WORLD TRADE ORGANIZATION

WT/DS405/R
28 October 2011

(11-5344)

Original: English

EUROPEAN UNION – ANTI-DUMPING MEASURES ON CERTAIN FOOTWEAR FROM CHINA

Report of the Panel

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EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943

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EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
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Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
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Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701

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US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, 85
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257

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US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, 3523
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087
US – Softwood Lumber V (Article 21.5 – Canada)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, adopted 1 September 2006, as reversed by Appellate Body Report WT/DS264/AB/RW, DSR 2006:XII, 5147
US – Softwood Lumber VI	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, 2485
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, 599
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117

Short Title	Full Case Title and Citation
US – Tyres (China)	Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R, circulated to WTO Members 13 December 2010 [appeal/adoption pending]
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, 97

GATT PANEL REPORTS

Short Title	Full Case Title and Citation
US – MFN Footwear	GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, DS18/R, adopted 19 June 1992, BISD 39S/128

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Reference
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)
Basic AD Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009
CEC	European Confederation of the Footwear Industry
China's Accession Protocol	Protocol on the Accession of the People's Republic of China, WT/L/432
China's Accession Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and Corr.1
Commission	Commission of the European Union, the EU investigating authority
Definitive Regulation	Council Regulation (EC) No. 1472/2006 of 5 October 2006
EFA	European Footwear Alliance
EUR	Euro
GATT 1994	General Agreement on Tariffs and Trade 1994
IT	Individual Treatment
MET	Market Economy Treatment
MFN	Most Favoured Nation
NME	Non-Market Economy
PCN	Product Control Number
Provisional Regulation	Commission Regulation (EC) No. 553/2006 of 23 March 2006
Review Regulation	Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Second *Ad* Note to Article VI:1 of the GATT 1994	Second *Ad* Note to Paragraph 1 of Article VI of the GATT 1994, in Annex 1 of the GATT 1994
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
STAF	Special Technology Athletic Footwear
Vienna Convention	Vienna Convention on the Law of Treaties
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

I. INTRODUCTION

A. COMPLAINT OF CHINA

1.1 On 4 February 2010, China requested consultations with the European Union pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").[1] The consultations concerned: (1) Article 9(5) of Council Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the European Community, as amended; (2) Council Regulation (EC) No. 1472/2006 of 5 October 2006, imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from, *inter alia*, China; and (3) Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in, *inter alia*, China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96.

1.2 China and the European Union held consultations on 31 March 2010. These consultations failed to resolve the dispute.

1.3 On 8 April 2010, China requested the establishment of a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII:2 of the GATT 1994, and Articles 17.4 and 17.5 of the AD Agreement.[2]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 18 May 2010, the Dispute Settlement Body ("DSB") established this Panel pursuant to the request of China in document WT/DS405/2, in accordance with Article 6 of the DSU.

1.5 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS405/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 23 June 2010 China requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 5 July 2010, the Director-General composed the Panel as follows:

Chairperson:	Mr. Jose Antonio Buencamino
Members:	Mr. Serge Fréchette
	Mr. Donald Greenfield

1.7 Australia, Brazil, Colombia, Japan, Turkey, United States and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.[3]

[1] WT/DS405/1.
[2] WT/DS405/2.
[3] WT/DS405/3.

1.8 The Panel met with the parties to the dispute on 3-4 November 2010 and 25-26 January 2011, and with the third parties on 4 November 2010.

1.9 The Panel submitted its interim report to the parties on 13 May 2011 and submitted its final report to the parties on 27 July 2011.

II. FACTUAL ASPECTS

2.1 This dispute concerns three measures introduced by the European Union: (1) Article 9(5) of Council Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the European Community, as amended, codified and replaced by Council Regulation (EC) No. 1225/2009 of 30 November 2009; (2) Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in, *inter alia*, China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96; and (3) Council Regulation (EC) No. 1472/2006 of 5 October 2006, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in, *inter alia*, China.

2.2 China makes "as such" claims with respect to the Basic AD Regulation concerning Article 9(5) thereof, the provision that deals with individual treatment of producers from countries that the European Union classifies as non-market economy ("NME") countries, including China, in anti-dumping investigations.[4] China's claims with respect to the Review and Definitive Regulations challenge numerous aspects of those measures and of the underlying proceedings. China also makes "as applied" claims concerning Article 9(5) of the Basic AD Regulation with respect to the Definitive Regulation.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CHINA

3.1 In its written submissions, China requested the Panel to find that:

(a) Article 9(5) of the Basic AD Regulation violates Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the AD Agreement; Articles I:1 and X:3(a) of the GATT 1994; and Article XVI:4 of the WTO Agreement;

(b) With respect to the Review Regulation, the European Union violated:

(i) Articles 2.1 and 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 by precluding a fair comparison between the export price and the normal value on account of the analogue country selection procedure and the selection of Brazil as the analogue country, and by using the PCN methodology applied in the original investigation and suddenly reclassifying the footwear categories in the middle of the investigation;

(ii) Articles 3.1 and 17.6(i) of the AD Agreement because it failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for

[4] China asserts that it is in fact a market economy country. China, first written submission, fn. 207. China's status in this regard is not an issue to be resolved in this dispute, and the Panel expresses no views on it.

like products, and the consequent impact of these imports on domestic producers of such products, as the European Union used different sampling procedures for Chinese exporters, EU importers, and non-complaining EU producers on the one hand, and complainant EU producers on the other hand;

(iii) Articles 3.1 and 17.6(i) of the AD Agreement, and Article VI:1 of the GATT 1994 because it failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products; and Article 6.10 of the AD Agreement, because:

- the European Union selected the EU producers' sample in the absence of requisite data which is normally solicited in a sampling form, is essential for the selection of the sample, and was requested from non-complainant EU producers who made themselves known;

- the EU producers' sample selected was neither statistically valid nor represented the largest percentage of volume that could reasonably be investigated and the European Union failed to cover the largest percentage of volume that could be investigated;

- the EU producers' sample included a producer that outsourced its entire production of the product concerned to a third country in the review investigation period; and

- the European Union used an incorrect product classification methodology and suddenly reclassified the footwear categories in the middle of the investigation.

(iv) Articles 3.1, 3.4 and 17.6(i) of the AD Agreement by failing to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry because several key injury indicators were analysed on the basis of the data of the whole EU production, as termed by the European Union, that included data pertaining to EU producers not part of the EU industry;

(v) Articles 3.1, 3.5 and 17.6(i) of the AD Agreement because it failed to make an objective examination, on the basis of positive evidence, that dumped imports are, through the effects of dumping, causing injury; and because it failed to ensure that injury caused to the EU industry by other factors was not attributed to dumped imports;

(vi) Article 11.3 of the AD Agreement because its determination that expiry of the measure was likely to lead to a continuation of dumping and injury was based on determination of continued dumping and injury in violation of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the AD Agreement;

(vii) the following procedural obligations, throughout the investigation:

- Article 6.1.2 of the AD Agreement by failing to provide other interested parties prompt access to the information in the non-confidential questionnaire responses filed by sampled EU producers;

- Articles 6.2 and 6.4 of the AD Agreement by failing to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defence of their interests concerning but not limited to sampling of EU producers, selection of the analogue country, and other procedural issues;

- Articles 6.5 and 6.5.1 of the AD Agreement because the European Union failed to ensure, among others, the disclosure of the names of the complainants; and the provision of summaries of confidential information relating to the EU industry and the sampled EU producers in the expiry review request and questionnaire responses respectively; and data used for selecting the sample of EU producers, or where provided, failed to ensure the provision by the EU industry and/or the sampled EU producers, of sufficiently detailed summaries to enable a reasonable understanding of the substance of that information;

- Articles 6.2 and 6.5.2 of the AD Agreement by failing to determine that the request for the confidentiality of the names of the complainants was not warranted; and by failing to reject the confidential information provided by the sampled EU producers, the non-confidential summaries of which were not provided;

- Articles 3.1 and 6.8 of the AD Agreement by failing to apply facts available when faced with incorrect and deficient information, including but not limited to the product classification information provided by sampled EU producers in the injury questionnaire responses;

- Article 12.2.2 of the AD Agreement by failing to provide sufficiently detailed explanations in the Review Regulation, regarding matters of fact and law and reasons which led to the extension of the measures; and of reasons which led to the acceptance or rejection of the arguments of the interested parties.

(viii) the European Union violated Article 17.6(i) of the AD Agreement because the analogue country selection procedure did not amount to a proper establishment of the facts and an unbiased and objective evaluation of those facts; and

(ix) in consequence, the European Union violated Articles 1 and 18.1 of the AD Agreement because an anti-dumping measure must be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the AD Agreement; and

(c) With respect to the Definitive Regulation, the European Union violated Articles 2.2.2, 2.4, 2.6, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 6.1.1, 6.2, 6.4, 6.5, 6.5.1, 6.5.2, 6.9, 6.10, 6.10.2, 9.2, 9.3, 12.2.2 and 17.6(i) of the AD Agreement; Article VI:1 of the GATT 1994; Section 15(a)(ii) of China's Protocol of Accession; and Paragraphs 151(e) and (f) of the Report of the Working Party on the Accession of China.

