguish the injurious effects of the dumped imports from the injurious effects of other factors. This does not mean, however, that Article 3.5 of the ADA establishes an obligation upon Members' investigating authorities to quantify or otherwise proceed to an estimation of the injury caused by other factors. It is enough for the authority to (i) investigate other factors claimed to be causing injury; (ii) then to separate and distinguish the injurious effects of these other factors (for instance by considering that it is not substantial, or not of a nature of breaking the causal link); and (iii) finally to assess whether, in the absence of these factors, injury would still have taken place.

12. As noted by the Appellate Body in *US - Hot Rolled Steel*[5], the ADA does not prescribe the methodology by which an investigating authority must avoid attributing the injury caused by factors other than dumped imports. The Appellate Body merely requires from investigating authorities that they identify the effects of other factors, i.e., "*undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.*"[6] The Appellate Body adds that "*this requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports*".[7] Investigating authorities enjoy, however, broad discretion to choose how to conduct such an analysis.

13. The next point Brazil would like to comment on concerns Article 12.2 of the ADA. Brazil would like to recall that, pursuant to Article 12.2 of the ADA, the obligation imposed upon WTO Members is that the public notice must contain information on findings reached on material issues. In this regard, the Panel in *EC - Pipe Fittings* considered that material findings are those related to issues

[4] China's First Written Submission, paras. 562-621, and paras. 1192-1249.
[5] See *US – Hot Rolled Steel*, Appellate Body Report, para. 224.
[6] *Ibid.*, para. 228.
[7] *Ibid.*, para. 226.

that must necessarily be resolved in order for the investigating authorities to be able to reach their determination.[8]

14. China lists in its submission several points which it believes should have been published by the EU authorities, both in the context of the review and the definitive Regulations.[9] The EU rejected China's claim and indicated that all these points had been dealt with in the Regulations and disclosure documents sent to interested parties.[10]

15. Brazil does not express a position on whether or not the EU is in breach of Article 12.2 of the ADA regarding this specific issue. However, in Brazil's view, China's claim implies the inclusion of a higher level of detail than the standard laid down in Article 12.2 of the ADA. Brazil understands that Article 12.2 of the ADA does not impose the publication of all information but only of material issues of fact and law. Brazil sustains that the standard set in this article is the information expressly listed in items (i) to (v) of Article 12.2.1 of ADA, which are as follows: names of suppliers or the countries involved, description of the product, margin of dumping and explanation of the methodology, relevant considerations to the injury determination (in light of the fifteen impact factors brought by Article 3.4 of ADA) and the main reasons leading to the preliminary or final determination (such as causal link).

16. It should be noted that Article 12.2 of the ADA deals with publicity of determinations and not with the right of defence, which involves distinct standards. Brazil recalls that even when certain information is not available on the public notice, this does not mean that the information was not disclosed to the interested parties in the course of the proceedings.

17. Moving on to the fourth point, Brazil would like to comment on China's assertion that Article 3 of the ADA is applicable to sunset reviews conducted under Article 11.3 of this same Agreement.[11]

18. In what pertains to this issue, Brazil refers to the findings of the Appellate Body in *US – OCTG from Argentina*[12] and notes that Article 3 and Article 11.3 of the ADA deal with two independent determinations: on the one hand, a determination of injury or threat thereof under Article 3; and, on the other hand, a determination of likelihood of continuation or recurrence of (dumping and) injury under Article 11.3. In addition, there is no provision within Article 11.3, Article 3 or elsewhere in the ADA which would mandate investigating authorities to comply with Article 3 provisions when conducting sunset reviews.

19. Accordingly, in the words of the Appellate Body, "[g]iven the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination". [13] (original emphasis)

Mr. Chairman, distinguished members of the Panel, this concludes Brazil's statement. Brazil will be pleased to answer any questions you may have. Thank you for your attention.

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[8] See *EC - Pipe Fittings*, Panel Report, para. 7.424.
[9] China's First Written Submission, paras. 797-808 and paras. 1387-1402.
[10] EU's First Written Submission, para. 508.
[11] China's First Written Submission, para. 421 *et seq*.
[12] See *US – OCTG from Argentina*, Appellate Body Report, para. 278.
[13] *Ibid.*, para. 280.

