ANNEX F

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

ANNEX F-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA

1. China will focus its attention this morning on addressing certain of the arguments made by the EU in its Second Written Submission ("SWS"). China will also draw to the attention of the Panel certain instances in which the EU has ignored key arguments outright, as well as certain instances where it has misconstrued China's arguments in such a way that its rebuttals are essentially non-responsive. The issues that China will mainly address this morning are the Article 9(5) as such claims; the overly broad PCN-system used by the EU; the analogue country selection process; the failure to examine the MET forms; Article 3 and Article 11.3 issues including sampling; causation in the injury analysis and certain procedural issues.

CHINA'S SUBSTANTIVE ARGUMENTS WITH REGARD TO THE "AS SUCH" CLAIMS ARE VALID

2. First, with regard to China's as such claims against Article 9(5) of the Basic AD Regulation, China considers that the Panel report in *EC - Fasteners (China)* broadly supports its claims. As China has demonstrated in its SWS[1], the Panel in that dispute roundly rejected the EU's arguments with respect to essentially every point on which it made an affirmative finding. It has done so on the basis of what are for the most part the same exact arguments put forth by the EU in this dispute and found the Article to be WTO-inconsistent for a variety of independent reasons.

ANALOGUE COUNTRY SELECTION FALLS WITHIN THE SCOPE OF ARTICLE 2.1 AND 2.4

3. China will begin with the instances of procedural bias seen throughout the analogue selection process. Throughout this dispute China has shown 1) that the EU had a strong motive predisposing it toward the selection of Brazil in light of the relatively high normal value such a selection was likely to yield - a fact corroborated by the actual results of the investigation along with the domestic producers' actions in ensuring the selection of Brazil; 2) highly disparate and inadequately explained treatment of potential analogue country producers in terms of the questionnaire response times, and 3) a very strong link between questionnaire response time and the likelihood that a given country would end up being selected as the analogue country.

4. With respect to the question of whether any aspect of the analogue country selection process can fall within the scope of the fair comparison obligation, the EU continues to rest its argument almost solely on its theory that the obligation, independent and overarching as it may be, only activates once the establishment of normal value has occurred. As to that, three AB reports[2] explicitly state that the independent and overarching fair comparison obligation informs "*all* of Article 2". In China's view the relevant AB pronouncements include the proposition that if any aspect of the establishment of normal value precludes a fair comparison, then the fair comparison obligation is necessarily violated.

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[1] See China SWS, part 2 generally.

[2] AB Report, *EC - Bed Linen*, para. 59, AB report, *US - Zeroing*, para. 146, AB report, *US - Softwood Lumber V*, para. 133.

5. As to the issue of the scope of Article 2.1 as it applies to the analogue country selection process, China recalls that the EU has argued in the context of the fair comparison issue that the initial establishment of normal value should be dealt with by Article 2.1 rather than Article 2.4. In support of that Argument, the EU has cited AB in *US-Hot Rolled Steel* finding a violation of Article 2.1 - and only Article 2.1 - in regard to an aspect of the initial establishment of normal value[3].

6. While China does not endorse the EU's "two-stage logic" theory, China is pleased to see that the EU recognizes that Article 2.1, and more specifically the obligation to identify a "*comparable price*," is central to the issue before the Panel. China recalls that it has indeed cited Article 2.1 in the context of the analogue country selection, and that the EU has not put forth an argument as to why the analogue country selection process does not fall within its scope.

THE EU'S ANALOGUE COUNTRY SELECTION PROCESS VIOLATED ARTICLE 2.4 AND 2.1

7. As to the question of what actually constitutes an appropriate method by which an analogue country selection process can secure a "comparable price" capable of a "fair comparison," the EU misconstrues China's argument, and by doing so fails to address the central point. China has made clear that it considers - in light of the object and purpose of the ADA - that the *underlying purpose* of the analogue country selection process, and indeed *all* processes by which proxy normal values not based on domestic prices in the domestic market of the country under investigation are derived, is to at least *attempt* to approximate the value which would have prevailed in the absence of the need to find the proxy. In the case of NME methodologies, if the methodology is to have any hope of approximating the extent to which dumping is *actually occurring*, then that methodology must be reasonably aimed at finding a proxy for the "undistorted" value. If not that, then what is the final dumping margin but essentially a random number?

8. The EU seems to have taken China's argument as to the *purpose* of the process - to approximate the value but for the distortion - as an argument dictating the *mechanics* of the process. It is apparently on this basis that the EU summarily dismisses the argument by concluding that it does not regard the goal of "replicating conditions in a non-market economy country as though it were not a non-market economic country as one that can meaningfully be pursued in the course of calculating dumping margins," and adding that it has not "ever been applied in this context".[4]

9. China notes the EU's observation that China's "but for the distortion" argument is not one that has "ever been applied" in the analogue country selection context. China notes that while it need not express an opinion as to the WTO-consistency of other Members' methodologies in the present case, it would appear as though it is in fact almost always applied by most Members that consider resort to the process necessary.

THE EU PRECLUDED FAIR COMPARISON AND VIOLATED ARTICLE 2.4 BY USING A BROAD PCN SYSTEM

10. First, it is recalled that hiking shoes and women's luxury shoes which were to be classified under the same PCN are different among others, in terms of production processes, time and technology and raw materials. All of these factors affect the production costs. It was impossible to quantify and substantiate the multiple adjustments for each transaction-based comparison between these two divergent footwear types falling within the same PCN; let alone calculating these adjustments for the numerous other footwear categories classified under the same PCN and then for all PCN categories "A" and "E".

[3] EU SWS, para. 61.
[4] EU SWS, para. 80.

11. Most importantly, the Chinese exporters were not even aware of the footwear models produced by the Brazilian producers. Consequently, they could not possibly request adjustments for the different footwear types classified within the same PCN by them and the Brazilian producers. Additionally, per the EU practice, adjustments are not accepted unless duly verified.

12. The EU asserts that had Chinese exporters requested adjustments such adjustments could have been taken into account. China notes that in the original investigation the leather quality adjustment, besides being incorrectly calculated, applied across the board to all PCNs. Such an adjustment did not address differences between divergent footwear classified in the same PCN.

THE EU VIOLATED (AMONG OTHERS) PARA. 15(a) PROTOCOL, PARA. 151 WORKING PARTY REPORT AND ARTICLES 17.6(i) AND 6.10.2 ADA BY FAILING TO EXAMINE THE MET APPLICATIONS OF THE NON-SAMPLED PRODUCERS

13. As to the EU's failure to examine the MET applications in the original investigation, China recalls that for practical purposes, the likely effect of examining the MET applications would have been that a significant number of producers would have escaped a dumping margin based on the analogue country normal value *even though their own normal values would not have been used*. That is, even though the EU resorted to sampling, in order to comply with Paragraph 15(a) of the Protocol, the EU would have had to calculate the dumping margins for the non-sampled companies on the basis of those sampled companies which *did* receive MET.

14. For this reason the EU's reliance on sampling as a means to justify ignoring outright over 140 MET questionnaires is misplaced. Sampling is not applicable to the MET determination. Article 6.10.2 provides that under certain circumstances authorities may be relieved of their obligation to determine *individual margins of dumping*, but it does not relieve them of the obligation to determine in which of the two relevant *groups* the companies are to be assigned, where those two groups are (1) companies whose margins are based on analogue country normal values, and (2) companies whose margins are based on Chinese market economy normal values. In other words, MET is a pre-determination into which of the two groups companies are put.

15. There are significant differences between the two principal questions that relate to the MET issue. The first is whether, within the meaning of Article 6.10.2, determining the market economy status of a company is tantamount to assigning it "an individual margin," as the EU argues. The EU notes that this question arises only as a result of a "unilateral concession *vis-à-vis* China"[5] in that the EU makes MET determinations individually as opposed to at the industry level. However, where those individual determinations are only made with respect to about 8 per cent of the potential producers operating under market economy conditions – and in this case much less - then it is not much of a concession.

16. The other principal question is whether or not an authority may in good faith and in accordance with the standards of Article 17.6(i) and the Working Party Report solicit questionnaire responses from non-sampled MET claimants and then never even bother to look at them, using sampling as a pretext. The EU barely argues that such action would accord with an obligation to provide interested parties a meaningful opportunity for the defence of their interests, but instead rests its case on the notion that none of the articles cited by China provide for that obligation.

17. In that regard the portion of the Working Party Report relevant to this issue does not necessarily provide for an "additional right" beyond Article 6.2 (particularly the chapeau), but rather *the same right*, though located in another place. China has provided its views on the binding nature of

[5] EU SWS, para. 216.

the commitments contained in Paragraph 151 of the Working Party Report.[6] However, it would point out here the contradictory nature of the fact that the EU argues that it did not actually commit to provide interested parties a defence of their interests in Paragraph 151 of the Working Party Report and that China should have invoked Article 6.2 in that regard, while at the same time arguing elsewhere that there are limitations to the invocation as a free-standing obligation of the "broadly stated" defence of interests provision of the Chapeau of Article 6.2.

THE EU VIOLATED ARTICLE 2.2.2(iii) BY FAILING TO APPLY THE CAP FOR PROFITS

18. Concerning the EU's failure to apply the cap for profits in the original investigation, it is common sense that footwear is much closer to textile products than to chemical and engineering products in terms of production inputs, production methods, end-uses, market structure, sales channels, and just about any other objective or subjective measure.[7]

THE EU'S VIOLATION OF ARTICLE 3 LED TO THE VIOLATION OF ARTICLE 11.3 TO THE EXTENT THE INJURY ANALYSIS WAS RELIED UPON IN THE LIKELIHOOD-OF-INJURY ANALYSIS

19. In response to the Panel questions, the EU claimed that it is an "open question" whether Article 3 applies to injury determinations in sunset reviews. Much has been said by China on this issue. Notably, that the panel in *US - OCTG Sunset Review (from Argentina)* found that if an investigating authority makes an injury determination in an expiry review and "**uses**" the injury determination "**as part**" of its expiry review determination, the injury determination should conform to the requirements of Article 3.[8]

20. In its SWS the EU asserts that China has not provided any evidence that the EU relied upon the injury analysis for its likelihood-of-injury determination. This claim is untenable in light of the detailed arguments in China's FWS, opening and closing statements at the first meeting of the Panel and the SWS. Additionally, the EU has also misinterpreted China's explanation of the legal relation between the applicability of Articles 3 and 11.3.[9] China considers that to the extent an investigating authority relies upon an injury analysis for its likelihood-of-injury determination, the former must conform to the provisions of Article 3.