3.2 China also requests that the Panel reject the European Union's request for preliminary rulings with respect to any alleged failure on China's part to comply with Article 6.2 of the DSU, as well as with respect to the propriety of China's claims under Article 17.6(i) of the AD Agreement.

3.3 In addition, concerning its "as such" claims with respect to Article 9(5) of the Basic AD Regulation, China requests that the Panel recommend that the DSB request the European Union to withdraw this measure.[5] With respect to the Review Regulation and Definitive Regulation, China requests that the Panel recommend that the DSB request the European Union to bring these measures into conformity with its obligations under the AD Agreement and the GATT 1994. Furthermore, China requests that the Panel use its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union could implement the recommendations and rulings of the DSB. More specifically, given the nature and scope of the numerous violations of the AD Agreement and the GATT 1994, China requests the Panel to suggest that the European Union (i) immediately repeal the Review Regulation and (ii) refund the anti-dumping duties that have been paid on imports of the product concerned from China.

B. EUROPEAN UNION

3.4 The European Union requests that the Panel make the following preliminary rulings:

(a) the Panel's terms of reference with respect to China's "as such" claims are limited to those specific aspects of the measure explicitly identified by China in its Panel Request, i.e. the imposition of anti-dumping duties on a country-wide basis or on an individual basis in the case of imports from non-market economies; and that any other issues, such as the individual determination of dumping margins, the calculation of those dumping margins, the level of anti-dumping duties, are outside the Panel's terms of reference;

(b) China's claims in items II.2, II.3, II.4, II.5, II.13, III.5, III.6 and III.20 in the Panel Request that are based on the alleged inconsistency of the challenged EU measures with Article 17.6(i) of the AD Agreement are outside the Panel's terms of reference;

(c) China's claims in items II.12 and III.19 in the Panel Request are outside the Panel's terms of reference since they do not satisfy the requirements of Article 6.2 of the DSU; and

(d) the references to profit margin and (in so far as it is implied) to the lesser duty rule, and to Article 9.1 of the AD Agreement, in Claim III.6 of the Panel Request are outside the Panel's terms of reference.

3.5 In its written submissions, the European Union requested that the Panel reject China's claims in their entirety, finding instead that, with respect to each of them, the European Union acted consistently with all its obligations under the WTO Agreements.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set forth in the executive summaries of their submissions provided to the Panel, are attached to this Report as annexes (see List of Annexes, pages vi-vii).

[5] China, first written submission, para. 324.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, as set forth in the executive summaries of their submissions provided to the Panel, are attached to this Report as annexes (see List of Annexes, pages vi-vii).[6]

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 On 13 May 2011, the Panel issued its Interim Report to the parties. On 27 May 2011, China and the European Union submitted written requests for review of precise aspects of the Interim Report. On 10 June 2011, China and the European Union submitted written comments on each other's requests for interim review. Neither party requested an additional meeting with the Panel.

6.2 As a result of the interim review process, the numbering of footnotes in the Final Report has changed from the Interim Report. The text below refers to the footnote numbers in the Interim Report regarding which the parties requested review. Where we have made changes to a footnote in the Interim Report, a reference to the corresponding footnote number in the Final Report is included (in parentheses) for ease of reference. The numbering of paragraphs is unchanged. We have also corrected typographical and other non-substantive errors throughout the Report, including errors identified by the parties, which are not referred to specifically below. However, some "typographical error" corrections proposed by China were, in our view, editorial suggestions we considered unnecessary, and we have therefore not made them.

6.3 In order to facilitate the understanding of the interim review comments and changes proposed, the following section is structured to follow the organization of the Final Report itself, with the review requests of the parties, and their comments, addressed sequentially.

B. GENERAL COMMENTS

6.4 With respect to claims regarding Council Regulation (EC) No. 1225/2009 (the "Basic AD Regulation") as such, the European Union stated that it considers that the Panel "entirely relied on the reasoning of an unadopted panel report without specifically addressing the specific facts and additional arguments made in these panel proceedings."[7] China did not comment on the European Union's observation.

6.5 The European Union's observation is not formulated as a request for specific changes to the Interim Report. We recall that the claims and arguments with respect to Article 9(5) of the Basic AD Regulation as such in *EC – Fasteners (China)* were substantively largely the same as those presented by the same parties on the same issue in this dispute. Thus, with respect to China's claims relating to the Basic AD Regulation "as such", the specific measure at issue is exactly the same in this case as in *EC – Fasteners (China)*, China claimed violations of the same provisions of covered agreements in both disputes, and the parties' arguments in both cases are very similar. Given the identity of the measure, the claims and the parties, and the substantial similarity in the arguments, we carefully considered the report of the panel in *EC – Fasteners (China)*. However, we did not simply "entirely rel[y] on the reasoning of an unadopted panel report". Rather, as noted in the Interim Report, we were persuaded by that panel's reasoning to reach the same conclusions, and adopted that

[6] Brazil, Colombia, Japan, Turkey, the United States and Viet Nam provided written submissions and/or made oral statements at the Panel's meeting with the third parties. Australia did not provide a written submission or make an oral presentation.

[7] European Union request for interim review, p. 1.

panel's analysis and conclusions with respect to the same issues and arguments presented by the same parties concerning the same measure. Thus, our objective assessment of China's claims and the parties' arguments was the same as that of the panel in *EC – Fasteners (China)*. In these circumstances, we see nothing to be gained, and a potential for confusion, were we to state our conclusions and analysis, which were the same as those of the panel in *EC – Fasteners (China)*, in different terms in this report. We have therefore taken the route of adopting that panel's analysis and conclusions as our own, with additional reasoning of our own when necessary to address arguments not made before that panel. When the same parties present the same claims and arguments concerning the same measure in two successive disputes, as here, if it finds the analysis and conclusions of the first panel persuasive and correct, we see no reason for the second panel to restate that analysis and conclusions. We are aware of no reasons that would preclude a panel from following such a course of action. We considered this approach to be appropriate in the unusual circumstances of this case, where the same measure was the subject of two successive disputes between the same parties within a short period of time, based on the same claims and largely the same arguments.

C. SPECIFIC REQUESTS

6.6 In addition to the specific requests discussed in more detail below, China made requests for modification of a number of paragraphs of the Interim Report, to more accurately reflect its arguments,[8] which the European Union did not comment on or oppose. We have, in each instance, considered the requested modification based on our review of China's arguments as presented to the Panel, and have modified the following paragraphs as a result, albeit in some instances not in the precise terms requested by China: **Paragraphs 7.171**, **7.173**, **7.182**, **7.231**, **7.302**, **Footnote 596 (now footnote 741)**, **7.407**, **7.416**, **7.497**, **7.502**, **7.505**, **7.566**, **7.587**, **7.593**, **7.608**, **7.629**, **7.823 and 7.855**.

6.7 **Paragraph 2.2**: China requests that the use of the expression "non-market economy" or "NME" to describe, *inter alia*, China, be qualified or a footnote be added in order to clarify that this is a classification assigned by the European Union, and that the use of this expression should not be taken as an indication that the Panel considers China to be a "non-market economy". China notes that this expression is not used in the AD Agreement, China's Protocol of Accession, or China's Working Party Report. China's request is with respect to paragraph 2.2, but China refers to the use of this expression "throughout the Interim Report", without proposing any other specific changes.[9] The European Union did not comment on this request.

6.8 We have made a change to Paragraph 2.2 of the Final Report to address China's request, albeit not in the precise terms proposed by China.

6.9 **Paragraph 3.1(c)**: China requests that the Panel include Articles 1, 9.1, and 18.1 of the AD Agreement in the list of provisions claimed by China to be violated with respect to the Definitive Regulation. The European Union did not comment on this request.

6.10 China previously made the same request in its comments on the Descriptive Part of the Report. Paragraph 3.1(c) of the Interim (and Final) Report reproduces China's request for findings and recommendations as set out in in its written submissions. In paragraph 1407 of its first written submission, China requested the Panel to find that the European Union violated a number of provisions expressly listed in that paragraph.[10] Articles 1, 9.1, and 18.1 of the AD Agreement are not listed in that paragraph. In paragraph 1538 of its second written submission, China again requested

[8] China, request for interim review, paras. 10-11, 13, 27, 34, 43-44, 49, 51-52, 56-59, 62, 72 and 74.
[9] China, request for interim review, para. 3.
[10] Paragraph 1406 of China's first written submission also includes, with respect to the AD Agreement, the same list of provisions, the violation of which China stated it had demonstrated.

the Panel to find that the European Union violated a number of provisions, and once more, Articles 1, 9.1 and 18.1 of the AD Agreement are not listed in that paragraph. In light of this, we did not make the change requested in response to China's comments on the Descriptive Part of the Report, and for the same reasons, have not made the requested changes now.

6.11 **Paragraph 7.36**: China requests that the Panel amend the first sentence of this paragraph. China asserts that its argument differentiates between "explicit" and "implicit" obligations allegedly contained in Article 17.6(i) of the AD Agreement.[11] China also requests that the Panel amend the fifth sentence of this paragraph, asserting that it did not consider the question of "explicit 'obligation creation'", but argued that Article 17.6(i) of the AD Agreement "does impliedly impose obligations" on investigating authorities.[12] The European Union requests that, should the Panel consider it appropriate to accept China's proposed changes, the Panel should rephrase the fourth sentence of this paragraph to better reflect the European Union's argument.[13]

6.12 Both requests concern statements of the parties' own arguments regarding the obligations contained in Article 17.6(i) of the AD Agreement, as summarized in the course of our analysis. Having reviewed the requested changes, we have decided to modify this paragraph, albeit in slightly different terms from those proposed, to more accurately reflect the parties' arguments, as we understand them. We also added a sentence to the end of paragraph 7.37 to more clearly express our conclusion that a provision which establishes no obligations on an investigating authority cannot form the legal basis of a claim of violation of the AD Agreement.