ANNEX D-2

THIRD PARTY STATEMENT OF COLOMBIA

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Colombia, I thank you for giving us the opportunity to express our views in this dispute.

2. Our participation as a third party is based on our systemic interest in the proper interpretation of several provisions of the WTO covered agreements, discussed in this case. In its written submission, Colombia set out its understanding of some of the major legal issues arising from this dispute. I will therefore not repeat all the content of the submission, but will rather focus on a few specific comments regarding the interpretation of the applicable WTO provisions in administrative and sunset reviews of definitive anti-dumping duties.

3. Colombia recognizes that many of the issues in this dispute are factual in nature. In that regard, Colombia would like to emphasize that it does not take a position as to whether the European Union has or has not complied with its obligations under the Anti-dumping Agreement.

II. RULES APPLICABLE TO ADMINISTRATIVE AND SUNSET REVIEWS OF ANTI-DUMPING DUTIES

4. Among China's claims 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 EU reviewed the anti-dumping duties imposed through Council Regulation (EC) No. 1472/2006 of 5 October 2006.

5. Colombia's interest in this debate lies in the need to clarify the applicable WTO provisions to administrative and sunset reviews of anti-dumping duties imposed as a consequence of an initial investigation. In this vein, Colombia supported proposals in the context of the negotiations under the Doha Development Agenda to amend the Anti-dumping Agreement.

6. According to China's claims[1], Article 3 of the Anti-dumping Agreement, except for Article 3.3, is totally binding upon national authorities in charge of undertaking administrative and sunset reviews of anti-dumping duties pursuant to numerals 2 and 3 of Article 11 of the Anti-dumping Agreement.

7. The EU has not contended the prior issue for the purposes of its defence. Nonetheless, Colombia considers that this is a relevant opportunity to complement the systemic interpretation of the Anti-dumping Agreement and to recall the proposals that on the matter have been made under the auspices of the negotiations of the Doha Development Agenda.

8. Numerals 2 and 3 of Article 11 of the Anti-dumping Agreement contain the conditions in which administrative and sunset reviews can be undertaken with respect to anti-dumping duties imposed as a consequence of an initial investigation.

[1] China's First Written Submission, paras. 421-428.

9. Within the legal framework of Article 11 of the Anti-dumping Agreement, paragraph 4 clarifies that the evidence and procedures of administrative and sunset reviews should be undertaken in accordance with Article 6 of the Anti-dumping Agreement. There is no additional clarification of what other WTO provisions are applicable to those reviews.

10. Faced with this limited normative clarity, the panel *US – DRAMS*[2] held that for the purposes of injury determination in these types of reviews, national authorities should follow the framework of Article 3 of the Anti-dumping Agreement.

11. Following this view, it has been accepted under the WTO that with respect to injury determination, national authorities undertaking administrative and sunset reviews, must follow the conditions provided for that matter in Article 3 of the Anti-dumping Agreement.

12. In response to the lack of clarity on the legal framework of administrative and sunset reviews for anti-dumping duties, a group of Members presented on 14 July 2004 a proposal to modify and complement some provisions of the Anti-dumping Agreement. These proposals are introduced in WTO document TN/RL/GEN/10. With a view to contributing to the legal debate, Colombia highlights two of those proposals in order to provide the Panel with additional information that it may consider when arriving at a decision on this case. Of course, Colombia is aware that the proposals do not constitute a means of interpretation as provided for in the VCLT and that such proposals represent the view of a group of Members and not necessarily of the membership as a whole.

13. Proposal 1 of the mentioned document, suggests that it should be clarified that administrative and sunset reviews are subject, where relevant, to the provisions of Articles 2 (determination of dumping), 3 (determination of injury), 4 (definition of domestic industry), 5 (initiation and subsequent investigation) and 6 (evidence). In addition, to the extent that it is appropriate, the *de minimis* rule in Article 5.8 of the Anti-dumping Agreement should apply to the mentioned reviews. Finally on this point, it is suggested that the methodology applied to the original investigation for comparison between normal price and export price as stipulated in Article 2.4.2 of the Anti-dumping Agreement should be applied to the reviews, unless a different methodology is requested by the exporters.