21. Additionally, the EU provides an explanation based on only one scenario concerning dumping and injury post imposition of the measures to allege that Article 3 does not apply in an expiry review even if a likelihood-of-injury determination relies upon the finding of past injury.[10] China notes that there may be a situation where post imposition of the measures the exporters increase their export prices and yet there is injury to the domestic industry. China does not agree that the injury determination is purely a judgmental process. The EU's determination shows that significant reliance was placed on the volume and price effects of the imports on the domestic industry and the undercutting margins calculated, which are mathematical issues.[11]

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[6] China's response to Questions 30 and 86; China's SWS, paras. 1252-1259.

[7] In any event, the EU does not deny that footwear and chemical and engineering cannot be considered "the same general category" of products. EU FWS, para. 589.

[8] See also Panel Report, *US - OCTG from Mexico*, footnote 121. The Panel in that case referred to the AB ruling in *US – Corrosion-Resistant Steel Sunset Review, supra* note 37, paras. 126-130 and held that "*if, an investigating authority **were** to make an injury determination in a sunset review, such a determination would be subject to the requirements of Article 3.*" See furthermore Panel Report, *US - Corrosion Resistant Steel*, paras. 7.99-7.101.

[9] Para. 91, EU's SWS.

[10] See paras. 160-162, EU's SWS.

[11] Recitals 288, 291, 292, 323, Review Regulation.

22. The EU also states that the "*fundamental issue is whether the EU's determination of the likelihood-of-injury satisfies the obligations of Article 11.3*" and China "*should be asked to prove*" this in a claim against an expiry review.[12] In response, China notes that the AB in *US-OCTG Sunset Review* clearly held that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood-of-injury determination.[13] Thus, the "obligations" referred to by the EU can at best be understood to stem from the requirement to reach a "reasoned and adequate conclusion" based on "sufficient factual basis".[14] To this end, if an investigating authority conducts a complete injury analysis and uses it to determine the likelihood of continuation of injury,[15] an assessment of the consistency of the injury analysis with Article 3 would be the logical recourse. Only then can it be determined as to whether or not the investigating authority's likelihood-of-injury determination was consistent with Article 11.3. [16]

THE EU VIOLATED ARTICLE 3.1 BY NOT APPLYING AN OBJECTIVE SAMPLING PROCEDURE AND BY NOT SOLICITING POSITIVE EVIDENCE FROM THE COMPLAINANT PRODUCERS

23. First, the EU alleges in its SWS that China has modified claim II.2 "*beyond recognition and understanding*."[17] Before elaborating on the factual incorrectness of the EU's allegations, China considers that the EU mixes up the concepts of 'claims' and 'arguments'. China recalls that parties have the right to progressively clarify their claims in the FWS, SWS, meetings with the Panel[18] and also in response to the Panel's questions.

24. That said, the EU's interpretation that this claim was only "*about a difference in the treatment between two broad categories*" of interested parties, is incorrect. In its FWS, China focused on the aspects of "objective examination" and "positive evidence" with reference to the sample selection of the domestic industry.[19]

THE EU'S DOMESTIC INDUSTRY SAMPLE SELECTED DID NOT COMPLY WITH ARTICLE 6.10

25. With regard to the applicability of Article 6.10 to sampling for injury analysis, the EU takes issue with China's interpretation of the panel findings in *EC - Salmon*. China has clearly explained its reasoning in the SWS.[20] China nevertheless reiterates that the *EC - Salmon* panel did not prohibit the application of Article 6.10 in the context of sampling for injury analysis. Contrary to the EU's projection, China has provided detailed proof that indeed volume of production was the key factor taken into account by the EU for sample selection.[21] Besides the fact that the EU suddenly introduces

[12] Para. 103, EU's SWS.
[13] AB Report, *US - OCTG-Sunset Reviews*, para. 281.
[14] *Ibid*., at para. 284.
[15] Panel Report, *US - OCTG Sunset Review*s, paras. 7.272-7.274.
[16] In its SWS, the EU repeats its allegation of a legal error by China in the context of the review investigation claims. The EU's arguments on this point have been extensively rebutted by China in its SWS (paras. 504-521, of China's SWS). China has demonstrated that the legal basis of its claims are Articles 11.3 and 3 and has justified the applicability of Article 3 in the context of the likelihood-of-injury determination in the EU's review investigation.
[17] Claim II.2, heading "A", EU's SWS.
[18] AB report, *Korea - Dairy*, para. 139. See also AB Report, *India - Patents*, para. 88. AB Report, *EC – Bananas III*, para. 145.
[19] See paras. 448-449.China summarized these very points in para. 287 of its response to question 40 from the Panel.
[20] See paras. 615-632 of China's SWS. See also China's response to question 53 from the Panel.
[21] See paras. 624-627 of China's SWS.

"price segment"[22] as a sampling criterion, any other criteria taken into account after the selection of the eight EU producers are irrelevant[23] and amount to ex-post justifications.

26. The EU states that it did not include companies in the sample based on their production volume but fails to substantiate how precisely the eight companies were selected such that they could be considered representative of the domestic industry.

THE EU VIOLATED ARTICLE 3.1 BECAUSE THE SAMPLE WAS NOT REPRESENTATIVE OF THE EU INDUSTRY AND THE SAMPLE SELECTION WAS NOT BASED ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE

27. China disagrees with the EU's contention that the Panel is not required to inquire into the representativeness of the sample. China's claim II.3 clearly refers to Article 3.1 as the legal basis and the lack of representativeness of the sample was argued in the FWS.[24] This aspect was also referred to by China in its opening statement at the first meeting of the Panel, was explained in response to question 53 from the Panel and extensively argued in the SWS.

28. The EU's repeated statement that besides a few large companies, 18,000 EU producers employ less than 10 persons and have extremely small production volumes is not substantiated by facts. Indeed large and medium size companies do exist in the EU as can be observed from the comments submitted by interested parties[25] and the websites of the Spanish and Italian footwear associations.[26] China recalls that sampling in the injury context is an exception to the general rule of a collective injury examination for the domestic industry as a whole and the results of the injury analysis of the sample are transposed to the whole domestic industry. Therefore sampling in the injury context is subject to the strict requirements of Article 3.1 and, based on the facts of a case, of Article 6.10 ADA. China does not consider that the EU's excuse of administrative impracticability to increase the number of companies in the sample is a permissible justification for violating the ADA.

29. Additionally, in response to the EU's arguments regarding China's *mere assertion* of data for sampling not being "sought",[27] China recalls that it has established that the relevant "positive evidence" for sampling was not sought from the complainant producers. Moreover, it was not available to the EU for the pool of the complainants, based on the complaint, standing forms and CEC submissions as claimed in the Review Regulation and the EU's FWS. Thus, the EU industry's sample selection was not based on an objective examination of positive evidence. This is the crux of China's claim II.3(i) to the exclusion of any other interpretations put forward by the EU.

30. China notes that the EU argued on numerous occasions that it had the relevant positive evidence "*which would have been solicited by a sampling form (had that form been sent),"* for selecting the eight producers from the complainant producers at the time of sample selection. In its SWS the EU asserts that since the domestic industry comprised of 18,000 SMEs it could not possibly have the information for each producer. The Panel should not be misled into believing that the "pool of producers" from which the eight companies were selected comprised 18,000 producers; it comprised only the complainants.[28] The EU cannot be permitted to erode the Article 3.1 requirements

[22] See para. 142, EU's SWS.
[23] See paras. 647, 655 of China's SWS.
[24] See paras. 500, 506-509, 511-513 of China's FWS.
[25] See European Footwear Alliance submission dated 12 November 2008, Annex 4. Exhibit CHN-34.
[26] http://www.fice.es/en/index.php?option=com_content&task=view&id=18&Itemid=17; http://www.ancicalzature.com/anci/soci.nsf/elencoassociati?openform.
[27] Para. 132, EU's SWS.
[28] On a date before 10 October 2008 and these eight companies were sent anti-dumping questionnaires on 10 October 2008.

also relevant for sampling of the producers,[29] by claiming that what matters is that the information relied upon by the investigating authority allows it to select a sample that "reliably" reflects the situation of the domestic industry.[30] Moreover, sample selection is supposed to be an "objective" procedure and not an alleged objective "declared in mind" by an investigating authority as considered by the EU.

31. China recalls that contrary to the EU's claims, it did not define anywhere that "the domestic industry" was "the Union production." China has disproved the EU's attempted interpretations of the Review Regulation recitals mentioned in response to question 50 from the Panel.

32. Finally, China is accused of not providing any factual support to show that the information mentioned in the complaint is exaggerated. In response, it is noted that among others, the Chinese and Vietnamese imports to the EU, the dumping and undercutting margins, the EU consumption and production of the like product for the years 2005-2007 provided in the complaint are significantly higher than those mentioned in the Review Regulation. In the Note for the File dated 26 November 2008, the EU accepted the existence of numerous estimates in the complaint. In China's view, the data provided in the complaint emanated from the parties seeking the extension of the measures and cannot be considered "positive evidence" unless verified at the source, i.e. the company providing them. Mathematical figures are verifiable but this does not establish that the companies providing them did not add estimates or exaggerate them. The CEC letter dated 29 October 2008 which as per the EU provided the volume and sales information for the first half of 2008, clearly included estimations.

THE EU VIOLATED ARTICLES 3.1 AND 3.4 IN ITS INJURY ANALYSIS

33. First, the EU states that China has not substantiated that the Prodcom data included the production of EU producers related to or importing from Chinese/Vietnamese producers and that Article 4.1 does not impose an obligation to exclude related producers. China notes that the British and German footwear associations clearly stated that their members included companies that imported footwear from China/Vietnam. Interested parties also provided comments noting that Italian producers like Tod's and Sixmar have significant imports from China.[31] In fact the EU itself claims to have investigated with respect to the complainant producers whether or not they were related to Chinese/Vietnamese producers and/or had imports from these countries beyond 25 per cent. Having followed this approach, the EU cannot claim now that exclusion was optional and that this is an issue related to standing only. The latter point is not supported by Articles 4.1 and 3.4, the panel ruling in *EC - Bed-Linen*[32] and recital 339 of the Review Regulation.