6.13 **Paragraph 7.66**: The European Union requests that the Panel modify this paragraph in order to more accurately describe the manner in which dumping margins are calculated.[14] China did not comment on this request.

6.14 Given that the proposed modification is a description of the relevant provisions of the European Union's Basic AD Regulation, and reflects the operation of that Regulation as we understand it, we have modified this paragraph accordingly.

6.15 **Paragraphs 7.118 and 7.119**: The European Union requests that these paragraphs be modified in order to more accurately describe the findings in the Review Regulation.[15] China did not comment on this request.

6.16 Having reviewed the European Union's proposed modifications, we agree that they more accurately summarize the Review Regulation, and have therefore modified these paragraphs accordingly.

6.17 **Paragraph 7.124**: China requests that the Panel modify this paragraph in order to better describe the involvement of the Chinese authorities in the discussions regarding the selection of the sample for dumping determinations.[16] The European Union did not comment on this request.

6.18 The Interim Report used the terminology of the Provisional Regulation, recital 57, in characterizing the actions of Chinese authorities regarding the selection of the sample of Chinese exporting producers. China's requested modification does not reflect the characterization of the Chinese authorities' actions set out in the Provisional Regulation. In light of this, we consider it

[11] China, request for interim review, para. 5.
[12] China, request for interim review, para. 6.
[13] European Union, comments on China's request for interim review, pp. 1-2.
[14] European Union, request for interim review, p. 1.
[15] European Union, request for interim review, p. 2.
[16] China, request for interim review, para. 7.

appropriate, and have added a reference to the Provisional Regulation to clarify this in the Final Report. We have made no other changes to this paragraph in response to China's request.

6.19 **Paragraph 7.125**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments and the factual record.[17] The European Union did not comment on this request.

6.20 As China's proposed changes accurately summarize the Definitive Regulation and reflect its arguments as presented to the Panel, we have modified this paragraph accordingly.

6.21 **Paragraph 7.146**: Both parties requested review with respect to this paragraph. China states that it argued that granting at least some of the individual examination requests would not have been unduly burdensome and that it had presented *prima facie* evidence in that regard, but makes no specific request for modification of this paragraph.[18] The European Union did not respond to China's comment.

6.22 The European Union requests that the Panel amend this paragraph to reflect the European Union's understanding of the basis for the Panel's rejection of China's argument, which is that China failed to make its *prima facie* case.[19] China commented in response that the European Union's suggested amendment would render this paragraph incoherent for two reasons. The Panel would be making a summary finding with respect to China's argument that it has presented a *prima facie* case, and that the burden of proof shifted to the European Union, without any actual evaluation thereof. Moreover, the previous sentence in this paragraph, stating that it would inappropriate for the Panel to interfere in this manner in an anti-dumping investigation, would become pure *dicta*.[20]

6.23 In support of its request, China reiterates the arguments it made during the proceeding. As we stated in paragraph 7.146 of the Interim Report, to the extent China is asserting that the European Union directly violated Article 6.10.2 of the AD Agreement by not examining the four Chinese producers who requested individual examination under Article 17(3) of the Basic AD Regulation, the Provisional and Definitive Regulations are clear that the Commission **did** consider the four individual examination requests received, and based on the criteria set forth in Article 6.10.2 of the AD Agreement declined to grant individual examinations to these requests.[21] Insofar as China is arguing that it would not have been unduly burdensome to examine the individual examinations requested, we rejected China's argument, considering that even if this were true, it would be "entirely inappropriate for us to interfere in this manner in an investigating authority's conduct of anti-dumping investigations." Therefore, as we have addressed these arguments, we consider it unnecessary to make any changes to this paragraph based on China's comments.

6.24 Turning to the European Union's request, we recall that paragraph 7.146 of the Interim Report states that "[t]o the extent China is arguing that it would not, in fact, have been unduly burdensome, and that the Commission could, and should, have allocated its available resources so as to enable it to undertake the individual examinations requested, we reject China's argument." Contrary to the European Union's view, this statement does not refer to whether China met its burden of proof in presenting a *prima facie* case of violation of Article 6.10.2 of the AD Agreement. As stated later in the same paragraph, "[e]ven assuming China is correct that the Commission had sufficient resources, and/or could have allocated its available resources differently, we consider that it would be entirely inappropriate for us to interfere in this manner in an investigating authority's conduct of anti-dumping

[17] China, request for interim review, para. 8.
[18] China, request for interim review, para. 9.
[19] European Union, request for interim review, p. 2.
[20] China, comments on the European Union's request for interim review, para. 2.
[21] Provisional Regulation, Exhibit CHN-4, recital 64; Definitive Regulation, Exhibit CHN-3, recital 65.

investigations." It is thus clear that we do not agree with the European Union's understanding of the basis of our rejection of China's arguments, as we did not reject China's argument because China failed to present a *prima facie* case, but rather because even assuming China did so, it would not affect our conclusion. We therefore have made no change to this paragraph in response to the European Union's request.

6.25 **Paragraphs 7.152 and 7.336**: The European Union requests that the Panel amend these paragraphs and footnote 215 (now footnote 356) to more accurately reflect its arguments.[22] China contends that the addition of the term "automatic", as suggested by the European Union, is unnecessary, considering China's arguments.[23]

6.26 Given that this request reflects the European Union's own arguments as presented to the Panel, we have modified these paragraphs and footnote 215 (now footnote 356) accordingly.

6.27 **Paragraph 7.178**: China requests that the Panel modify this paragraph in order to accurately reflect the text of Article 2(7)(b) of the Basic AD Regulation.[24] The European Union did not comment on this request.

6.28 Given that the requested modification reflects the actual text of Article 2(7)(b) of the Basic AD Regulation, we have modified this paragraph accordingly.

6.29 **Paragraph 7.206**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[25] The European Union states that it does not understand what China intends by the expression "non-products concerned" in its proposed amended text.[26]

6.30 Given that the requested modification reflects China's own arguments as presented to the Panel, we have modified this paragraph, albeit not in the precise terms proposed by China.

6.31 **Paragraph 7.208**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[27] The European Union considers that China's proposed amendment would insert a detailed account of what China asserted the European Union to have argued in its submissions, and states that it cannot see the useful purpose of such amendment, as the Interim Report gives an account of what the European Union argued.[28]

6.32 The Interim and Final Reports summarize the arguments of the parties as we understand them, reflecting those points we consider most important, but obviously are not a complete statement of the sometimes voluminous arguments presented by the parties in their various written and oral submissions and answers to Panel questions. China proposes that we include in our description of its argument much of what it argued at paragraphs 1501-1505 and 1508-1509 of its second written submission, although it cites only paragraph 1501 of that submission in support of its request. Nonetheless, given that the requested modifications reflect China's own arguments, we have modified this paragraph, albeit not in the precise terms, and not to the extent, proposed by China.

6.33 **Paragraph 7.218**: China requests that the Panel review the first and penultimate sentences of this paragraph, asserting that they do not correctly represent China's argument, but does not make any

[22] European Union, request for interim review, pp. 2 and 4.
[23] China, comments on the European Union's request for interim review, para. 3.
[24] China, request for interim review, para. 12.
[25] China, request for interim review, para. 14.
[26] European Union, comments on China's request for interim review, p. 2.
[27] China, request for interim review, para. 15.
[28] European Union, comments on China's request for interim review, p. 2.

suggestions for modifications.[29] The European Union notes that China makes a bald statement that sections of the Interim Report do not correctly represent China's arguments, and states that if China seeks amendment of the report, China should indicate what that amendment should be.[30]

6.34 We have reviewed this paragraph, which is part of our analysis, in light of the portions of China's submissions cited in China's request for interim review. The sentences objected to by China accurately reflect our understanding of China's arguments, and nothing in the cited portions of China's submissions affects that understanding or our conclusions as set forth in this paragraph. We note that China made no specific proposal for modification, and we are satisfied with, and have therefore made no changes to, this paragraph.

6.35 **Paragraph 7.220**: China requests that the Panel review the first sentence of this paragraph, considering that it does not correctly represent China's argument, but does not make any suggestions for modifications.[31] The European Union did not comment on this request.

6.36 We have reviewed this paragraph, which is part of our analysis, in light of the portions of China's submissions cited in China's request. The sentences objected to by China accurately reflect our understanding of China's arguments, and nothing in the cited portions of China's submissions undermines our understanding or our conclusions as set forth in this paragraph. We note that China made no specific proposal for modification, and we are satisfied with, and have therefore made no changes to, this paragraph.

6.37 **Paragraph 7.224**: China requests that the Panel modify the last sentence of this paragraph in order to more accurately reflect its arguments.[32] The European Union did not comment on this request.