14. On the other hand, Proposal 2 of document TN/RL/GEN/10, suggests that indicative lists for the assessment of dumping and "likelihood of injury" under Article 11.2 should be developed.

15. Among the elements of the indicative lists for dumping assessment, Members' investigating authorities should take into account: (i) that dumping margins to be considered are those based on current market conditions and pricing, rather than the ones at the time of the initial investigation; (ii) in case the measure has been subject to reviews, they shall rely on the margin found in the most recent review; and (iii) if no dumping margin is found, the "likelihood of injury" test shall not apply and the measure shall be terminated.

16. With respect to the analysis of the "likelihood of injury", Members' authorities should take into account: (i) that the assessment should be based on current market information and not on the conditions at the time of the initial investigation; as provided for in Article 3 of the Anti-dumping Agreement, the investigation should be based on facts, and not merely on allegations, conjectures or speculations; and (ii) the determination of whether the antidumping duty continuation is warranted or not, shall be based on the current volume of dumped imports.

17. Based on the above mentioned considerations, Colombia invites the Panel to take into account the mentioned proposals, as a non-legally binding information, in the review of the EU'S implementation of Article 11 of the Anti-dumping Agreement. Colombia considers that these

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

proposals can be especially relevant to clarify the debate between the Parties as to how to use the provisions of Article 3 of the Anti-dumping Agreement in the present case. Particularly, with respect to how the EU undertook and concluded on the extension of the definitive anti-dumping duty reviewed under its Regulation.

III. CONCLUSION

18. Mr. Chairman, distinguished Members of the Panel, with these comments, Colombia expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the applicable WTO provisions for administrative and sunset reviews of the Anti-dumping Agreement. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX D-3

EXECUTIVE SUMMARY OF THE THIRD PARTY STATEMENT OF JAPAN

I. INTRODUCTION

1. In this oral statement, Japan would like to address the following important systemic issues.

- Whether Article 2.4 of the *AD Agreement* is applicable to the EU's analogue country selection in the case of import from non-market economy;

- Whether "positive evidence" and "objective assessment" requirements under Article 3.1 of the *AD Agreement* apply to its examination in a sunset review; and

- Whether Article 3.5 of the *AD Agreement* requires an authority to make quantitative analysis in separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports.

II. DISCUSSION

A. THE PANEL SHOULD CAREFULLY EXAMINE WHETHER ARTICLE 2.4 OF THE *AD AGREEMENT* IS APPLICABLE TO THE EU'S ANALOGUE COUNTRY SELECTION

2. According to Article 2.7(a) of the Council Regulation No 384/96, which provides for the EU's analogue country selection, "[i]n the case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country". As to this mechanism, China submits that Article 2.4 of the *AD Agreement*, which requires the investigating authorities to make a fair comparison between the export price and the normal value, "sets forth certain principles regarding the comparability of export prices and normal value."[1] China further claims that "an improper selection of an analogue country […] directly precludes a fair comparison between the export price and the normal value"[2], and thus that the EU's analogue country selection violates Article 2.4 of the *AD Agreement*. On the other hand, the European Union states that "the purpose of the analogue country methodology must be to find a normal value that is compatible with the export price," and that "[o]nce such a normal value has been identified the obligation stated in Article 2.4 of making a fair comparison comes into play, but not before. The very wording of Article 2.4 assumes that a normal value already exists."[3]

3. Thus, the question to be addressed by the Panel is whether Article 2.4 of the *AD Agreement* is applicable to the selection of the analogue country in the context of determining the existence of dumping for imports from non-market economy.

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[1] *First Written Submission by China* submitted to this Panel on 20 August 2010 ("China FWS"), paras. 370, 924.

[2] China FWS, paras. 375, 927.