34. Next, China does not consider that merely by cross-checking trends established through different sources for different data sets pertaining to different time periods and product levels can an investigating authority discharge the obligation of conducting an injury assessment consistent with Articles 3.1 and 3.4. Just because the EU permitted the national associations to provide estimates, such estimates do not constitute "positive evidence".[33] China does not accept that "estimates" can be used for each and every assessment in the context of injury by an investigating authority as was done by the EU.

[29] Panel Report, *EC - Salmon*, para. 7.130. AB Report, *US - Hot-Rolled Steel*, paras. 192-193.
[30] Para. 136, EU's SWS.
[31] See paras. 733-740 of China's FWS for detailed comments.
[32] Panel Reports, *EC - Bed-Linen*, para. 6.181.
[33] Para. 155 of EU's SWS.

BY USING NON-VERIFIED DATA THE EU DID NOT CONDUCT AN OBJECTIVE EXAMINATION OF INJURY BASED ON POSITIVE EVIDENCE

35. In the context of China's claim concerning the violations of Articles 3.1 and 17.6(i) in the original investigation, and the use of non-verified data provided by the complainants at the complaint stage,[34] China would ask the Panel not to accept the EU's arguments as to the WTO consistency of cross-checking information with data provided by national federations according to a black box methodology.

36. Essentially, the overall picture that emerges is one where an investigating authority that applies sampling both on the dumping and on the injury side, accepts at face value data from 800+ non-sampled unverified companies when it comes from the complainant industry, but rejects outright all information submitted by around 140 non-sampled exporting producers requesting MET on the very ground that it cannot be checked.

THE EU DID NOT PERFORM THE NON-ATTRIBUTION ANALYSIS CORRECTLY BECAUSE ITS ANALYSIS COULD NOT HAVE DETERMINED THE EXTENT TO WHICH THE DUMPED IMPORTS WERE THE CAUSE OF THE INJURY

37. China has shown that as a general matter the EU's arguments demonstrate that the conclusion on causation can be properly made without regard to the non-attribution analysis, and how this helps explain its approach in general. In that regard, the EU's SWS contains another telling paragraph:

> *"By applying the criterion successively to two 'other factors', each of which caused 50 per cent of the damage, China claims that the European Union would be compelled to disregard their relevance. In the first place,* ***the European Union does not understand how in such circumstances the authority could have arrived an initial finding of causation by the dumped imports****."*[35]

38. The EU has barely attempted to hide the fact that it views the non-attribution requirement as a pointless formality because, in its apparent view, it is not possible to 'unring the bell'. The question that the EU is asking here is "how could a non-attribution analysis break the causal link if the causal link is already found by the time we do the non-attribution analysis?"

39. China notes that the EU's exposition of its attitude toward the practical utility of the non-attribution requirement now takes on particular importance because it is now - as a last-ditch "alternative argument" - essentially asking the Panel to believe that it really did perform a proper collective analysis on the basis of more precise ideas as to what the *actual extent* of injury caused by each individual factor really was. The EU cites its boilerplate assertion that it performed a collective analysis in support of its plea, and reasons that if it did not "have an appreciation of the relative contribution of dumped imports…on the one hand, and the various known 'other factors' on the other, it would not be able to reach the conclusion to which it refers in terms of breaking the causal link."[36]

40. While China considers that logic sound enough, it would ask the Panel here, as it has elsewhere, to decline the EU's request that it be taken at its word that the contents of its black box are indeed WTO-consistent. First, China considers that the AB in *US-Hot Rolled Steel*, in requiring "a *satisfactory explanation* of the nature and *extent* of the injurious effects of the other factors,"[37] intended this "explanation" to come at the investigation stage. In addition, the AB has endorsed the

[34] EU SWS, para. 224.
[35] EU SWS, para. 227.
[36] EU SWS, para. 253.
[37] AB report, *US - Hot Rolled Steel*, para. 226

rule that the party which asserts a fact, whether the complainant or respondent, is responsible for providing proof thereof.[38]

41. Second, the EU's claim is hard to believe in light of the context of its other arguments. It has argued that, as a matter of logic, a non-attribution analysis cannot possibly break the causal link that is "initially found" even before the non-attribution analysis. At the same time it asks the Panel to believe, in spite of its not having provided any evidence to this effect, that (1) it did in fact expend the necessary resources required to perform rigorous analyses and make more precise determinations as to the *actual extent* of each of the injurious effect of the various factors it considered, and (2) that it performed a collective analysis on the basis of those more precise results. Why didn't the EU divulge these results and the methodologies used to derive them in the regulations, and why would it only disclose their very existence at this late stage of the proceedings, even though these issues were the subject of much debate at the first meeting with the Panel?

42. Finally, with respect to the EU's rebuttal on the currency appreciation issue, China notes once again that in considering the appreciation of the Euro to be solely an issue of "import price levels," the EU conveniently avoids the fact that the steep appreciation of the Euro throughout the period of investigation was likely to have, *in itself*, an injurious effect.[39]

43. One effect of the appreciation of the Euro vis-à-vis the dollar was, to be sure, to make Chinese imports relatively more attractive in that import prices were lower when measured in Euros, and whether or not that issue—when framed in terms of "import prices"—can be considered an "other factor" is one side of the argument.

44. But the other side of the issue is that, in a competitive world market with many players, the appreciation of the currency of the home country vis-à-vis that in which footwear is traded on the world market may very well have caused *major* injury to the European industry even if Chinese imports did not exist, or even if China's home currency were also the euro.[40]

THE EU VIOLATED ARTICLE 6.2 BY FAILING TO CONFIRM THAT FIVE SAMPLED PRODUCERS DID NOT COMPLETE THE COMMUNITY INTEREST QUESTIONNAIRE

45. First, China does not contend, as the EU puts it, that an EU importers' association was left in ignorance of the fact that some EU producers did not complete the Community interest questionnaire. China's claim is based on the evidence on the record. In its FWS the EU strongly argued on this issue.

46. Next, China notes that the EU while referring to the Note for the File of 23 January 2009 claims that the absence of five responses in the non-confidential file should have been interpreted by the interested parties to imply that the missing replies had not been received. China notes that the Community interest questionnaire responses were made available progressively.[41] In recital 401 of the Review Regulation, the EU referring to the Community interest questionnaire stated that "all" cooperating producers sampled in the original investigation kept a significant part of their production in the EU. This was a clear indication that the replies of all the ten sampled producers were available to the EU but only six responses were made available in the open file. Thus the non-availability of the questionnaires in the non-confidential file was not an indicator that the sampled producers did not respond.

[38] AB Report, *US - Wool Shirts and Blouses*, p. 14.
[39] See for example paras 591, 610 of China's responses to question 94.
[40] I.e., there are other competitors that price in dollars which would depress EU prices.
[41] China notes that the questionnaire responses of companies "H" and "I" were added sometime between end of February and beginning of March 2009.

47. In response to the EU's procedural allegation in this context[42], China notes that Article 6.2 is a part of the Panel's terms of reference in claim II.7. Based on the disclosure of new facts on this issue, per the panel ruling in *India-Patents*, China has the right to make additional arguments.[43]

THE EU VIOLATED ARTICLE 6.5 BY GRANTING CONFIDENTIALITY IN THE ABSENCE OF GOOD CAUSE

48. The EU disputes China's assertion that the sampled EU producers were represented by lawyers. China has provided additional evidence in its SWS[44] and also refers to the various CEC submissions made on behalf of the sampled companies. In fact the EU itself stated in the Note for the File dated 9 December 2008 that CEC was competent to provide complementary information on behalf of the complainants including the sampled companies.[45]

THE EU VIOLATED ARTICLES 6.2 AND 6.4 BY NOT PROVIDING INTERESTED PARTIES TIMELY OPPORTUNITIES TO SEE THE RELEVANT INFORMATION

49. China disagrees with the EU's assertion that analogue country selection issues were not covered within the scope of "information" for the purpose of Article 6.4 as the request of the interested parties pertained to the "intention" of the investigating authorities. The e-mail of EFA was drafted in a prospective manner based on the terminology used in the notice of initiation of the EU. This does not dilute the substance of the claim regarding the denial of timely opportunities to see the "information" pertaining to the analogue country selection, *i.e.* if any analogue country producers responded to the questionnaires, etc. These issues clearly fall within the scope of "information". Additionally, China notes that the present case has to be distinguished from *Korea - Paper (Article 21.5)* referred to by the EU. The EU's projection of the alleged "revocability" of the selection of Brazil is at odds with the facts.

50. Last, in response to the EU's accusation of China's expansion of claim II.7 by invoking an independent violation of Article 6.2,[46] it is clarified that China has developed its arguments based on the same Articles as stated in the Panel request and based on the facts as described in its FWS.

[42] See para. 179, EU's SWS.
[43] Panel Report, *India - Patents*, paras. 7.11-7.15.
[44] See para. 868(iii) of China's SWS.
[45] Exhibit CHN-26. Additionally, besides sending the anti-dumping questionnaire to the eight sampled companies, an undated letter was also sent by the EU to CEC mentioning that the eight sampled companies were required to complete the questionnaires by 19 November 2008.
[46] Paras. 200-203, EU's FWS.

ANNEX F-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION

1. China chose to file an unusually long Second Written Submission (SWS), saving some of the discussion, arguments and evidence till the last moment. This necessitates a lengthy oral statement from the EU in which the EU addresses the tens, if not hundreds, of factual allegations by China. Although the EU addresses them at length[1], the relevance of many of those allegations for China's claims is dubious. We hope that the Panel will see through this.

2. **China's "as such" claim against Article 9(5) of the Basic AD Regulation.** With respect to Panel's terms of reference, the EU again observes that China is not responding to our arguments based on Article 6.2 of the DSU. Nor has China fully addressed our arguments raised in our Request for Preliminary Rulings.

3. Moving on to substantive issues, the EU observes that in its Second Written Submission China mischaracterises the EU's arguments by saying that our defence rests, essentially, on China's Protocol of Accession. The EU is merely interpreting the provisions of the ADA and applying them to the specific circumstances of imports from China, as a non-market economy country. Contrary to what China asserts, Section 15(d) of China's Protocol of Accession explicitly permits the EU to treat China as a non-market economy country until 2016. And certain natural consequences in the context of anti-dumping proceedings arise from that status without that amounting to a discrimination under Article I:1 of the GATT 1994.