6.38 The last sentence of paragraph 7.224 states that the conclusion of the panel in *Argentina – Poultry Anti-Dumping Duties* that a lack of information from a company subject to the investigation, whether or not part of a limited examination, does not justify declining to determine an individual margin for that company, has no bearing on the question before us in this dispute. As the last sentence of paragraph 7.224 does not describe China's arguments, we fail to understand how it "does not correctly represent China's argument". However, we note that the text which China proposes be amended is actually the last sentence of paragraph 7.223. Assuming China is actually requesting that we modify that sentence, in the terms set out in its request for interim review, we note that China's request simply paraphrases language in *Argentina – Poultry Anti-Dumping Duties* which is quoted in paragraph 7.224. Moreover, the language China proposes we add to paragraph 7.223, which is part of our analysis, is already set out in paragraph 7.208, where China's arguments are described. The last sentence of paragraph 7.223 states that China relies on the Panel Report in *Argentina – Poultry Anti-Dumping Duties* in support of its position, without describing that position, which is what China proposes that we do. We consider it unnecessary, in the context of our analysis, to repeat the substance of China's position which is described elsewhere in the Final Report, and therefore have made no change to this paragraph.

6.39 **Footnote 416 (now footnote 558)**: China requests that the Panel delete the second sentence of footnote 416 (now footnote 558), referring in this regard to paragraphs 15-18 of its opening statement at the second meeting. In particular, China recalls its rejection of the view that compliance with Articles 2.1 and 2.4 of the AD Agreement would require something approaching a "distortion

[29] China, request for interim review, para. 16.
[30] European Union, comments on China's request for interim review, p. 2.
[31] China, request for interim review, para. 17.
[32] China, request for interim review, para. 18.

analysis".[33] The European Union argues that in the passage China proposes be deleted, the Panel states its own view of the practical consequences of China's argument. In the European Union's view, the point the Panel makes is that "[i]n order not to behave with [] "complete disregard" [of the actual value which the proxy is meant to represent] the Member must have an estimation of "the actual value which the proxy is meant to represent"", a view the European Union considers appropriate.[34]

6.40 In this footnote we address China's argument that ""in order to be considered to have reasonably exercised its discretion as to the actual mechanics/methodology of the process is, *at a bare minimum*, to not select a proxy value *in complete disregard of the actual value which the proxy is meant to represent*, and … that avoiding that could require as little as taking into account the level of economic development of the analogue country, which is quite clearly a goal which can be and is meaningfully pursued by many Members."[35] We recognize that China did not argue that a "distortion analysis" was necessary in order to determine the extent of distortion. Nonetheless, we fail to see how an investigating authority could attempt to determine a proxy for the normal value in the terms proposed by China without actually determining, even if only to some extent, what domestic prices would have been but for the fact that the country in question is not a market economy. The sentences which China proposes be deleted accurately reflect our views in this regard, and we have therefore made no changes to this footnote in response to China's request.

6.41 **Paragraph 7.265**: China asserts that there is a "tenuous relationship" between the Panel's conclusion that the fair comparison obligation does not "establish[] a general requirement of "fairness" which applies, inter alia, to the selection of an analogue country", and its rejection of the possibility that the fair comparison could inform or otherwise be implicated by any form of analogue country selection methodology, no matter how unreasonable. China requests that the Panel broaden its conclusion to indicate that, apart from not establishing a "general requirement of fairness", the analogue country selection necessarily falls out of the scope of Article 2.4 in such a manner that the Panel need not examine the facts of the particular case. In China's view, this would require the Panel to clarify whether it considers that no aspect of normal value calculation could preclude a fair comparison, or whether, even if that were a possibility, such preclusion would not be inconsistent with Article 2.4.[36] The European Union did not comment on this request.

6.42 We recall our conclusion that the fair comparison obligation in Article 2.4 of the AD Agreement does not establish a general requirement of ""fairness" which applies to the selection of an analogue country". However, we did not "categorical[ly] reject[] the possibility that the fair comparison *could* inform or otherwise be implicated by *any form* of analogue country selection methodology, no matter how unreasonable" as asserted by China.[37] Consequently, we see no reason to broaden our conclusion in paragraph 7.265 as China requests. We considered and rejected China's argument that Article 2.4 establishes a general requirement of "fairness" which applies to the selection of an analogue country, and in our view, there is no need, in view of the claims and arguments in this dispute, to go beyond that conclusion in the manner requested by China. We therefore have made no changes to this paragraph in response to China's request.

6.43 **Paragraph 7.267**: China requests that the Panel modify this paragraph to accurately reflect China's arguments.[38] The European Union did not comment on this request.

[33] China, request for interim review, para. 20.
[34] European Union, Comments on China's request for interim review, p. 2.
[35] China, request for interim review, para. 20.
[36] China, request for interim review, para. 21.
[37] China, request for interim review, para. 21 (emphasis in original), citing China, second written submission, paras. 254-258.
[38] China, request for interim review, para. 22.

6.44 The first requested change reflects in large part the text of paragraph 409 of China's first written submission, and we have modified this paragraph, albeit not in the precise terms proposed by China. China also requests that the phrase "as well as domestic market prices" be deleted from paragraph 7.267, without any explanation for this proposed change. These words appear in paragraph 481 and footnote 218 of China's second written submission, as reflected in this paragraph. We have therefore made no change to this paragraph in response to this aspect of China's request.

6.45 **Footnote 434 (now footnote 576)**: China asserts that the reference to paragraph 484 of China's first written submission in this footnote is incorrect.[39] The European Union did not comment on this assertion.

6.46 We have reviewed the reference in question, and concluded that China is correct, and have therefore deleted this reference.

6.47 **Paragraph 7.283**: China requests that the Panel add the phrase "and the fact that Chinese producers did not have the knowledge of the PCNs of the cooperating Brazilian producers" after the first comma, and add the word "any" after the word "claim", in the first sentence of this paragraph, in order to accurately reflect its arguments, referring in this regard to paragraphs 11 and 22 of its opening and closing oral statements at the second meeting with the Panel, respectively. Second, China requests that the Panel review its conclusions, without making any specific suggestions for modification, contending that (i) the adjustments that were made in the investigation are of a different nature and character, and were based on the data of the Brazilian producers, and the fact that such costs were not incurred by Chinese producers applied to all footwear irrespective of the PCNs; and (ii) the adjustments for children's shoes and for transport and insurance costs are not comparable to the adjustments concerning production processes and costs, time, technology and raw materials which are different as regards the divergent kinds of footwear classified under the same PCN. Finally, China requests that the Panel consider the issue addressed in China's argument that the Commission reclassified sports, sports-like and trekking footwear from PCN category "E" into PCN category "A", leading to the mixing of completely different footwear types, which automatically prevented a fair comparison as required by Article 2.4 of the AD Agreement.[40] The European Union contends that the page references cited by China in support of the first aspect of its request are not correct, and asserts that the Panel has adequately addressed the matters referred to by China, and therefore no amendment is necessary.[41]

6.48 With respect to the first aspect of China's request, as the European Union notes, the page references cited by China are incorrect. More importantly, the paragraph China proposes to modify sets forth our conclusions. In that context, we see no reason to expand the description of and reference to China's arguments, which are in any case set out in the second and third sentences of paragraph 7.269 and footnote 435 (now footnote 577) of the Final Report. However, we have inserted the word "any" before the word "adjustments" in the first sentence of footnote 435 (now footnote 577) to more accurately reflect China's argument in paragraph 28 of its closing statement at the second meeting with the Panel. With respect to the second aspect of China's request, this paragraph sets forth our conclusion that the use of a PCN system, even with broad categories, does not alter or shift the obligation on parties to demonstrate the need for an adjustment. The nature of the adjustments requested or made does not affect this conclusion. Clearly, in some circumstances the quality and quantity of evidence available to a party seeking to demonstrate the need for an adjustment may be less than in others, but this does not affect the Panel's conclusion. We therefore have made no changes in response to this aspect of China's request. Finally, with respect to the third aspect of

[39] China, request for interim review, para. 23.
[40] China, request for interim review, para. 24, referring to China, first written submission, paras. 408 and 415-417; second written submission, paras. 498-502.
[41] European Union, comments on China's request for interim review, p. 2.

China's request, to the extent that China is arguing that the Panel failed to address its argument regarding the Commission's unilateral reclassification of footwear, without seeking the cooperation of the Chinese exporting producers, we recall that China made no claim concerning the reclassification of certain footwear *per se*. Rather, China argued that the reclassification precluded the possibility of a fair comparison, in violation of Article 2.4, because it mixed different footwear types within a single PCN category.[42] We recall that our analysis of China's claim addresses China's arguments regarding the allegedly overly-broad PCN system used by the European Union. The fact that one allegedly overly-broad PCN category was further broadened as a result of the reclassification of certain footwear does not affect our analysis or conclusion with respect to China's claim. We therefore have made no changes in response to this aspect of China's request.

6.49 **Paragraph 7.289**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[43] The European Union considers that no amendment is necessary.[44]

6.50 Given that the requested modification reflects China's arguments as presented to the Panel, we have modified this paragraph accordingly.