[3] *First Written Submission by the European Union* submitted to this Panel on 24 September 2010, para. 171. See also Brazil Third Party Written Submission, para. 38.

4. As China argues that "the selection of an appropriate or suitable analogue country is the first fundamental step in ensuring fair comparison"[4], the selection of the analogue country was the starting point for the European Union to complete the entire process of determining the existence of dumping in this case, including a fair comparison of the export price with the normal value. It is also correct that Article 2 of the *AD Agreement* sets forth the substantive rules and disciplines on the process of determining the existence of dumping.

5. In this regard, the panel in *Egypt – Rebar* has found, in the context of examining the scope of the requirement not to impose "an unreasonable burden of proof" referred to in Article 2.4, that "[a] straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price."[5] In this context, the panel also found that Article 2.4 in its entirety "has to do with ensuring a fair comparison" of export price and normal value, and "does not apply to the investigating authority's establishment of normal value as such."[6] It is also noted that the issue as to who the parties to relevant sales should be in calculating the normal value under Article 2.1, the Appellate Body in *US – Hot-Rolled Steel* stated that, given that Article 2.4 of the *AD Agreement* provides that a fair comparison "shall be made at the same level of trade, normally at the ex-factory level," "[t]he use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price because, for instance, the downstream sales may have been made at a different level of trade from the export sales."[7]

6. Japan respectfully requests the Panel to carefully review the arguments on the applicability of Article 2.4 of the *AD Agreement* to the EU's analogue country selection, taking into account viewpoints as discussed above.

B. APPLICABILITY OF "POSITIVE EVIDENCE" AND "OBJECTIVE ASSESSMENT" REQUIREMENTS UNDER ARTICLE 3.1 OF THE *AD AGREEMENT* TO SUNSET REVIEWS

7. Japan is mindful that, in *US – Oil Country Tubular Goods Sunset Review*, the Appellate Body has found that "investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination", that "factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination", and that "the necessity of conducting such an analysis in a given case results from the requirement imposed by Article 11.3—not Article 3".[8]

8. It must be emphasized, however, that the above findings of the Appellate Body should be read in their contexts. The Appellate Body also has found that authorities in a sunset review are obliged to act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of positive evidence.[9] The Appellate Body has found that "[c]ertain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or *possibly even required*,

[4] China FWS, para. 387.
[5] Panel Report, *Egypt - Rebar*, para. 7.333.
[6] Panel Report, *Egypt - Rebar*, para. 7.335.
[7] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 167-168.
[8] Appellate Body Report, US – Oil Country Tubular Goods Sunset Review, paras. 280, 284.
[9] See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 283. Appellate Body Report, *US – Corrosion Resistant Sunset Review*, para. 111. See also Third Party Submission of Japan, paras. 23-27.

in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'."[10] It further found "[i]n this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3."[11] These findings suggest that, when a likelihood-of-injury determination is inconsistent with the fundamental requirements of "positive evidence" and "objective examination" mandated by Article 3.1, this would also demonstrate the inconsistency of the likelihood-of-injury determination with the requirement in Article 11.3 that the authority arrive at a reasoned conclusion.[12]

9. While Japan does not take any particular position on China's establishment of a *prima facie* case with respect to inconsistency of the EU's likelihood-of-injury determination with Article 11.3, it respectfully requests the Panel to carefully review this issue, taking into account viewpoints as discussed above.

C. ANALYSIS REQUIRED UNDER ARTICLE 3.5 OF THE *AD AGREEMENT* TO SEPARATE AND DISTINGUISH INJURIOUS EFFECTS OF DUMPED IMPORTS FROM THE INJURIOUS EFFECTS OF OTHER FACTORS

10. Article 3.5 of the *AD Agreement* provides that "the injuries caused by […] other [known] factors must not be attributed to the dumped imports." In this regard, as the Appellate Body pointed out in *US – Hot-Rolled Steel*,[13] the investigating authorities are required to "appropriately" separate and distinguish the injurious effects of the other factors from the injurious effects of the dumped imports under Article 3.5 of the *AD Agreement*.