4. We have demonstrated that China's claim under Article 6.10 does not fall under the Panel's terms of reference and relies on an incorrect interpretation of that provision. The use of "shall" followed by the terms "as a rule" indicates that the obligation therein is only a general principle and not a strict obligation that is to be complied with in any and all circumstances. We have also shown in our SWS that China is incapable of dealing with the existence of other hypothetical examples where investigating authorities have to calculate dumping margins and impose anti-dumping duties on a country-wide basis. Those examples provide strong contextual support to the conclusion that sampling is not the only exception to the individual dumping margin determination, as China posits. Moreover, the application of the Article 9(5) criteria does not make the application of the "relationship" test under other rules irrelevant. Both are complementary, although they serve similar purposes, i.e. identify the relevant supplier, either a group of companies or separate legal entities, on the one hand, or the State and companies which do not act independently from the State in their export activities (as a "group") or companies operating independently from the State, on the other hand. In sum, both tests serve to identify a close relationship between separate legal entities in order to conclude that they can be considered as one single exporter or producer for the purpose of Article 6.10. Furthermore, in the specific context of anti-dumping investigations relating to Chinese imports, the EU has shown that, in non-market economy countries, the State can be considered as a producer and that the presumption is State control of international trade. Thus, the degree of interference of the State in the export activities of private entities has to be examined on a case-by-

[1] For the purposes of this executive summary, the EU focuses on some but necessarily not all the points raised in its oral statement.

case, company-by-company basis. China has not contested this presumption by reference to relevant evidence, but only by assertions regarding its economic status. Needless to say, such assertions are not enough to meet its own burden of proof in these proceedings. Once again, the fact that China has not provided evidence to rebut the presumption that the State in non-market economy countries is a supplier and controls international trade, i.e. the mere basis of why Article 9(5) exits, is quite telling.

5. Moving on to China's claim under Article 9.2, this provision permits the imposition of anti-dumping duties on a country-wide basis also in the particular case of imports from non-market economy countries, where the State is considered as one supplier. In any event, the third sentence of Article 9.2 of the ADA also permits the imposition of duties on a country-wide basis when there are several suppliers and it is "impracticable" to specify individual anti-dumping duties per supplier. The notion of "impracticable" implies "something which is not feasible in practice", "something which cannot be done for practical reasons", or something that is not "able to be effected, accomplished or done". In other words, suppliers cannot be specified by name and duties cannot be imposed on an individual basis because of "practical" reasons (i.e. it would render those duties ineffective, not feasible or not suited for being used for a particular purpose, i.e. offsetting or preventing dumping). Indeed, if a supplier is not acting independently of the State, in view of the role of the State in non-market economy countries and in particular its control on international trade, there is a risk that non-IT suppliers will channel all its exports through the company with the lowest duty-rate, thereby undermining the main objective of the anti-dumping measure, i.e. to offset or prevent dumping.

6. With respect to China's claim under Article I:1 of the GATT 1994, the EU has elaborated in theory but also by providing uncontested evidence specifically relating to China that the status of the economy of the exporter is relevant in the context of anti-dumping proceedings. China also follows a narrow approach to when a conflict between two covered agreements may take place. This includes situations like the present case, where an agreement prohibits what another permits. Indeed, if Article 9.2 of the ADA already requires the imposition and collection of anti-dumping duties "on a non-discriminatory basis" and Article 9(5) is consistent with such a provision, by definition, Article 9(5) could not violate the non-discrimination provision contained in Article I:1 of the GATT 1994.

7. Finally, Article 9(5) does not provide for any discretion as to how the EU authorities administer this provision and, thus, China's claim is outside the scope of Article X:3(a). In reality through this claim China takes issue with the manner in which the EU authorities calculate dumping margins in the case of imports from China. This issue is blatantly outside the Panel's terms of reference since China made no reference to Article 6.8 of the ADA in its Panel Request. In conclusion, the EU respectfully requests the Panel to reject China's claims against Article 9(5) of the Basic AD Regulation.

8. **Claims against Review and Definitive Regulations – Burden of Proof.** Where there is a clash of evidence the maxim 'he who asserts a fact must prove it' will come into play. Although the rule is the same for both parties, the consequences of failing it are not. If the complainant fails to prove the facts that form the basis of its claim that claim will fail. If a responding Member fails to prove a fact that it has put forward in order to refute the complainant's factual assertions the panel will still have to determine whether those assertions have been proved. In other words, that the respondent's assertions are not established to be true does not necessarily imply the truth of those of the complainant.

9. **Claim II.1, Claim II.13. A. Analogue country selection.** The basic source of law on the selection of the analogue country is China's Protocol of Accession. The Commission considered all relevant factors in making the selection; there is no obligation to consider the level of economic development. Article 2.1 of the ADA does not provide a sufficient basis for regulating the selection, nor do Articles 2.4 and 17.6(i), or paragraph 151 of the Working Party Report. The distortions of a non-market economy prevent identification of what would exist but for the distortions. Even if

Indonesia had been used as an analogue country the margins of dumping would have been large, and the evidence produced in the review showed that prices were not likely to rise and extinguish that margin. The possibility of using proxies under Article 14 of the SCM Agreement has no significance for the ADA, where the context is much wider. The EU looks at various factors in making its selection, but in the footwear review competitiveness and representativeness were the most significant. As regards representativeness, sales in Brazil satisfied the 5 per cent rule, whereas those in Indonesia fell far below it. China has failed to prove that the 'holiday season' resulted in bias in favour of Brazil as the analogue country. The contacts with producers did not reflect such a bias. Extensive time was allowed to producers in all countries, and none was refused for lateness. Allegations of collusion between Italian and Brazilian producers to distort the investigation were not substantiated. Indian and Indonesian producers would have had most to gain from continuation of the measure. China provides no evidence for its suggestions regarding collusion, which remain no more than hypotheses. China tries, ineffectually, to justify its previous invocation of the Czechoslovak proposal as regards the interpretation of the second Ad Note to Article VI:1 of GATT 1994. The great number of producers in Brazil was a significant indicator of competitiveness. The increased value of the Brazilian real served to off-set the increase in tariff. The problem of 'like product' and children's shoes was overcome by making allowances during comparison. China has failed to establish that the EU made a determination of likelihood of dumping that was based on a defective finding of past dumping.

10. **B. PCN**. The alternative classification proposals made during the review were considered by the Commission, but were not shown to be a significant improvement. China has not shown that problems caused by the range of products within particular PCNs could not be dealt with by appropriate adjustments during comparison. It has not established that the EU's PCN system actually prevented fair comparison being made by means of such adjustments.

11. **Errors in China's claims on injury in the review regulation.** The approach taken by the panel in the *US – Corrosion Resistant Steel Sunset Review* confirms the EU view. Panels have a duty to consider whether claims based on Article 11.3 of the ADA are in circumstances like those of the present case properly before them. In this case they are not. China's argument that the Commission failed to give proper consideration to the issue of likelihood is ill-founded. In particular, it ignores the thorough examination of expected export prices and volumes in the light of such factors as spare capacity. China fails to distinguish between the Commission finding of injury, and its findings on the various injury factors. These were used independently in the course of making the determination of the likelihood of injury should the measure be allowed to lapse.

12. **Claim II.3**. Contrary to what China argues, the Notes for the file of 29/10/2008, 09/12/2008 and 09/03/2009 confirm the EU view, stated also in the Review Regulation (Recital 21). China also overlooks that the company at issue still maintained its production capacities in the EU, even after it discontinued its production there. Hence, this company could have at any moment re-started its production in the EU.

13. **Claim II.4** The Note for the File of 2 October 2008 (Exhibit EU-19) discusses the information used by the EU IA to verify the standing of the complainants. That note explains that the production of the complaining industry was about 150 million pairs and the total production in the EU had been assessed at 390 million pairs. This confirms the EU was consistent in defining the domestic industry throughout the investigation.

14. **Claim II.5**. China's claim that 'structural inefficiency' was a cause of injury was an 'other factor' that the Commission did not consider, but this is in effect a claim that Chinese producers can undercut those in the EU, which, given that there is dumping, supports the conclusion that the 'dumped imports' are the cause of injury. In any event the fact that China's producers operate in non-market economy means that differences in efficiency cannot be adequately measured. The Commission had found that the EU industry had undergone and was undergoing major changes to

improve efficiency and meet the demands of the market. The use of outsourcing was one of these changes, but in so far as it resulted from competition from dumped imports it was a symptom rather than a cause of injury. Regarding non-dumped imports from third countries as a cause of injury, this was not denied by the Commission, but the volume and level of undercutting of dumped imports was such that their causal link with the injury was not broken. As regards reduction in demand this was matched with a reduction in production, but this also did not break the causal link. That link was established by examining data for market share, profits, investments and wages. Since movements in exchange rates affected prices any associated injury was a consequence of undercutting by the dumped imports.

15. **Claim II.6**. As complainant, it is China's responsibility to provide evidence for its assertions that the Commission did not make available non-confidential versions of questionnaire responses under Article 6.1.2 of the ADA. The rules on confidentiality have the consequence that the Commission was obliged to clarify parties' intentions in that respect, given that there were serious grounds for believing that they had not properly understood the procedures. In the circumstances, the time taken for clarification respected the standard of promptness. Furthermore, those circumstances also support the conclusion that revised versions of the responses, concealing the companies' identities, were received in response to requests from the Commission, and that the differences in the dates on which responses were made available to interested parties were due to differences in the dates on which those responses were received. The parties' requesting confidentiality made clear that it concerned any information that would reveal their identities. The circumstances of the consideration of these matters were complicated. A proper consideration of the facts shows that the Commission's account of what occurred regarding Company B was correct. China has no evidence for its assertion that the response was not made available until 'around 12 December'.

16. **Claim II.7**. China's attempt to use Article 6.2 to expand the rights conferred by Articles 6.1.2, 6.4 and 6.9 of the ADA conflicts with the interpretative principles of 'effectiveness' and of *lex specialis derogat legi generali*. China's interpretation of Article 6.2 would amount to establishing a right of 'advance consultation' on all steps taken by an investigating authority in the course of an investigation or review, but the ADA confers no such right. The prospect of legal proceedings encourages the Commission to take account of criticisms made during investigations and if appropriate to change provisional decisions. The particular categories of information identified by China were dealt with correctly by the Commission. It confuses 'information' with methodology. A party's response is what it defines as its response, which may be a revised document. China has failed to provide evidence regarding the reason for the delays in placing responses of potential analogue companies in the non-confidential file.