6.51 **Paragraphs 7.299 and 7.300**: The European Union requests that the Panel modify these two paragraphs, contending that they unfairly imply arbitrariness to the Commission's conduct in not calculating the cap.[45] China argues that the Panel refers to two distinct issues: (a) the absence of calculation of the cap for profits called for in Article 2.2.2(iii) of the AD Agreement; and (b) the lack of any attempt to do so. China considers that the report accurately describes the investigating authority's conduct during the investigation. China also considers that the failure to calculate the cap for profits called for in Article 2.2.2(iii) in itself is sufficient to show a violation of that provision, such that even without regard to the question of the nature of the European Union's "attempt", the undisputed fact that the European Union did not calculate the cap as called for in Article 2.2.2(iii) is sufficient grounds on which to find inconsistency with that provision.[46]

6.52 Article 2.2.2(iii) of the AD Agreement provides that the amounts for profits and SG&A may be determined on the basis of "any other reasonable method, **provided that** the amount for profit" established pursuant to that method does not exceed the cap defined in that provision.[47] Whether or not the method used to calculate the profit was reasonable *per se* does not affect the requirement that the amount for profit so established not exceed the cap, and does not excuse an investigating authority from satisfying that aspect of Article 2.2.2(iii). Given that there is no evidence that the Commission ever attempted to calculate the cap, and that the Commission did not explain why it did not calculate the cap, we consider that these paragraphs accurately describe our understanding of the facts of the investigation and accurately reflect our views, and therefore deny the European Union's request.

6.53 **Paragraphs 7.300 and 7.301, and footnotes 487 (now footnote 629) and 488 (now footnote 630):** The European Union requests that the Panel modify these paragraphs. The European Union contends that the meaning of the words "the matter" in the third sentence of paragraph 7.300 is unclear, as the Panel could be referring to the issue of whether and how to apply the "cap", or to the issue of whether non-MET company data could be used in calculating the "cap". In either event, the European Union considers that the Panel's finding is not justifiable, asserting that China never argued that the Commission failed to consider the matter of the calculation of the "cap" in general, or in respect of the exclusion of non-MET company data. The European Union maintains

[42] China, second written submission, para. 481.
[43] China, request for interim review, para. 25.
[44] European Union, request for interim review, p. 2.
[45] European Union, request for interim review, p. 3.
[46] China, comments on the European Union's request for interim review, paras. 4-5.
[47] Emphasis added.

that it indicated or implicitly asserted during the panel proceedings that the Commission had considered both the application of the cap, and the question of excluding non-MET data.[48] The European Union contends that while panels are free to develop arguments not made by either party with respect to the correct interpretation of the covered agreements, panels cannot make new arguments as to why a measure is WTO inconsistent. The European Union considers that the Panel has not fully addressed the European Union's arguments with respect to the substantive question whether the Commission was justified in concluding that the cap was inapplicable, and requests that the Panel address the European Union's arguments as to why it was impossible to apply the cap in the circumstance of this case, since the Panel's finding in based on the consideration of this matter by the Commission. The European Union further asserts that the Panel cannot base its findings on an argument that was never raised by China, and requests that the Panel modify its findings accordingly. Finally, the European Union considers that, once it has revised the report as suggested by the European Union, the Panel need not address the European Union's argument based on the reasonableness of the amounts determined by the Commission for the SG&A and profit, and may exercise judicial economy in this regard.[49]

6.54 China understands the Panel to have found that the European Union did not make any attempt to calculate the cap provided for in Article 2.2.2(iii) of the AD Agreement at the time it made its determination, which, if it had been done, would have included the possible use of data pertaining to other sampled footwear producers. China considers that, in this context, the European Union's comment on the meaning of the words "the matter" seems irrelevant. China asserts that it approached the Article 2.2.2 claim from various angles, arguing, *inter alia*, that the calculation of the cap itself and the sub-requirement that the benchmark should relate to "products of the same general category in the domestic market of the country of origin" are non-negotiable conditions precedent to the WTO-consistent use of the method at issue. Moreover, China asserts that it argued that the European Union failed to consider data from other sampled producers in order to calculate the cap under Article 2.2.2(iii), and that the European Union had ample opportunity to set out its arguments in this regard. China considers that the Panel does not accuse the European Union of "failing to consider the matter in general", but rather that it did not even attempt to calculate the cap called for in Article 2.2.2(iii). China understands the Panel to have concluded that a lack of information does not excuse the European Union from satisfying the requirement to calculate the cap, and thus the European Union violated Article 2.2.2(iii). China observes that, assuming its understanding is incorrect, the Panel's exercise of judicial economy on the "chapeau question" of reasonableness, in footnote 489 (now footnote 631), would no longer be justifiable to the extent that the resolution of that question would be essential to the determination that the European Union violated Article 2.2.2(iii).[50]

6.55 In our consideration of China's claim concerning Article 2.2.2 of the AD Agreement, we concluded, as a matter of fact, that the Commission did not, and made no attempt to, calculate the cap called for in Article 2.2.2(iii). There is no explanation of why it failed to do so in the Definitive Regulation, or any indication that it considered calculation of the cap at all. Nothing in the European Union's request for interim review demonstrates otherwise. The fact that the Commission sought to use a "reasonable" method to determine the profits for Golden Step does not justify this failure. Given our finding concerning failure to calculate the cap, we continue to see no reason to address whether the method used by the Commission was otherwise reasonable. In our view, even if it were, this would not affect our conclusion as to the violation of Article 2.2.2(iii) in the failure to calculate the cap. However, we have amended paragraph 7.300 by replacing the word "matter" in the third sentence with the phrase "calculation of the cap" in order to clarify our views.

[48] European Union, request for interim review, p. 3.
[49] European Union, request for interim review, p. 4.
[50] China, comments on the European Union's request for interim review, para. 6.

6.56 **Title (g) and Paragraphs 7.302 to 7.315**: China requests that the Panel amend the phrasing in these sections to more accurately reflect the facts of the Definitive Regulation.[51] The European Union did not comment on this request.

6.57 China is correct that referring to "STAF above €7.50" is not the same as referring to "STAF of not less than €7.50". Given that the latter reflects the usage in the Definitive Regulation, we have modified these sections of the Final Report accordingly.

6.58 **Paragraph 7.303**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[52] The European Union notes that it believes that China intended to refer to Article 2.6 rather than to Article 6.2.[53]

6.59 China has requested the inclusion of the phrase "based on the ordinary meaning of the word "product" and the context of Article 6.2" in this paragraph. As the European Union has suggested, this appears to be an error, and we believe that China intended to refer to Article 2.6, rather than Article 6.2. Assuming this to be the case, the requested modification reflects China's own arguments as presented to the Panel, and we have therefore modified this paragraph accordingly. However, to the extent that China may indeed have intended to refer to Article 6.2, we would deny China's request, as China has not previously referred to Article 6.2 in this context.

6.60 **Paragraph 7.342**: China requests that the Panel modify this paragraph in order to more accurately reflect its claims.[54] The European Union contends that China shifted its arguments during the course of the proceedings, and suggests that any modification to China's arguments should be in addition to the summary of China's arguments already in the Report, rather than a replacement thereof. The European Union states that, as a general principle, China's arguments should be summarised on the basis of China's submissions to the Panel, and not on the basis of how China rephrases them in its comments on the Interim Report.[55] The European Union states that these comments also apply to China's requests with respect to paragraphs 7.343, 7.359, 7.360, 7.361, 7.367, and 7.369 of the Interim Report.

6.61 The Interim Report summarizes the European Union's concerns with respect to the shifting focus of China's claims in paragraph 7.363, and sets out our understanding of this matter in paragraph 7.371 and footnote 615 (now footnote 760). Paragraph 7.342 introduces China's claims regarding the selection of the sample of EU producers in the context of the injury examination, and refers to both the claims concerning the expiry review, and those concerning the original investigation. Thus, we have maintained the reference in this paragraph to the original investigation. Otherwise, given that the requested modifications reflect China's own arguments as presented to the Panel, we have modified this paragraph to better reflect China's arguments as made during the panel proceeding, albeit not in the precise terms suggested. In doing so, we have not replaced the existing description of China's arguments, but added to it as appropriate.

6.62 **Paragraphs 7.343 and 7.344**: China requests that the Panel modify these paragraphs in order to more accurately reflect China's arguments concerning claims II.2 and II.3(i).[56] The European Union raised concerns with respect to this request, as noted above in paragraph 6.60, which we have taken into consideration.

[51] China, request for interim review, para. 26.
[52] China, request for interim review, para. 28.
[53] European Union, comments on China's request for interim review, p. 2.
[54] China, request for interim review, para. 29.
[55] European Union, comments on China's request for interim review, p. 3.
[56] China, request for interim review, para. 30.

6.63 We understand, as China points out, that its claims II.2 and II.3(i) are independent claims. However, both claims concern alleged violations in the procedure to select the sample of the EU industry, and we considered it appropriate to examine them together to avoid excessive repetition and ensure clarity and consistency in our analysis of China's claims. We have reviewed the references China cites in support of its request to include a reference to "consent", and in our view, they do not support China's request. We note, however, that China's position in this regard is in any case set out in the description of China's arguments at paragraph 7.360, and examined in paragraph 7.370 of the Final Report. With respect to the rest of China's proposed modifications, given that they reflect China's own arguments as presented to the Panel, we have modified this paragraph, albeit not in the precise terms proposed by China. In doing so, we have not replaced the existing description of China's arguments, but added to it as appropriate.