11. However, the *AD Agreement* does not set any particular methods or approaches as to how investigating authorities are to appropriately separate and distinguish these effects. In this connection, Japan recalls that the Panel is obliged to examine "whether the investigating authority has provided a reasoned and adequate explanation" and that "a panel can assess whether an authority's explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation in the light of the facts".[14] In order for the Panel to examine whether the authority's explanation on the causation is reasoned and adequate, therefore, the Panel must review the adequacy of the authority's analysis of the non-attribution issue upon an examination of the particular facts of this case.

12. In some cases, it might be sufficient for the authority to make a qualitative analysis on the injurious effects of dumped imports and those of other factors in order to provide the reasoned and adequate explanation that the injury is actually caused by those imports. In other cases it might be necessary for the authorities to conduct a quantitative analysis separating and distinguishing the injurious effects of dumped imports from the injurious effects of other factors for this purpose. At a minimum, as stated by the panel in *EC – Countervailing Measures on DRAM Chips* in the context of evaluating the non-attribution requirement under Article 15.5 of the *SCM Agreement*, "[a]n investigating authority must do more than simply list other known factors, and then dismiss their role with bare qualitative assertions".[15]

13. In sum, the *AD Agreement* neither mandates nor exempts the authorities from making a quantitative analysis to comply with the non-attribution rule under Article 3.5. The analytical method

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[10] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 284 (Emphasis Added).

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

[12] See China FWS, para. 812.

[13] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223

[14] *See* Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 98-99 (Emphasis Original).

[15] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405.

that an authority would be required to adopt depends on the underlying facts of the given case. Japan respectfully requests that the Panel review whether the Commission provided a reasoned and adequate explanation that it adequately separated and distinguished the injurious effects of the other factors from the injurious effects of the dumped imports.

III. CONCLUSION

14. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments as discussed in its submission and above to ensure the fair and objective application of the provisions of the *AD Agreement*.

ANNEX D-4

THIRD PARTY STATEMENT OF TURKEY

1. I am glad to present you with the views of Turkey at this stage of the panel proceedings regarding the complaint launched by People's Republic of China. I will summarize Turkish position on the subject, to the extent possible, by refraining from repetition of details presented in our written submission. Turkey takes no position as to the defence and allegations presented by the parties. Turkey wishes to contribute by focusing on two major issues during this oral statement, namely Analogue Country Selection and Sampling.

I. ANALOGUE COUNTRY SELECTION

2. Article 2.1 of the Anti-Dumping Agreement ("ADA") provides under what circumstances a product is considered as being dumped. A plain interpretation of Article 2.1 clearly indicates that an investigating authority has to work on two data groups namely 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 ADA between normal value and export price.

3. 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 domestic prices and the exporting prices do not permit a proper comparison. In order to overcome these difficulties, the ADA provides alternative ways to find a comparable price.

4. Furthermore, Ad. Article VI.2 of GATT1994 together with paragraph 15(a) of the Accession Protocol of China provides derogation from the provisions of the ADA 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.

5. 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. In fact from the submission of the Parties, Turkey understands that the use of the analogue country procedure is not disputed between the parties.

6. Turkey would like to point that investigating authorities sometimes face difficulties in analogue country selection. 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.

7. 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.

8. 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 ADA, 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 appropriate 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.

9. 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.

10. 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. The analogue country selection process is related with determining the normal value stage, not related with the comparison stage.

11. 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.

II. SAMPLING

12. It is clearly understood from Article 6.10 of the ADA that while the general rule is to calculate individual dumping margin 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

III. CONCLUSION

18. Turkey wishes to thank the Panel for the opportunity to submit its views during this hearing and welcomes any questions the Panel or the parties may have.

ANNEX D-5

EXECUTIVE SUMMARY OF THE THIRD PARTY STATEMENT OF THE UNITED STATES

1. While the United States is not discussing today all of the issues that it addressed in its written submission, the Panel should not interpret this as an indication that the United States considers those issues to be unimportant. Indeed, even though the United States will not be discussing today most of China's procedural claims, the United States would like to use this opportunity to reiterate its appreciation of China's acknowledgment in its first written submission of the importance of due process and transparency in trade remedy proceedings. The United States trusts that China will demonstrate these in its administration of its own trade remedy laws.