17. **Claim II.8**. The Commission applied the same policy regarding good cause for according confidentiality to all interested parties. Certain categories of information were recognised as by nature confidential, and the Commission did not require companies to make statements of the obvious. The fact that complainants requested confidentiality for their identities is not in doubt. China fails to indicate the source of the obligation to reveal the names of EU producers. Its claims regarding the provision of information are contradictory. The Commission had good evidence for accepting the complainants' fears of retaliation should they be identified; participation of some in other proceedings did not concern comparable situations. Once the claim of confidentiality was accepted it had to be applied to any information that could be used to identify the companies concerned. The particular documents listed by China in this context do not reveal any failures by the Commission regarding the rules on confidentiality.

18. **Claim II.9**. China's claim appears to be based on the mistaken belief that an investigating authority is obliged to weigh the importance of a valid claim to confidentiality against the problems that such confidentiality would create for other parties.

19. **Claim II.10**. The EU confirms that the Commission's verification visits to EU producers allowed sufficient time for corrected data to be obtained. China is far from establishing the truth of its allegations of bias in the treatment of interested parties. It introduces a claim under Article 6.8 of the ADA which is not within the terms of reference. The procedure under that Article is a means to an end, not an end in itself.

20. **Claim II.11**. China's only reference to Article 11.3 of the ADA is in this claim. It has treated this claim as a purely consequential matter, and cannot change that approach at this stage of the proceedings.

21. **Claim II.12**. Article 12.2.2 of the ADA does not extend to requiring publication of explanations of the application of doctrines of domestic law.

22. **Claim III.2**. The methodology specified in Article 2.2.2(ii) of the ADA could not be used in this investigation because the companies concerned were not operating on a market-economy basis. For the same reason the data of such companies could not be used in applying the cap in Article 2.2.2(iii). The companies proposed by China were makers of polyester fibres, and as such could not be regarded as in the same general category as footwear producers.

23. **Claim III.3**. China's evidence of supposed bias by the Commission is completely unpersuasive. An investigating authority is not obliged overtly to address every argument raised by parties.

24. **Claim III.4**. The product scope of the investigation was a matter for definition by the EU and was not governed by the notion of 'like product'.

25. **Claim III.5.** As apparent from its first sentence, recital 215 of Definitive Regulation discusses the analysis of micro-economic elements and the statement about companies having to close down is the result of that analysis and is made in that context, rather than as a result of any statements in recitals 172 or 200 of the Provisional Regulation. The fact that the information from complainants was further cross-checked with information from the relevant associations does not mean that the data used by the EU was thereby made less reliable.

26. **Claims III.6, III.16**. The ADA leaves Members free to set anti-dumping duties below the level of the dumping margin, but they may not discriminate in breach of Article 9.2. In applying the 'lesser duty' principle a Member is not obliged to use concepts drawn from Article 3.

27. **Claim III.8**. The Commission provided adequate evidence for its finding on employment and production capacity. It properly evaluated the factors affecting domestic prices. The calculation of the lesser duty was quite distinct from the determination of injury. The Commission's evaluation of profit levels was proper, as was the lifting of the quota on imports from China.

28. **Claims III.10, III.11, III.12**. The 36 supporters of the complaint also endorsed the confidentiality request that it contained. Giving the names of companies not supporting the complaint would have risked enabling the identification of complainants and supporters. Doubts about the sufficiency of evidence supporting the complaint should be pursued under Article 5 of the ADA. Commercial data may still be of use to competitors even if the names of the supplying firms are unknown.

29. **Claim III.13**. The MET questionnaires are not part of the 'original questionnaire sent to interested parties at the outset of an investigation'. They are not part of a comprehensive set of questionnaires. They seek information that is a necessary preliminary to the dumping calculation.

China's Accession Protocol makes explicit provision regarding which parts of the Working Party Report are binding.

30. **Claim III.14**. The facts of the present dispute are similar to those in *EC – Norway (Salmon).* The changed method of calculating the lesser duty involved no new facts. The Commission was going beyond its obligations under Article 6.9 of the ADA in providing further disclosure and giving an opportunity for comment. In any event, that opportunity would itself have satisfied Article 6.9.

31. **Claim III.15**. The Commission confirmed that the removal of STAF from the products covered by the investigation did not affect the representativeness of the sample. The government of China agreed to the sample that was selected, and did not question the content of the sample when it was informed of the removal of STAF. It is therefore estopped from going back on that agreement.

32. **Claim III.19**. The notion of publishing an 'evidentiary path' is relevant only to those situations where the authority had to reconcile divergent information and data. Article 12.2.2 does not forbid Members referring to matters in other publicly available documents. It does not require publication of matters that are neither required to be considered nor were actually considered.

ANNEX F-3

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF CHINA

I. INTRODUCTION

1. China has taken note of the exceptionally long opening Oral Statement ("OS") of the EU, which is for all intents and purposes its Third Written Submission. While this Closing Statement will not be nearly as long as the EU's Opening Statement, it too will be unusually long in light of the quantity of misconstrued arguments and outright falsehoods which China simply cannot allow to pass without comment.

2. With regard to the EU's arguments on the burden of proof found at paras. 48 et seq. in its OS, the EU cites the AB Report *US - Gambling* as to the definition of a *prima facie* case[1] while referring to "the well-established rule that 'he who asserts a fact must prove it[2]'". With regard to the *US - Gambling* case, China notes the distinction between "evidence" in the context of as such claims where measures are generally WTO-consistent or not as a matter of law - such as those which were the subject of the *US - Gambling* case - and "evidence" in the context of claims that an investigating authority did or did not act in a WTO-consistent manner where only that investigating authority holds the evidence necessary to definitively prove the truth or falsity of the allegation one way or the other. Where that is the case, and the complaining party makes substantiated allegations with regard to which only the defendant holds the evidence which will ultimately prove or disprove the allegation, the burden must shift to the defending party to refute a substantiated claim against it, while at the same time the Panel may seek information which may help it make a determination:[3] a right China has asked the Panel to exercise with respect to the sample of EU producers from the beginning of this proceeding. What is for certain is that the defending party cannot in good faith withhold all evidence which would tend to corroborate a complainant's claims while at the same time freely offering that which at least appears to absolve it of any wrongdoing.

3. As to the EU's repeated accusations that China has brought "new claims" in its Second Written Submission and because of that much of China's SWS are out of the Panel's terms of reference; China recalls once again the distinction between claims and arguments as those terms have been defined for the purposes of Article 6.2 of the DSU - a distinction which has been noted countless times throughout these proceedings.[4]

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[1] The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision. AB report, *US - Gambling*, para 148.

[2] Para. 65 EU's oral statement at the second meeting with the Panel.

[3] DSU Article 13(2).

[4] By "claim" we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a claim of violation must, as we have already noted, be distinguished from the arguments adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. **Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and**

4. The EU has not provided any support for its apparent contention that parties' may not make additional arguments and provide evidence relating to their claims after the time of the First Written Submissions, and China considers the fact that the EU has addressed many of China's additional arguments in its 130 page OS as evidence that it too recognizes the clear distinction. To the extent that the EU considers China to have "saved some of the discussion, arguments and evidence till the last moment," thus implying that China has taken strategic decisions in bad faith, China notes that while its SWS was indeed lengthy, the vast majority of whatever could be considered "new" has come as a direct reaction to the EU's FWS and the events of the first meeting of the Panel, some of which include the sudden disclosure of key facts withheld by the EU up until the time of that meeting.

II. CLAIMS II.1 AND II.13

ANALOGUE COUNTRY SELECTION

5. With regard to the question as to whether "China [can] overcome the argument that [Article 2.1] is purely definitional that cannot be used as a basis of a claim[5]," the EU argues that the only reason why the AB in *US - Hot Rolled Steel* ruled on a claim based on an impermissible interpretation of "ordinary course of trade" is because "the complainant had no way of challenging this particular conduct of the US other than by invoking Article 2.1 since the phrase is not elaborated elsewhere in the ADA".

6. Actually, the phrase is located in three different parts of Article 2, and this very fact was specifically noted[6] as central to China's point that while Article 2.1 does not create *independent* obligations, it may nevertheless form the basis of a claim so long as it can be shown that the obligation is also located (or "created") elsewhere in the ADA as well. In the case of "comparable price," China has noted five[7] other instances in which that phrase occurs, including in the Paragraph 15 of the Protocol itself, and thus is not purporting that the part of Article 2.1 cited creates an independent obligation.

7. Thus, the EU's argument that China must have cited Paragraph 15 of the Protocol in order to benefit from the "comparable price" language contained therein must fail just as an argument that Article 2.2 *must* be cited in order to find a violation of the "ordinary course of trade" obligation contained in Article 2.1. The EU has not meaningfully distinguished this case from the *US - Hot Rolled Steel* case. China notes that this "no independent obligation" point is the extent of the EU's argument as to whether the Article 2.1 claim is valid as it specifically acknowledges that the analogue country selection process is fundamentally about securing a "comparable price".

8. On the broad issue of the disciplines imposed by the Articles cited, China notes that its argument that the process must include some factor acknowledging the economic realities of the target of the investigation is *completely distinct* from its arguments attacking the EU's use of the criteria that it *did* apply. The EU has addressed both as if it would be the case that if the Panel finds that the selection criteria were applied in a reasonable manner, then it need not rule on whether those criteria were permissible to begin with. The opposite is true. China's arguments that the "competitiveness," "representativeness" and "like product" issues were handled incorrectly in this particular case are only necessary in the event that they, <u>*without anything more*</u>, are permissible in <u>*any*</u> case. In that regard it is noteworthy that even if the Panel is to believe that China would have been no better off with Indonesia as it's analogue country, as the EU now suddenly argues, it is the *selection*

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the first and second panel meetings with the parties. AB Report, *Korea - Dairy*, para. 139. (Emphasis added).

[5] Para. 65 EU's oral statement at the second meeting with the Panel.

[6] Para 300, China's SWS.

[7] Para 308, China's SWS.

process which is of primary importance rather than any "harmless error" argument now put forth by the EU. Up to this point, the parties have gone back and forth arguing over whether analogue country domestic sales volume and the number of producers are sufficient as the only considered criteria. That issue logically precedes that of whether the EU analysed them correctly.