6.64 **Paragraph 7.349 and footnote 574 (now footnote 719)**: The European Union requests that the Panel modify the second sentence of this paragraph in order to clarify the cross-reference between the explanations and arguments in the context of the expiry review and those referring to the original investigation, asserting that the second sentence of this paragraph and the footnote relate to the expiry review, while paragraph 7.349 as a whole refers to China's claim with respect to the selection of the sample in the original investigation.[57] China does not believe that a reference to the analysis of the second part of claim III.5 is necessary, given that the Panel noted in footnote 562 (now footnote 704) that China's claim III.5 is analysed in two different sections of the report.[58]

6.65 The European Union is correct that paragraph 7.349 as a whole refers to the original investigation. However, we recall that we divided our consideration of China's claim III.5 into two parts, and this section of our report addresses the first part, concerning the procedure for the selection of the sample of the EU industry. In this regard, footnote 573 (now footnote 718) cites the part of European Union's first written submission where it refers, in the context of the original investigation, to its arguments on this issue with respect to the expiry review. As we understand it, paragraphs 646 et seq. of the European Union's first written submission, referred to in its request for interim review, address the second part of China's claim III.5, which we address at paragraphs 7.406-7.463 of the Final Report, together with China's claims III.8 and II.4. As the European Union made no specific suggestions, it is not entirely clear what modifications it is seeking. However, we have amended paragraph 7.349 in order to clarify that we took into account the European Union's arguments concerning sample selection in the context of the expiry review in considering the first part of China's claim III.5, concerning the original investigation.

6.66 **Paragraph 7.359**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[59] The European Union raised concerns with respect to this request, as noted above in paragraph 6.60, which we have taken into consideration.

6.67 Paragraph 7.359 is part of our evaluation of China's claims, and sets forth our understanding of the arguments and resolution of the claims. We see no reason to modify the text of this paragraph, which accurately reflects our understanding and views, to refer to China's arguments in different and more expansive terms. We therefore have made no changes to this paragraph in response to China's request.

6.68 **Paragraph 7.360**: China requests that the Panel modify this paragraph, asserting that it has not claimed that the difference in the amount of information requested from the different groups

[57] European Union, request for interim review, p. 4.
[58] China, comments on the European Union's request for interim review, para. 7.
[59] China, request for interim review, para. 31.

demonstrates that the Commission was unfair.[60] The European Union raised concerns with respect to this request, as noted above in paragraph 6.60, which we have taken into consideration.

6.69 Paragraph 7.360 is part of our evaluation of China's claims, and sets forth our understanding of the arguments and resolution of the claims. We see no reason to modify the text of this paragraph, which reflects our understanding and views, to refer to China's arguments in different terms. We therefore have made no changes to this paragraph in response to China's request.

6.70 **Paragraph 7.361**: China requests that the Panel review the first sentence of this paragraph, which, China contends, is an incorrect assessment of its claim and arguments. China also asserts that the references to China's written submissions in footnote 592 (now footnote 737) do not support the interpretation set out in this paragraph, but makes no specific proposals in this regard. In addition, China requests that the Panel modify the fourth and fifth sentences of this paragraph in order to more accurately reflect China's arguments.[61] The European Union raised concerns with respect to this request, as noted above in paragraph 6.60, which we have taken into consideration.

6.71 Although China has made no specific proposal for modification of the first sentence of this paragraph, as we understand it, China objects to the reference to "even-handed treatment". It is true that the cited portions of China's submissions do not expressly refer to "even-handed treatment". However, in its arguments to the Panel, China repeatedly referred to the notion of "even-handed treatment" with respect to the selection of the sample for the purpose of the injury assessment. Moreover, as discussed in paragraph 7.371 of the Final Report, China appears to have shifted the focus of its claim throughout the Panel proceedings.[62] It is surprising that China seems now to suggest that this argument was never made and should not be reflected in the report. Thus, we deny China's request with respect to the first sentence, and in order to clarify the basis for our understanding of China's argument, we have modified footnote 592 (now footnote 737) to include references to China's submissions where it made arguments regarding "even-handed treatment" with respect to this claim. Regarding the proposed modification of the fourth sentence, paragraph 7.361 is part of our evaluation of China's claims, and sets forth our understanding of the arguments. It accurately reflects our understanding and conclusions, and we see no reason to modify the text of this paragraph to refer to China's arguments in different terms. We therefore have made no changes in response to this aspect of China's request. Regarding China's request that the Panel add a new sentence after the fourth sentence, China has not provided any reference to where in its submission China presented this argument, and we therefore have made no changes in response to this aspect of China's request. Finally, concerning the requested modification to the fifth sentence, we note that the point China suggests be included is clearly stated in the following sentence, and the accompanying footnote contains additional details in this regard. We therefore consider the proposed modification unnecessary, and have made no changes in response to this aspect of China's request.

6.72 **Paragraph 7.367**: With reference to the last sentence of this paragraph, China states that it has not claimed that the same information should be solicited from all groups of interested parties, and that the crux is that the relevant information should be sought from all parties subject to sampling in an objective and unbiased manner, but makes no specific suggestion for modification.[63] The European Union raised concerns with respect to this comment, as noted above in paragraph 6.60.

6.73 We understand that China does not argue that the same information should be solicited from all interested parties, as reflected in paragraph 7.359 of the Final Report, which states that "China

[60] China, request for interim review, para. 32.
[61] China, request for interim review, para. 33.
[62] The European Union also raised this point in its comments on China's request for interim review, see paragraph 6.60 above.
[63] China, request for interim review, para. 35, citing China, second written submission, para. 606.

recognizes that each group of interested parties is required to provide different types and amounts of information for sampling purposes, and does not argue that 'the same information, or the same quantity of information is required to be sought from all sets/groups of interested parties'". In paragraph 7.367, however, we set forth our understanding of Article 3.1 of the AD Agreement, not China's arguments. In the absence of any specific request by China with respect to this paragraph, we see no reason to modify this paragraph and have made no changes to it.

6.74 **Paragraph 7.369**: China requests that the Panel review the third sentence of this paragraph, asserting that its arguments are not correctly represented, referring in this regard to its response to Panel question 40, paragraphs 291-294. China also requests that the Panel review the fourth and seventh sentences of this paragraph, asserting that it demonstrated that the European Union did not possess the relevant information when the sample was selected.[64] The European Union raised concerns with respect to this comment, as noted above in paragraph 6.60, which we have taken into consideration. In addition, the European Union contends that China attempts to re-argue its case and re-open issues to which the European Union already responded. The European Union requests that, to the extent that the Panel considers it necessary to grant China's request, the European Union's submissions on the issues raised be appropriately considered.[65]

6.75 With respect to the third sentence of this paragraph, we have reviewed the references cited by China. In Panel question 40(b), we asked China whether "even-handed treatment" would require that information be sought even if a sample can be selected on the basis of "objective examination" of "positive evidence" already available to the investigating authority. In responding to this question, China stated that the question is premised on the assumption that "positive evidence" is already available to the investigating authority, the scenario posed by the question, and went on to state that the information available to the investigating authority should form the basis of the sample selection, provide the positive evidence necessary for sampling, and be credible and affirmative, and that the investigating authority should have the consent of the producers to be sampled.[66] Despite its long answer and the statement that even-handedness is "complied with" if positive evidence, as described by China, is available to the investigating authority, China did not specifically answer the Panel's question. Paragraph 7.369 of the Final Report states that China's arguments suggest that, in order to be "even-handed", sampling forms must be sent to every interested party, regardless of whether the investigating authority already possesses what it considers to be sufficient information for the purposes of selecting a sample. We fail to see how China's response to Panel question 40(b) shows that that paragraph 7.369 does not correctly represent China's argument. In our view, the third sentence in paragraph 7.369 accurately reflects China's arguments that the establishment of the sample of all interested parties should be done in an even-handed manner, and that the European Union failed to do so, at least in part because it did not solicit the information requested in sampling forms from one group of interested parties, the complainant EU producers, while all other parties were required to complete detailed sampling forms in order to be considered for inclusion in the sample.[67] Finally, we recall that paragraph 7.369 is part of our analysis of China's claim, and thus reflects our understanding of China's arguments and resolution of the claim. China has not pointed to any evidence that demonstrates that our understanding is incorrect. Therefore, we have not modified the third sentence of this paragraph in response to China's request.

6.76 Concerning the fourth and seventh sentences of this paragraph, China requests that the Panel review these sentences "in the context of the facts of this case" asserting that it demonstrated that the

[64] China, request for interim review, para. 36, referring to China, answer to Panel question 40, paras. 291-294; and second written submission, paras. 594-595 and 640-650.

[65] European Union, comments on China's request for interim review, p. 3.

[66] China, answer to Panel question 40, paras. 291-293.

[67] China's opening oral statement at the second meeting with the Panel, para. 36, read together with, as indicated by footnote 39 of China's oral statement, China, first written submission, para. 451.