2. One of China's principal claims in this dispute is that Article 9(5) of the EU's Basic AD Regulation is inconsistent with provisions of various covered agreements because Article 9(5) requires the investigating authority to apply a single dumping margin to multiple firms unless certain conditions are met. China argues that Article 6.10 of the AD Agreement permits application of a single dumping margin to multiple exporters or producers only where the number of producers and exporters is so large as to make impracticable the application of individual dumping margins for specific exporters or producers and, because Article 9(5) of the Basic AD Regulation does not fit into this narrow exception, it is inconsistent with Article 6.10.

3. The EU responds that China's argument fails because limiting the exporters or producers examined due to their large number is not the *only* exception to the general requirement of an individual margin contained in the first sentence of Article 6.10. According to the EU, Article 6.10 permits application of a single margin of dumping to multiple firms depending on the economic realities of those firms.

4. The United States agrees that the economic realities of the firms included in the investigation are key to implementing the obligations in Article 6.10 of the AD Agreement. However, as we will explain, these economic realities do not provide an *additional exception* to the first sentence of Article 6.10. Instead, evaluation of the economic realities of the firms included in the investigation is part of the investigating authority's task in determining the "exporters" and "producers" for which it must generally determine an individual margin.

5. Article 6.10, first sentence, states that: "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." The provision then provides one exception to this rule when the number of exporters or producers is so large as to make such a determination impracticable.

6. However, a fundamental question an investigating authority must answer when fulfilling the requirement of the first sentence of Article 6.10 is which "exporters" or "producers" are included in the investigation. Put differently, Article 6.10 establishes that the identification of the specific producers or exporters in an investigation is a *condition precedent* to calculating a dumping margin. This question must be addressed in all anti-dumping proceedings, both those involving market economies and those involving non-market economies.

7. The United States recalls that the AD Agreement does not define what constitutes an "exporter" or "producer," nor does it establish criteria for an investigating authority to evaluate when making this determination. As the United States and other Members in this dispute have recognized, one particularly meaningful criterion in this inquiry is the economic realities of the firms included in the investigation, including their structure and operations in the particular economy at issue. For example, if a firm included in the investigation has a parent company that controls fundamental business decisions such as those related to production and pricing for the firm included in the investigation, then it may be appropriate to consider that firm and its parent company as a single exporter or producer.

8. Under such circumstances, it would not make sense to assign the firm and its parent company separate margins of dumping because such a close relationship would permit the related exporters or producers to channel exports through an affiliate with a lower dumping margin, thereby significantly undermining the effectiveness of anti-dumping measures. Nothing in the rule established in Article 6.10 of the AD Agreement requires such a result.

9. The panel's reasoning in *Korea – Paper* fully supports the understanding of the United States and other Members regarding Article 6.10. Consistent with this reasoning, the Panel should find that nothing in Article 6.10 prohibits an investigating authority from treating multiple firms as one exporter or producer if the facts demonstrate that the firms are sufficiently close that such treatment is appropriate. Furthermore, to the extent that Article 9(5) of the EU Basic AD Regulation is a mechanism for the investigating authority to examine such a close relationship between firms, that mechanism would not appear to be inconsistent with Article 6.10. Rather, such a mechanism would be critical to assist the investigating authority in complying with the general rule in Article 6.10 to calculate a single margin of dumping for every known exporter or producer.

10. Before leaving this discussion of Article 6.10 of the AD Agreement, the United States would like to address China's suggestion that Article 9(5) of the Basic AD Regulation inappropriately imposes "extra" conditions that have to be satisfied before firms in non-market economies can qualify for an individual margin. As we have just described, Article 6.10 of the AD Agreement does not prohibit an investigating authority from considering the economic realities of a firm when deciding whether the firm on its own qualifies as a "producer" or "exporter" and should therefore receive an individual margin. These economic realities necessarily include the kind of economy in which the firm operates and, in a non-market economy situation, the degree of a firm's independence from the government.