9. With regard to the "but for the distortion" argument, as a threshold issue, China notes in respect of the EU's OS that the fact that the Panel in DS 379 ruled only on the basis of Article 14 of the SCM Agreement as opposed to Article 15 of the Protocol is of absolutely no consequence. At least as long as the Panel considers convincing the argument that there is no difference in the underlying purpose of proxy-value determination in NME anti-dumping and subsidies cases.

10. The EU says that the Panel in that case - in noting that at a bare minimum an authority must seek to find the value that "*would* prevail in the absence of the distortion" - "did not purport to address how Section 15(b) [of the Protocol] would have been applied had it been invoked[8]". The EU also continues to argue that finding or attempting to find undistorted values is impossible in non-market economies.

11. On the second point, China recalls that DS 379 was a case in which *China* was the target of the anti-subsidy investigation, so it seems pretty clear that the Panel thought that it was possible to try to find undistorted values in "NME" scenarios. As to the first point, China understands the EU to argue, without giving any reason as to why, that the underlying purpose of proxy establishment in the case of *China* would or could be different depending on whether the investigating authority relies on Article 14 of the SCM Agreement or Paragraph 15 of the Protocol as its legal basis for finding a benchmark. China fails to see how this could be possible.

12. Finally, as to the issue of the over-reliance on domestic sales volume as that criteria was applied *in the present case*, China would first note that the "5 per cent rule" borrowed from the footnote of Article 2.2 is not actually a rule, but rather a guideline from which derogation is acceptable in instances where "the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison[9]".

13. China has never said that there was *no* statistical advantage between the Brazilian sales volume and the Indonesian sales volume. Rather, China's argument was that by considering the 200,000 Indonesian pairs capable of providing a statistically significant sample (i.e. of significant magnitude to permit a proper comparison), it was unreasonable for the EU to have considered the marginal advantage gained from the difference in two already statistically significant domestic sales volumes as more valuable than both the comparable level of economic development *and* broader range of footwear types sold found in the case of Indonesia.

14. With regard to the procedural bias issues in connection with the analogue country selection, China notes that it has not in fact "abandoned" its Article 17.6(i) claim, as the EU argues in Paragraph 64, and China has explicitly said as much. Rather, China has noted the alternate bases on which the Panel should find that the EU has violated China's due process rights and demonstrated how those additional bases fall within the Panel's term of reference and how China had made its case in regard to those bases in its First Written Submission.

[8] Para. 85 EU's oral statement at the second meeting with the Panel.
[9] ADA Article 2.2[fn].

PROCEDURAL BIAS

15. The EU claims in its OS that sending the analogue country questionnaires in the holiday season did not affect cooperation of Indian and Indonesian producers as holidays are there all around the year and refers to the festival Eid-al-Adha. It is noted that for this festival, in Indonesia[10] and India there is one public holiday. Therefore, this would not have interrupted or dissuaded Indonesian producers from cooperating and this one day holiday cannot be compared to the long holiday break starting before Christmas and ending after the new year, generally covering two weeks.

16. Besides the fact that the EU changed its justification in the FWS compared to the Review Regulation concerning the reason for the sending of questionnaires to Indian and Indonesian producers only on 23 and 22 December 2008 respectively, it has provided no proof why this was so.

17. In paras. 107-108 of its OS the EU claims that responses were received from analogue country producers even after the dates mentioned in the Note for the File dated 6 February 2009 and makes several arguments about the dates of the receipt of the non-confidential questionnaire response of Indonesian producers. These arguments besides being irrelevant to the issue show the complete lack of transparency in the proceeding. Additionally, the EU's own Note for the File dated 6 February 2009 gave the dates of receipt of the confidential versions of the analogue country questionnaire responses. China's claims II.1 and II.13 relate to the confidential versions of the responses. The fact that the responses had certain deficiencies is an issue apart from the substance of China's claims.

18. China has already explained that the Brazilian producers got maximum flexibility to reply to the questionnaire and the encouragement to cooperate. This approach is undoubtedly biased. For the record it is noted that non-confidential versions of the extension letters sent to Indian and Indonesian producers are not available in the open files. The EU is well aware of the Indian footwear association (Indian Shoe Federation) and the Indonesian footwear association (Aprisindo) but no contacts were established with these associations. Only the Brazilian footwear association was contacted by the EU to solicit cooperation.

19. With regard to the issue of collusion, the point is that the EU did not investigate this issue despite its apparent close links with the Brazilian footwear association. The EU also notes that Indian as well as Indonesian producers had interest in the extension of the measures. China notes that the factor differentiating the situation of the Brazilian producers was that only Brazil initiated an anti-dumping investigation against Chinese footwear simultaneous to the EU's investigation and that producers in the two countries were clearly assisting each other.

COMPETITIVENESS

20. China has neither claimed nor premised its arguments on the grounds that domestic prices in Brazil would increase by 35 per cent on account of the tariff increase. China notes that the EU has accepted that the tariff increase would affect the domestic prices but considers that the large number of producers in the Brazilian market would offset this increase.[11] While this theory of the EU does not appear to be economically sound, it is clear that the EU at a minimum did not have any evidence to this effect. Third, there is no evidence in the non-confidential file that the Brazilian footwear association provided the price data for domestic footwear sales for the period concerned.

[10] http://www.indonesialogue.com/about-indonesia/public-holidays-for-2008-indonesia.html.
[11] Para. 118 EU's oral statement at the second meeting with the Panel.

PCN METHODOLOGY

21. China notes that the EU incorrectly claims that the PCN methodology proposed by the interested parties would not have overcome the problems on account of the broad PCN system. China recalls that because cooperating importers in the original investigation reported data based on the more specific PCN system with more specific PCN categories the Commission determined that STAF should be excluded from the product scope. Additionally, it is common sense that, if, for example, there had been specific categories for formal/dress footwear and informal/leisure footwear, the problem of classification of different footwear in the different PCNs would not be there as far as these categories of footwear is concerned. The main issue was with PCNs classified under categories "A" and "E" and these PCNs comprised 70 per cent of the PCNs exported by Chinese producers.[12]

22. The Commission repeats that adjustments could have been made but China has explained[13] that in the absence of the knowledge of the footwear classified by the Brazilian producers in the various PCNs, Chinese exporters could not possibly demonstrate any adjustments. The issue does not pertain to adjustments between PCNs but to footwear within the same PCN.

23. Last, as regards the reclassification of footwear, the EU claims in para. 142 of its OS that China has not indicated where the EU requested Chinese exporters or EU producers to classify sports, sports-like and trekking footwear (hiking, climbing and outdoor footwear) in category 'E'. In response, it is noted that the EU requested such classification specifically in AD questionnaires sent to the exporters and EU producers. China refers to para. 406 of its FWS which provides extracts from the AD questionnaire for Chinese exporters and the EU producers.

24. China notes that the EU has accepted that the PCN list of the Commission was wrong. Interestingly, it took the EU this WTO case to figure out where the problem lay as regards PCN ABE31. Nevertheless, it shows that the EU could not apply its own PCN system and that even in the verification the EU did not gather the correct data.[14]

FORMULATION OF CHINA'S CLAIMS CONCERNING ARTICLE 11.3

25. Regarding claims II.1 and II.3, China notes that the EU repeats its allegation of a legal error in the formulation of China's claims. However, China's claim and its arguments are clear – that to the extent the EU for its likelihood-of-dumping determination relied on the dumping margin calculated inconsistently with Articles 2.1, 2.4 ADA and Article VI:1 GATT 1994, it violated Article 11.3.

26. With reference to the additional analysis claimed to be carried out by the EU, it specifically refers to the alleged substantial analysis of the volume and prices of the imports made in the likelihood-of-dumping context. To the extremely limited extent these findings were referred to by the EU in the likelihood-of-injury analysis, China has presented its comments in the SWS showing that the volume and prices of the imports were evaluated in the context of the injury analysis and the comparative price analysis of the Chinese exports was never undertaken. Additionally, the EU states that if a point is covered under the arguments of interested parties it is still part of the likelihood analysis. The EU seems to be pointing to its likely causation analysis through this statement. In that context China notes that the EU's responses to the interested parties pertained to selected causal factors raised; were not entirely fact-based; and largely relied upon the injury analysis conducted.[15]

[12] See Exhibit CHN-112.
[13] See paras. 19-22 of China's oral statement at the second meeting with the Panel.
[14] The PCN list of the Commission was made after the verification of the EU producers as mentioned by the EU. See Exhibit CHN-74.
[15] See e.g. recitals 308, 310, 311, 312, Review Regulation.

CLAIM II.3

27. Surprisingly in its OS the EU now claims that there were five sampling criteria; the fifth being sales value. This is contrary to recital 21 of the Review Regulation which explicitly refers to sales volume. Such confusion in the EU's arguments thoroughly discredits its analysis and reinforces China's point that the sample selection of the EU was not based on "objective examination" of "positive evidence". The EU also claims at this late stage of the proceeding that there is no difference between product segment, price segment and sector segment and this can be obtained by dividing the total sales value by the total sales volume. First, China notes that the unit sales price is not determinant of the price segment/sector segment in which a company operates. Second, as noted by China in its FWS and SWS, the non-confidential version of the complaint does not show that sales data was provided by the complainants. Third, the EU stated in response to question 45 from the Panel that only sales volume data was provided in the complaint and in the standing forms.[16] Fourth, the EU mentioned in response to question 45 from the Panel that the complaint provided the data for the price segment, i.e. the average price/unit price, and not the sales value. Therefore, there is extreme confusion in the EU's arguments as to the ex-post criteria created.

28. Indeed, China has stated that the situation of producers in one Member State is different from those in another Member State but the EU's sample did not take into account the situation of producers in 80 per cent of the EU Member States where footwear production is undertaken as per the Prodcom data. Therefore, the EU's assertions concerning the geographical representativity of the sample are incorrect.

29. China recalls that the EU argued strongly in its FWS and SWS that there is no evidence that the data in the complaint is based on estimates and that it had all the relevant information for sampling from the complaint among others. In complete contradiction, in paras. 339, 342 and 344 of its OS the EU has pointed out clearly that the complainants had made false claims of providing information which was actually not provided in the complaint. This shows that the complaint was not a reliable source for any form of information.