Commission did not possess the relevant information concerning the pool of complainant EU producers when the sample was selected, but makes no specific suggestions for changes to the Interim Report. Paragraph 7.369 addresses whether the Article 3.1 requirement of "objective examination" entails "even-handed treatment" in the collection of information for purposes of selecting a sample, and concludes that Article 3.1 does not establish any particular methodology that should be used by the investigating authority to collect the information considered by the investigating authority necessary for the selection of the sample. We did not specifically address whether the Commission possessed the information it considered necessary in order to select the sample as a matter of fact. Rather, we addressed whether Article 3.1 would require the Commission to send sampling forms when it already possessed the necessary information, and concluded that it would not. China's arguments regarding the information allegedly not possessed by the Commission do not affect this finding. Finally, we recall that paragraph 7.369 is part of our analysis of China's claim, and thus reflects our understanding of China's arguments and resolution of the claim. Therefore, we have not modified the fifth and seventh sentences of this paragraph in response to China's request.

6.77 **Paragraph 7.370**: China requests that the Panel review this paragraph with respect to whether consent to be sampled had been given by EU producers before the sample was selected.[68] The European Union considers that China attempts to re-argue its case and re-open issues to which the European Union already responded. The European Union requests that, to the extent that the Panel considers it necessary to grant China's request, the European Union's submissions on the issues raised be appropriately considered.[69]

6.78 In paragraph 7.370, we concluded that nothing in Article 3.1 of the AD Agreement requires that consent must be given by each company considered for selection of the sample, and that even if such a requirement could be implied, the very act of participating as complainants in an anti-dumping investigation suggests a willingness to be considered for inclusion in a sample. In our view, the most that can be concluded based on the facts and China's arguments is that the consent of the individual companies was communicated to the Commission on the same day the sample was selected, but not after the selection. As we found that individual consent by individual producers was not required, we consider that it is not necessary to make a factual finding as to the communication of individual companies' consent. Therefore, we have not modified this paragraph in response to China's request.

6.79 **Paragraph 7.378**: China requests that the Panel modify this paragraph to more accurately reflect its arguments.[70] The European Union did not comment on this request.

6.80 At paragraph 657 of its second written submission, cited by China in support of its request, China argues that factors other than the volume of production, the main factor, "cannot take precedence over the obligation to establish the sample based on the 'largest percentage of volume' of production". In our view, this does not support the assertion that the European Union **in fact** "gave precedence" to criteria not found in Article 6.10, as set out in China's proposed modification. The assertion that the volume of production was the principal basis for the selection of the sample is already reflected in the previous sentence of paragraph 7.378, and we therefore see no reason to include it once more, as proposed by China. Therefore, we have not modified this paragraph in this regard in response to China's request.

6.81 **Paragraph 7.381**: China requests that the Panel amend this paragraph to reflect that it reiterated that Article 6.10 provides a good contextual basis for determining the consistency of the sample with the general requirements of "positive evidence" and "objective examination" based on the

[68] China, request for interim review, para. 37, referring to China, first written submission, para. 478; and second written submission, para. 610.

[69] European Union, comments on China's request for interim review, p. 3.

[70] China, request for interim review, para. 38.

European Union's assertions in two other disputes, *EC – Fasteners (China)* and *EC – Salmon (Norway)*.[71] The European Union maintains that its statements made in other disputes should not be taken out of the context in which they were made and which was conveniently ignored by China.[72]

6.82 In paragraph 7.381, which is part of our analysis, we addressed and rejected China's assertion that Article 6.10 of the AD Agreement provides a good contextual basis for determining the consistency of the sample with the requirements of "positive evidence" and "objective examination". In this context, we do not consider it necessary or relevant to consider what the European Union argued with respect to this matter in other WTO dispute settlement proceedings. Nor is the fact that China cited and relied on the European Union's assertions in other disputes relevant to our analysis and conclusion in this regard. Therefore, we have not modified this paragraph in response to China's request.

6.83 **Paragraph 7.383**: China requests that the Panel amend this paragraph to more accurately reflect its arguments, stating that it disagrees with the Panel's statement that China's arguments concerning the violation of Article 3.1 in the context of its claim II.3(ii) are consequential and to the extent it made an independent claim under Article 3.1, its only argument was that the sample included a company that outsourced production.[73] The European Union recalls that it responded to all arguments raised by China.[74]

6.84 We note that, contrary to China's statement, we recognized at paragraph 7.383 of the Final Report that China made two arguments, one concerning the inclusion of a company that outsourced production during the relevant period, and the second concerning the small volume of production represented by the sample, in support of its position concerning the representativeness of the sample of the domestic industry, to the extent it made an independent claim under Article 3.1 in this regard. We considered and rejected both of these arguments in paragraphs 7.384 to 7.387 of the Interim Report. Second, we consider it clear from China's arguments to the Panel that its claims of violation of Article 3.1 of the AD Agreement and Article VI:1 of the GATT 1994 are consequential to the asserted violation of Article 6.10 of the AD Agreement. We note in this regard that China argued that "[i]t **follows** [from an inconsistency with Article 6.10] that the European Union's evaluation of injury to the domestic industry … was inconsistent with Articles 3.1 of the [AD Agreement] as well as Article VI:1 of the GATT 1994."[75] In our view, China's submissions clearly identify these as consequential claims.[76] In addition, the references provided by China do not support its request. Paragraphs 506-507 and 513-514 of China's first written submission do not address this issue, and paragraphs 658-670 of China's second written submission, when referring to the different claims,

[71] China, request for interim review, para. 39.

[72] European Union, comments on China's request for interim review, p. 3.

[73] China, request for interim review, para. 40, referring to China, first written submission, paras. 506-507, and 511-514; and second written submission, para. 658-670.

[74] European Union, comments on China's request for interim review, p. 3.

[75] China, first written submission, para. 468 (emphasis added). See also China, first written submission, para. 514.

[76] China, first written submission, para. 500 ("Thus, the European Union acted inconsistently with Article 6.10 of the [AD Agreement]. Moreover, this **led to** the selection of a sample … not representative of the entire domestic industry … [in violation of] Articles 3.1 and 17.6(i)") (emphasis added), second written submission, paras. 633 and 667 ("… it was not consistent with the sampling criteria of Article 6.10 of the [AD Agreement]. It **follows** that the European Union's evaluation of injury to the domestic industry based on the sample … was inconsistent with Article[s] 3.1, [and] Article 17.6(i) of the [AD Agreement] as well as Article VI:1 of the GATT 1994.") (emphasis added), ("Such a sample is not representative of the domestic industry as whole which includes non-complainant producers…Thus the selection of such a sample demonstrates the lack of objective examination in sample selection and an injury determination based on such a sample is not consistent with Articles 3.1 and 17.6(i) of the [AD Agreement].").

explain that some claims are consequential,[77] or address the producer that outsourced its entire production, which we addressed in paragraph 7.384. We note that China did make a different independent claim of violation of Article 3.1, with respect to sampling for purposes of the examination of injury, which we addressed elsewhere in the Interim Report. However, this does not change the fact that, in the context of its claims and arguments concerning the representativeness of the sample of the domestic industry, the claim of violation of Article 3.1, as presented by China in its submissions to the Panel, is consequential to its claim of violation of Article 6.10. Finally, we note that China has made no specific suggestions as to proposed changes. Therefore, we have not modified this paragraph in response to China's request.

6.85 **Paragraph 7.384**: China requests that the Panel modify this paragraph to more accurately reflect its arguments.[78] With respect to this request, and China's requests concerning paragraphs 7.386, 7.424, and 7.425, the European Union states that, as a general principle, China's arguments should be understood and summarised on the basis of China's submissions made before the Panel, and not on the basis of how China rephrases them in its comments on the Interim Report, and urges the Panel to carefully review China's request and avoid making changes unsupported by China's submissions actually made in the course of the proceeding.[79]

6.86 Given that the requested modification reflects China's own arguments as presented to the Panel, we have modified this paragraph, albeit, taking account of the European Union's comment, not in the precise terms suggested by China.

6.87 **Paragraph 7.386**: China requests that the Panel modify this paragraph to more accurately reflect its arguments.[80] As noted in paragraph 6.85 above, the European Union urges the Panel to carefully review China's request and avoid making changes unsupported by China's submissions during the course of the proceeding.[81]

6.88 Given that the requested modification reflects China's own arguments as presented to the Panel, we have modified this paragraph, albeit, not in the precise terms suggested by China.

6.89 **Paragraph 7.424**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[82] As noted in paragraph 6.85 above, the European Union urges the Panel to carefully review China's request and avoid making changes unsupported by China's submissions during the course of the proceeding.[83]

6.90 Given that the requested modification reflects China's own arguments as presented to the Panel, we have modified this paragraph, albeit, taking account of the European Union's comment, not in the precise terms suggested by China.

6.91 **Paragraph 7.425**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[84] As noted in paragraph 6.85 above, the European Union urges the Panel to carefully review China's request and avoid making changes unsupported by China's submissions during the course of the proceeding.[85]

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[77] See, e.g., China, second written submission, para. 667.
[78] China, request for interim review, para. 41.
[79] European Union, comments on China's request for interim review, p. 3.
[80] China, request for interim review, para. 42.
[81] European Union, comments on China's request for interim review, p. 3.
[82] China, request for interim review, para. 45.
[83] European Union, comments on China's request for interim review, p. 3.
[84] China, request for interim review, para. 46.
[85] European Union, comments on China's request for interim review, p. 3.

6.92 Given that the requested modification reflects China's own arguments as presented to the Panel, we have modified this paragraph, albeit, taking account of the European Union's comment, not in the precise terms suggested by China.