11. Among the distinguishing features of a non-market economy is that the role of the government distorts the functioning of market principles. That such distortion exists in the Chinese economy is well understood. As the EU has pointed out, there is no shortage of evidence of the Chinese government intervening in the Chinese economy. Indeed, the fact that WTO Members have recognized the pervasiveness of government influence on the Chinese economy is reflected in both China's Protocol of Accession and its Working Party Report.

12. Thus, in a non-market economy, the government can exert influence over companies, which can include the government making decisions related to production and pricing for the firm included in the investigation. A lack of independence in production or pricing decisions is an important factor in determining whether a firm constitutes an "exporter" or "producer" for which an individual margin of dumping must be calculated pursuant to Article 6.10 of the AD Agreement. Thus, firms in non-market economies such as China operate under economic realities that make it particularly important for an investigating authority to analyse more closely the particular structures and operations of these firms to evaluate their independence.

13. According to China, the EU acted inconsistently with Article 2.4 of the AD Agreement because the analogue country selection procedure and the selection of Brazil as the analogue country

precluded a fair comparison between export price and normal value. China argues that the first sentence of Article 2.4 sets out the "overarching principle or 'generic rule' that a fair comparison shall be made between the export price and the normal value." China further argues that this fair comparison requirement should guide the standard by which investigating authorities select an analogue country. Thus, according to China, "an improper analogue country selection procedure leading to the selection of an unsuitable/inappropriate analogue country . . . directly precludes a fair comparison within the meaning of Article 2.4 ... ."

14. The EU responds that Article 2.4 does not apply to the selection of the analogue country because the purpose of such selection is to find a normal value that is comparable with the export price and only once a normal value has been identified does the fair comparison obligation stated in Article 2.4 come into play. According to the EU, "the 'fair value' rule in paragraph 4 does not apply to the choice of the normal value . . ." but, rather, that the "standard process of finding the normal value is set out" in Articles 2.1 and 2.2.

15. The United States agrees that Article 2.4 does not apply to the selection of an analogue country. Contrary to China's assertions, Article 2.4 does not impose an "overarching principle" of fair comparison in the selection of an analogue country. Nor does it guide the standard by which an analogue country is selected. Instead, the focus of Article 2.4 is on how the authorities are to select specific transactions for comparison and make the appropriate adjustments for differences that affect price comparability once the method for determining normal value has been selected. The general obligation to make a "fair comparison" in the first sentence of Article 2.4 cannot be divorced from the remainder of Article 2.4, which exemplifies the types of adjustments that an authority is obliged to make in pursuit of price comparability.

16. As noted by the EU, the purpose of selecting an analogue country is "to find a normal value that can be placed in comparison with the export price." In a market economy proceeding, an authority would apply the rules in Articles 2.1 and 2.2 of the AD Agreement in selecting the home market, a third country market or cost of production as the method for determining normal value. When dealing with a non-market economy, the selection of an analogue country substitutes for the choice between home market, third country market or cost of production in a market economy proceeding. Just as nothing in the text of Articles 2.1, 2.2 or 2.4 indicates that the first sentence of Article 2.4 is relevant to the choice between home market, third country market or cost of production, nothing in paragraph 15(a)(ii) of the Protocol or Article 2.4 suggests that the first sentence of Article 2.4 is relevant to the selection of the analogue country.

17. In summary, an authority uses the analogue country selection procedure to select the basis on which normal value will be determined. While Article 2.4 addresses how the export price and normal value will be *compared* and the obligation to make adjustments for differences that affect price comparability, it does not govern the basis on which normal value is determined. Thus, the obligation under Article 2.4 to ensure a fair comparison between normal value and export price does not apply to the selection of an analogue country.

18. China has asserted that the provisions of Article 3 of the AD Agreement apply to expiry reviews (also referred to as "sunset" reviews) conducted under Article 11.3 of the AD Agreement. The EU responds – correctly in our view – that China's argument is in legal error because the relevant provision setting forth the disciplines relevant to the expiry review at issue is primarily Article 11.3 of the AD Agreement and not Article 3. As the EU notes, China's arguments are directly contradicted by the Appellate Body report in *US - OCTG from Argentina*.