CLAIM II.4

30. China notes that it has extensively demonstrated in its SWS that the EU nowhere defined or clarified that the domestic industry comprised complainants and non-complainants and the EU's references to the various recitals of the Review Regulation do not support its assertion. The Note for the File dated 2 October 2009 referred to by the EU does not support its assertion. The EU claims that the Note for the File dated 9 December 2008 was a minor mistake and "*the standing Note, the other notes*" prove its point. The so-called standing note of the EU as mentioned above again refers to Community production and not EU industry production. China requests the Panel to ask the EU to provide the "other notes" which it considers clarified the situation.

CLAIM II.5

31. In the context of the causation analysis, all of the EU's arguments erroneously first blame the imports from China as being the cause of the other known factors affecting the EU producers. Second, the EU overlooks the fact that the injurious effect of the other known factors has to be assessed for the EU producers. No comparison is required to be made to the labour costs or efficiency in China for that purpose.

32. Regarding the structural inefficiency of the EU producers, China's contention is not that Chinese exporting producers are more efficient than EU producers or can produce footwear at cheaper

[16] China notes that until now the EU has provided no proof to establish that indeed sales data was provided in the complaint.

costs. The claim is that EU producers are structurally inefficient, period. This is a major cause of injury to them as recognized by the EU as well in the Review. Additionally, the EU's argument that thousands of 10-employee EU producers could supposedly together achieve the production levels and efficiency so as to be an attractive source of supply for multinational brands is an interesting ivory tower concept but of course does not work in practice. In fact in reality no multinational brand is sourcing from these clusters.

33. Besides the fact that the EU did not assess the injurious effect of the high labour costs in the EU, it claims that China provided in its FWS labour costs for all industries. It however fails to note that the labour costs provided were given by a sampled EU footwear producer from the original investigation in its Community interest questionnaire response and that ample evidence on the issue was presented by EFA members during the hearing conducted in the course of the review investigation.

34. China notes the EU's statement that it had facts and evidence to support its arguments concerning the structural inefficiency issue and that it disclosed it to the parties in the Note for the File dated 16 October 2009. This document was submitted by China as Exhibit CHN-126. But it does not contain an analysis as claimed by the EU.

35. On the issue of the injurious effects of the imports from third countries, China notes that in para. 203 of the OS the EU claims completely the opposite of what it claimed in its SWS.[17] Additionally, while deviating from the issue that the price of the Indian and Indonesian imports did not take into account the product mix, the EU confuses it with the point of volumes and market shares.

36. The EU also claims that the fact that producers could not reach the 6 per cent profitability target establishes the causal link with the allegedly dumped imports and shows that there was no injury on account of the decline in EU demand. This does not amount to examining the nature and extent of the injurious effect of the contraction in the EU demand and changes in patterns of consumption within the meaning of Article 3.5. In fact such an argument cannot even be considered to be providing a satisfactory qualitative explanation in support of the conclusion that this factor does not break the causal link between the dumped imports and the injury to the domestic industry.

37. Furthermore, the EU claims that the injury attributed to the dumped imports was that of preventing the domestic industry from restoring itself to a viable level of operations notably in terms of share, profits, investment and wages. China notes that the Review Regulation states that in the RIIP:[18] sales prices increased by 30 per cent; profits increased by 131 per cent; investments increased by 133 per cent; return on investments increased by 117 per cent; and wages increased by 12 per cent.

CLAIM II.6

38. The EU presents an incorrect interpretation of the *Guatemala - Cement II* case in para. 230 of its OS. The Panel neither assumed nor implied as the EU claims that "*the authorities would have been entitled to delay making the document in question available if their suspicions had had a sufficiently serious basis*."

39. China notes that contrary to what the EU states in para. 233 of its OS, in this case there was no Commission practice of checking the non-confidential documents of other interested parties than the EU producers. For instance, China will provide an example in the context of claim II.8 concerning the non-confidential AD questionnaire response of Adidas which provided information that was considered by the EU as confidential by nature as regards the EU producers. But the EU did

[17] See para. 162 EU's SWS.
[18] See recitals 250-256, Review Regulation.

not check this nor contact the importer concerned with "confidentiality concerns" and the non-confidential questionnaire response of this importer was made available promptly to all interested parties.

40. The EU also creates an interpretation based on Article 6.4 as to how an authority should act if there is a conflict between the promptness requirement of Article 6.1.2 and confidentiality issues. China submits that this interpretation has no legal basis in the ADA and is not supported by any Panel or AB findings.

41. The EU while referring to a few sentences from the CEC's request for confidentiality of the names claims that the Commission interpreted that "*confidentiality was sought for any information that would lead to the disclosure of the names of the relevant companies*." China considers that when the CEC letter itself refers to the names and Member States only, how can an objective investigating authority grant confidentiality to anything it considers to be even closely related to the identity of a company. There is no legal basis in the ADA for this interpretation. Per the EU, besides the names themselves, the identity of the producers could have been discovered if among others, any of the following were disclosed - Member States' names; PCNs produced; production; and sales volume.[19] Therefore, the EU projects that practically everything related to the eight sampled producers was confidential as it could lead to the discovery of their identity irrespective of the fact that there are 18,000 producers in the EU and most of them would likely be producing multiple kinds of footwear.

42. China requests the Panel not to take into account the EU's excuse of administrative burden upon its officials on account of maintaining a file, sending deficiency letters and handling the questionnaire responses concerning which there were confidentiality issues. Above all the latter issue was self-created and does not permit a violation of the ADA.

43. In para. 257 of its OS the EU notes that dates are recorded only when a document is received and not when it is made available to interested parties. This in itself shows that the EU has significant leverage to add a document as and when it likes. This also proves that it was easy for the EU to claim that Company B's response was added right the day after EFA's legal representative checked the file.

CLAIM II.7

44. The EU admits in para. 272 of its OS that sampling and application of facts available, among others, are matters of interest for interested parties. Agreeably these issues are related to the interested parties' rights of defence. However each of the decisions taken by an investigating authority at the specific stage of the investigation are not of a provisional character as stated by the EU and are not merely confirmed by the adoption of the measure. In fact China recalls that this new explanation is in contrast to the statement of the EU in para. 393 of its FWS.

45. Therefore, China's interpretation of timeliness is correct and interested parties will have full opportunity for the defence of their interests only if they have timely opportunities to see the relevant information pertaining to the issues as requested to the investigating authority. China's claims are not such that every step of the investigating authority would be subject to the Article 6.4 requirement as the EU projects. However, the aim is indeed to have access, at least in part, to the information in the EU's black box.

46. The EU has made abundant arguments but failed to explain how the sampled producers' production increased from 10.7 million pairs as stated in the Note for the File dated 18 November 2008, to 11.3 million pairs, despite the fact that production of the sample became 18-

[19] See paras. 286-289, EU's oral statement at the second meeting with the Panel.

20 per cent lower due to the discovery of outsourcing by one sampled producer.[20] Contrary to what the EU claims, this was not explained in the disclosure issued on 12 October 2009.

47. The EU claims that the non-confidential responses of two Brazilian producers were not made available because their data was not used. This however does not justify a violation of Article 6.4.

CLAIM II.8

48. The EU claims in para. 310 that certain categories of information such as sales data are by nature confidential and if a company provides such data it does not have to establish good cause. First, this proposition is inconsistent with three Panel reports – *Guatemala-Cement II*[21], *Korea-Paper*[22], and *Mexico-Tubes and Pipes*.[23] Second, China notes that it is not for the investigating authority to decide whether or not the information provided is confidential by nature. Third, by giving an example regarding the EU importer Adidas' questionnaire response, the EU cannot justify the breach of Article 6.5. It was incumbent upon the EU to ask Adidas to demonstrate good cause for confidential treatment. China considers it important to present a copy of that response as Exhibit CHN-132. That questionnaire response gives extensive information on all points and on the very same issues which the EU apparently considers confidential by nature in the case of the EU producers, including sales turnover of the company. The EU is sharp in criticizing Adidas for not requesting confidentiality for minimal data but fails to note that sampled Companies G & H did not make any request for confidentiality as regards their questionnaire responses.

49. As regards the request for confidential treatment, China considers it important to note that on the one hand the EU claims that the sampled producers authorized CEC to request confidentiality on their behalf. On the other hand it has claimed in the FWS, SWS and its OS that CEC did not represent the sampled companies as far as the questionnaire responses were concerned and CEC had no knowledge of the data of these companies. These two assertions are contradictory and the EU must decide its argument.

50. Despite the detailed explanations of China and evidence provided, the EU continues to claim that China gave no evidence to show that the risks of retaliation claimed in the original investigation are untrue. China reiterates that in the original investigation after the imposition of the provisional measures, seventeen Italian footwear producers that were granted confidential treatment filed an application for annulment of the Provisional Regulation thereby disclosing their names **during the course of the investigation**. The argument developed by the EU in its OS that risk of retaliation is less likely once duties are imposed therefore rests on a factually incorrect basis. Furthermore, it is illogical that at the time of initiation of the original investigation, the risk of retaliation existed and a few months later after the imposition of provisional measures, it suddenly disappeared only to miraculously re-appear at the time of the review investigation. Third, the fact that these same producers later intervened in other court cases despite their names and identities having been known for a long time by then, proves that retaliation never occurred.

51. In para. 352 the EU claims that if reasons why non-confidential summaries cannot be provided are obvious, the EU does not require parties to provide reasons. This approach is totally in violation of Article 6.5.1 as confirmed by the Panel in *US - OCTG Sunset Reviews (Article 21.5)*.[24]

[20] For detailed arguments see China's SWS paras. 965-966.
[21] Panel Report, *Guatemala - Cement II*, para. 8.219.
[22] *Ibid*., at para. 7.335.
[23] Panel Report, *Mexico - Pipes and Tubes*, para. 7.378.
[24] See Panel Report, *US - OCTG Sunset Reviews (Article 21.5)*, paras.7.135-7.136.

CLAIMS III.1; CLAIM III.20

52. The plain reading of Article 6.10.2 ADA, which provides only for the possibility not to determine an *individual margin of dumping* for not sampled producers, does not allow the EU's departure from its obligations under Paragraph 15(a) of China's Protocol of Accession.

53. As to the issue of the EU's administrative capacity to analyse four additional non-sampled producers, China considers that the EU's interpretation that individual examinations beyond the companies selected in the sample are never necessary, renders Article 6.10.2, which clearly uses the term "nevertheless" a nullity.

54. Finally, the EU's insistence on receiving from China data on the EU's own administrative capacity goes beyond what China is required to establish, i.e. a *prima facie* case, as China has established in its FWS.[25]

CLAIM III.2

55. The EU claims that Article 2.2.2(ii) cannot be applied *per se* when "*the other exports or producers subject to investigation*" have not been granted MET, while in the same footwear investigation the EU *did* use data from the companies that have not been granted MET.[26] Furthermore 3 of the 12 sampled companies were found to comply with MET criteria which permit the use of their profits and SG&A.

56. China's interpretation as to how to determine reasonability under Article 2.2.2(iii) is totally in line with previous Panel reports.[27] The EU has criticized China's suggestion as to the use of profits from an investigation on finished polyester filament fabrics from China and on polyester staple fibres, but did not even attempt to show a similarity between "chemical" and "engineering", which could mean anything from castings to trichloroisocyanuric acid[28], and footwear.

CLAIM III.3

57. The EU has - by using its own incomplete records as an excuse[29] - attempted to demonstrate that China has adduced no evidence of discriminatory treatment in favour of Brazilian producers in the analogue country selection process. Ironically, the supporting evidence against which the EU directs its criticisms, is no other than it's own non-confidential files. The EU also requires China to prove future predictions, a claim that cannot be taken seriously.[30]

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[25] China's FWS, para. 1048.

[26] Definitive Regulation, Recital 127.

[27] Panel Report, *EC – Bed Linen*, para. 6.60, footnote 32. Cited in para. 901 of China's FWS. Panel Report, *Thailand - H-Beams*, para. 7.125. Cited in para. 900 of China's FWS. See also China's response to Question 84.

[28] Or hand pallet trucks, tartaric acid, barium carbonate or magnesia bricks. These are all products that were covered by measures published between 10/07/2005 and 10/07/2006 (i.e. within 12 months before the disclosure) in which certain Chinese companies obtained MET.

[29] EU's oral statement at the second meeting with the Panel, para. 392: "The EU does not now possess records sufficient to explain the circumstances in 2005 that led to this conduct." See also EU FWS para. 609, referring to an entry from Calcados Myrabel: "At this stage the European Union cannot confirm whether the earlier submission was the confidential version."

[30] EU's oral statement at the second meeting with the Panel, para. 394: "…China has no evidence to prove that a supposedly lengthy period that was allowed to one company would not have been allowed to another company should that have been required."

In any event, the available evidence suggests that no extensions of the deadlines to respond to questionnaire from Thai, Indian or Indonesian producers would have been granted. China FWS, para. 930, bullet point (ii) and Exhibit CHN-84.

CLAIM III.4

58. The EU does not contest that the criteria for the establishment of the "product concerned"/"product under consideration" and like product are similar and has undertaken no attempt to rebut the arguments in paras. 1340-1348 of China's SWS showing that the EU effectively applied the like product test in this case, when it decided to exclude STAF from the scope of the "product concerned"/"product under consideration".

CLAIM III.5

59. The EU's conclusion that "*in the case of SMEs, [losses] cannot be sustained for more than a few months without their being forced to close down*"[31] was explicitly based on information provided by the national federations, i.e. information provided by companies outside the domestic industry. The EU's argument that the same conclusion, when put in another paragraph of the Regulation imposing measures, would be the result of the analysis made in its own context, should be rejected.[32]

60. As the use of data from producers outside of the domestic industry, i.e. companies that are neither part of the sample, nor of the complainants, cannot be used, [33] cross-checking the information – in the black box part of the investigation - against information provided by national associations, is equally prohibited.

CLAIM III.10; CLAIM III.11; CLAIM III.12

61. Contrary to the complainants which authorized CEC to act on their behalf[34], the 36 supporters of the complaint merely declared their support for the complaint but did not provide powers of attorney empowering CEC to act on their behalf, as the complainants did.

62. China made no statement that the complaint contained no summary of the names of the complaining companies but referred to the missing summary of the domestic prices in Brazil and export prices from China and Viet Nam.

CLAIM III.13; CLAIM III.14

63. An MET questionnaire is not comparable to a sampling form. The EU acknowledges that MET and dumping questionnaires were sent simultaneously to interested parties and therefore the outcome of the MET determination does not determine which party will receive the "dumping" questionnaire.

64. The Additional Disclosure did involve consideration of new facts as import value amounts for the calendar year 2005 had not been disclosed previously. The reference to the Definitive Disclosure[35] refers to *volumes*, not values, and in any event concerns only the volumes of 2005 *from China*, not Viet Nam.

65. Finally, China takes note of Para 380 of the EU's OS, in which it claims that the Panel would not be justified in making any recommendations to the DSB if the 2009 regulation lapses at some point between now and the when it would make its final recommendations. China considers that even if measures were to expire it is essential that the Panel makes findings regarding China's claims and

[31] Provisional Regulation, Recital 199.
[32] EU's oral statement at the second meeting with the Panel, para. 400.
[33] Panel Report, *EC - Bed Linen*, paras. 6.182, 6.183.
[34] Exhibit CHN-108.
[35] Exhibit CHN-81, Recital 291.

rules on the suggestions as mentioned by China in para. 1225 of its FWS because even if the measures are terminated for now, a new set of inconsistent measures could recur and in fact the EU industry has already threatened in press releases to do so. The issues raised by China in this case are to a large extent systemic. China notes that there have been previous cases in which the Panel made a finding in favour of the complainant exactly for these reasons.[36]

[36] They are the GATT panel reports US-Prohibition of Imports of Tuna and Tuna Products from Canada, EEC-Import Restrictions on Imports of Apples from Chile and EEC-Import Restrictions on Imports of Desert Apples from Chile. The Panel in *US - Wool Shirts and Blouses* cited those three reports, among others, in considering it appropriate that it issue its report in a case where the measures as issue were to be terminated, but where there was no agreement between the parties to terminate the proceedings and where the issue of the withdrawal of the measure did not arise until long after the establishment of the panel. See Panel report, *US - Wool Shirts and Blouses* (para 6.2).

ANNEX F-4

CLOSING STATEMENT OF THE EUROPEAN UNION

1. We divide our closing statement into two parts. First, we focus on housekeeping issues, second, we would like to make a few observations regarding the proceedings and the way China has been arguing its case.

A. "HOUSEKEEPING" ISSUES

2. We noticed that a couple errors occurred in our oral statement yesterday. In para. 355, we referred to the data from year 1995, we meant to refer to year 2005. In para. 260, references made to September should be read as references to November and references to October as references to December.

3. Next, we note that China confirmed at this meeting that estimates can, as such, constitute positive evidence within the meaning of Article 3.1 of the ADA. However, China is of the view that in the circumstances of this case the estimates made by national associations cannot constitute positive evidence. We are returning to this to make sure that this position of China is firmly on the record.

4. Further, we return to the one comment we owe you on China's second oral statement. China, in para. 66 of this statement says that the Commission failed to take full account of the changed exchange rate as an 'other factor' in injury causation. However, the aspect to which it refers – the increased price of EU products in dollar terms – was considered by the Commission because the consequences of that increase would have been felt in the areas of exports of EU products, and of imports from third countries. Both of these topics were examined in the Commission's causation analysis.

B. HORIZONTAL POINTS ARISING OUT OF THE PROCEEDINGS

5. Now, as this the last opportunity for us to speak before you, we would like to draw your attention to a few horizontal points which we see emanate from the proceedings.

6. First, yesterday, in our oral statement, we took you through many of the petty factual allegations which China made in its SWS. As you remember, we talked, *inter alia*, about such things as a page missing in a previous version of the open file due to a photocopying error or what holiday seasons were celebrated at a certain moment in the investigation around the world. There were many more of these tiny factual matters, all of which China turned into an issue or allegation before this Panel. We addressed them, but we return to what we stated at the beginning of this meeting: even if these allegations were true, we sincerely wonder what relevance, if any, would they have for China's claims. The Panel should review China's claims also in this light.

7. Second, we note that China has made and is making new factual assertions at the last stages of this proceeding. For instance, with respect to injury, China now raises the issue with the fact that the EU industry comprised about 18.000 companies. The EU pointed to this fact from the very beginning, because it was legally relevant for the consideration of the claims. Now, when China realizes this is an important fact, China suddenly, in its oral statement, raises an issue with this

number, saying it represents only an EU "assertion". Of course it is no assertion and the number is based on evidence on file. But more fundamentally, if China had problems with this number, it should have raised them at the latest the first time the EU mentioned it, and not know (when China eventually realized that this number is relevant for the legal consideration of its claims). If we continue like this, we will end up with yet another 600-page submission, full of new allegations which the EU will have to rebut at the last moment. China's strategy raises some issue of abuse of the procedure in which indeed it should be the respondent who has the last word or at least a chance to comment on the factual allegations made. We have sincere concerns that this backloading of discussion may happen again at the stage of comments to the disadvantage of the respondent.

8. Finally, we have an important observation about China's arguments for which we have a shorthand "destruction without solution". China very often criticizes the methods used by the EU IA as inconsistent with WTO rules. But China does not offer solutions. China does not offer alternative ways of how the EU IA could have acted or the methodologies it could have followed (e.g. in the injury analyses) in compliance with WTO rules in the factual circumstances of the case. One thing is clear – it is always possible to obtain additional information, especially if one would have the whole time of the world. But this is not the task of an IA. The task of an IA is not to write a thesis about the state of domestic industry, for instance. An IA has to gather information which complies with the requirements of the ADA (e.g. Article 3 ADA in case of injury claims about domestic industry), within the strict deadlines imposed. The IA looks for reasonable methods to deliver on this task while making the conduct of the investigation possible. Metaphysical certainty and level of details which China seeks is something else which does not take account of the realities of an investigation. We would urge the panel to have this viewpoint in mind when reviewing China's claims.

9. Finally, let me say again that we are concerned about a possible disadvantage for the EU. If China will indeed continue to provide its submissions as it did up to this point, we may be faced with very substantial China's comments to which we cannot respond. We would thus urge the Panel to bear this in mind when reviewing, in particular, any new assertions made by China in their comments and, if necessary, provide the EU with a chance to respond.

10. This concludes our statement. We would like to thank the Panel again for the good discussion we had and for the patience you showed in listening to our statement yesterday (and your physical stamina; it became very clear that panel proceedings are not only about an intellectual challenge but also may present a physical one). We also thank you for the work ahead of you when reviewing our responses to the questions and comments and drafting the report. Thank you.