19. As the United States explained in its written submission, the specific requirements imposed by Article 3 of the AD Agreement for original investigations do not apply to sunset reviews under Article 11.3. The Appellate Body has explained this on two occasions, noting that 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. Moreover, turning to the text of the Agreement, Article 11.3 contains no cross-references to Article 3 that would make Article 3 provisions applicable to sunset reviews. Nor does the text of Article 3 mandate that whenever the term "injury" is used in the AD Agreement, a determination of injury pursuant to the provisions of Article 3 is required.

20. We also observe that Colombia's third party submission invites the Panel to consider proposals made in the on-going Rules Negotiations concerning sunset reviews. We urge the Panel not to do so for at least two reasons. First, there is no basis in customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, for considering these proposals, as Colombia noted in its oral statement today. The proposals do not lend guidance to the meaning of the existing provisions of the AD Agreement. Second, the proposals do not reflect any consensus of Members. Instead, they merely reflect the views of some Members as to how the Agreement should be changed. For these reasons, the proposals should not be given any weight.

21. China asserts that the EU acted inconsistently with Article 6.9 because the investigating authority did not allow sufficient time for parties to respond to a supplemental disclosure explaining a new methodology being used to calculate the "lesser duty." The EU responds that this disclosure was not one of essential facts, but disclosed only outcomes or methodologies and, therefore, the provision of Article 6.9 requiring sufficient time to respond is not applicable.

22. The United States agrees with the EU to the extent that the EU asserts that Article 6.9 does not pertain to the disclosure of outcomes or methodologies by the investigating authority. Rather, the focus of Article 6.9 is whether there is a disclosure of "essential facts" and, if so, whether the time allotted to interested parties to analyse and comment on the disclosure of such facts was reasonable under the circumstances.

23. In addition, even when Article 6.9 applies, its text does not specify any minimum amount of time that would constitute "sufficient time" for a party to defend its interest. Therefore, what constitutes "sufficient time" for an interested party to defend its interests and respond to an essential facts disclosure will depend on the size, significance, and nature of the disclosure.

24. China claims that the EU acted inconsistently with Article 3.3 of the AD Agreement by cumulating imports from China and Vietnam because the conditions of competition between the imports from China and Vietnam were not equivalent. China's claim is based on the erroneous legal premise that an investigating 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 pursuant to Article 3.3.

25. The text of Article 3.3 sets out the only specific requirements for cumulation, and there is no legal basis to impose other requirements for cumulation. These specific requirements are that the dumping margins for the individual countries must be more than *de minimis*, the volume of imports from the individual countries cannot be negligible, and there must be a determination that a cumulative assessment is appropriate in light of conditions of competition between the imported products and between the imported products and the domestic like product. The AD Agreement does not elaborate on the factors to be considered by an authority in making the determination regarding conditions of competition, let alone require that an authority must find the type of identity in trends described by China.

26. In its third party submission, Colombia invites the Panel to identify standards with respect to the criteria that an authority should take into account when considering conditions of competition. We urge the Panel to reject Colombia's invitation. First, we note that Colombia itself acknowledges that Article 3.3 of the AD Agreement does not specify criteria that must be considered under the

conditions of competition. Second, to the extent that Colombia is asking the Panel to do more than is necessary to resolve this dispute, we would recall the Appellate Body's admonition in *US – Wool Shirts* that panels and the Appellate Body should not "'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute."

27. Regarding China's claim that the EU authorities acted inconsistently with Article 6.1.1 of the AD Agreement by allowing less than 30 days for interested parties to submit responses to MET and IT claim forms, the United States notes that the panel in *US – AD/CVD Duties on Products from China* recently rejected a similar claim by China under Article 12.1.1 of the SCM Agreement, a provision that is almost identical to Article 6.1.1, at paragraphs 15.15 to 15.37 of the report.