6.93 **Paragraph 7.428**: China requests that the Panel modify this paragraph to more accurately reflect the facts, arguing that the Panel did not take into account the facts of the current case, notably the particularly unrepresentative and un-objective data sources used by the Commission for collecting the information regarding the macroeconomic injury indicators concerning the like product for the review investigation period and for cross-checking the information collected.[86] The European Union considers that China attempts to re-argue its case and re-open issues to which the European Union already responded. To the extent that the Panel considers it necessary to grant China's request, the European Union requests that its submissions on the issues raised be appropriately considered.[87]

6.94 China expresses disagreement with the conclusion in this paragraph, based on its own view of the facts, but makes no specific suggestions as to modifications. Nonetheless, we have carefully reviewed the facts referred to by China, and consider that paragraphs 7.424-7.425 correctly reflect our understanding of the facts. Our findings in paragraph 7.428 were obviously made with these facts in mind. China makes much of the alleged impossibility of verification of estimates and other information, and of the sources of information used by the Commission. However, as stated in this paragraph, we consider that it is normal to have flaws or gaps in the information obtained by an investigating authority in the context of its examination of injury. While imperfect information may require additional explanations of the facts found and the reasoning underlying the investigating authority's determinations, we see nothing in the AD Agreement that might preclude consideration of and reliance on such information. In addition, we recall that verification of information is not a formal requirement under the AD Agreement. Thus, we have made no changes to this paragraph in response to China's request.

6.95 **Paragraph 7.444**: China asserts that the last sentence of this paragraph is incorrect in light of its answer to Panel question 92, in particular paragraph 550, but makes no specific request in this regard.[88] The European Union considers that the Interim Report correctly describes China's arguments, and asserts that this paragraph merely observes that the European Union disregarded certain factors, but makes no arguments as to why the European Union should have done otherwise, and therefore no amendment is necessary.[89]

6.96 We have carefully reviewed China's answer to Panel question 92. We recall our view that Article 3.4 of the AD Agreement does not refer to either sales values or market shares based on turnover, and that consideration of these factors is not required. China's answer to Panel question 92, including paragraph 550, discusses sales values and market shares based on turnover, but does not argue that the fact that the Commission did not consider these factors undermined the Commission's reasoning and conclusions based on the factors it did consider, or the injury determination as a whole, as we indicate in the last sentence of paragraph 7.444. Merely that China presented an argument supporting a different conclusion based on factors the Commission did not consider, i.e., sales value and market share based on turnover, does not demonstrate that consideration of those factors is required, or that a failure to consider them undermines the analysis that actually was undertaken. Thus, we have made no changes to this paragraph in response to China's request.

[86] China, request for interim review, para. 47, referring to China, second written submission, paras. 755-758.
[87] European Union, comments on China's request for interim review, p. 3.
[88] China, request for interim review, para. 48.
[89] European Union, comments on China's request for interim review, p. 3.

6.97 **Paragraph 7.484**: The European Union requests that the Panel modify this paragraph in order to express what it understands to be the Panel's intention.[90] China did not comment on this request.

6.98 Having considered the European Union's comment, we have modified this paragraph, albeit in different terms than proposed by the European Union, to more clearly express our views.

6.99 **Paragraph 7.501**: China requests that the Panel review the penultimate sentence of this paragraph, asserting that it is incorrect. China refers in this regard to paragraphs 577-580 of its first written submission and evidence it proffered to show that EU producers were being injured by structural inefficiency. In addition, China asserts that it referred to specific recitals of the Review Regulation which, it asserts, contradicted the Commission's finding of no break in causal link on account of this factor, and provided additional evidence in its second written submission. China further requests that the Panel clarify what facts are referred to as not disputed by China.[91] The European Union understands the Panel to be referring to evidence "that was not considered", and contends that general remarks about trade competition attributed to Commissioner Mandelson cannot seriously be regarded as "evidence" regarding the particular situation of the footwear industry.[92]

6.100 We recall that China argued that EU producers were incapable of competing with increasing globalisation and were increasingly resorting to outsourcing or changing their business structure, due to their structural inefficiency, and presented evidence to support its view that such inefficiency is a result of the fact that the EU industry is comprised of very small-scale producers, employing a small number of workers, and of the European Union's high labour cost.[93] We concluded that the Commission's conclusion in the Review Regulation, that lack of efficiency and structural problems in the industry did not break the link between the dumping and the injury, was reasonable, based on the facts, and a conclusion which could be reached by an unbiased and objective investigating authority. Nothing in China's arguments during the proceeding, or in its request for review, points to evidence that was not considered by the Commission in reaching its conclusion, or disagrees with the facts as stated by the Commission in the Review Regulation concerning this issue. It is these facts that we consider China did not dispute. We agree with the European Union that then-Commissioner Mandelson's statement is not directly relevant to this issue, as it does not refer to the footwear industry, but merely to "Asia's natural and legitimate low-cost advantages", which says nothing about the alleged structural inefficiency of the EU industry as a factor causing injury to the domestic industry. Based on the foregoing, we are satisfied that the penultimate sentence of this paragraph accurately reflects our views, and we have therefore made no change to it in response to China's request.

6.101 **Paragraph 7.504**: The European Union suggests that the Panel modify this paragraph in order to more accurately reflect the Panel's apparent intention.[94] China did not comment on this request.

6.102 Having considered the European Union's suggestion, we have modified this paragraph to more clearly express our views, albeit not in the precise terms proposed by the European Union.

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[90] European Union, request for interim review, p. 5.

[91] China, request for interim review, para. 50, citing Exhibits CHN- 23, 34, 44, and 45 and statements of then-Commissioner Mandelson in the European Parliament, China, second written submission, paras. 770-771.

[92] European Union, comments on China's request for interim review, p. 4.

[93] China, first written submission, paras. 577-579, citing the European Footwear Alliance submission dated February 2009, Exhibit CHN-23; the European Footwear Alliance submission dated 12 November 2008; Community interest questionnaire response of Company D dated 16 January 2009; and Community interest questionnaire response of Company F dated 15 January 2009.

[94] European Union, request for interim review, p. 5.

6.103 **Paragraph 7.510**: China requests that the Panel review the fourth sentence of this paragraph and the accompanying footnote 891 (now footnote 1038), asserting that the references in the footnote do not indicate that the Commission assessed the factor of high labour costs in the Review Regulation or otherwise.[95] The European Union considers that the Panel's reference is to the explicit consideration of structural inefficiency in the recitals quoted by the Panel at paragraph 7.498, and thus, the European Union considers that the existing text is accurate.[96]

6.104 We recall our view that "high labour cost" was raised in the context of one party's argument concerning the structural inefficiency of the EU production, and not as an independent "other factor", and was considered in the European Union's analysis of the alleged structural inefficiency of the EU industry, as set out at paragraphs 7.497-7.501 of the Interim Report. We consider our statement accurate. Nonetheless, in order to clarify the basis for our views, we have added a new footnote 1037, referring to recital 271 of the Review Regulation, where the issue of labour costs is addressed in the context of the alleged structural inefficiency of the EU industry.

6.105 **Paragraph 7.511**: The European Union requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[97] China did not comment on this request.

6.106 The text as currently drafted more closely follows the phrasing of the European Union's argument in paragraph 345 of its first written submission, where it stated that "[o]utsourcing was detected, analysed, and fully taken into account in the injury analysis in the context of sampling", than does the European Union's proposed modification. We have therefore made no changes to this paragraph in response to the European Union's request.

6.107 **Paragraph 7.544**: China requests that the Panel modify this paragraph in order to more accurately reflect its arguments.[98] The European Union did not comment on this request.

6.108 Not all of China's proposed modifications are cited to the submissions where the amendments it seeks can be substantiated as having been made during the proceedings before the Panel. Nonetheless, and in the absence of any objection from the European Union, we carefully reviewed the references given, and are satisfied that the requested modifications reflect China's arguments as presented to the Panel. We have therefore modified this paragraph, albeit not in the precise terms proposed by China.

6.109 **Paragraph 7.563**: China requests that the Panel modify this paragraph to accurately reflect its arguments.[99] The European Union did not comment on this request.

6.110 China has not cited the submissions where the amendments it seeks can be substantiated as having been made during the proceedings before the Panel. Nonetheless, and in the absence of any objection from the European Union, we have reviewed China's arguments and are satisfied that the requested modifications reflect China's arguments as presented to the Panel. We have therefore modified this paragraph, albeit not in the precise terms proposed by China.

6.111 **Paragraph 7.615**: China requests that the Panel modify this paragraph to better reflect its arguments, referring in this regard to paragraph 76 of its closing statement at the second meeting with the Panel.[100] The European Union argues that the submission referred to by China does not contain

[95] China, request for interim review, para. 53.
[96] European Union, comments on China's request for interim review, p. 4.
[97] European Union, request for interim review, p. 5.
[98] China, request for interim review, para. 54.
[99] China, request for interim review, para. 55.
[100] China, request for interim review, para. 60.

evidence that the Commission's sample selection was irrevocable and, in any event, the closing statement at the second meeting is not an occasion on which evidence may be presented.[101]

6.112 We note that although China's comment refers to paragraph 7.615 of the Interim Report, the text to which it proposes modifications is actually in paragraph 7.621 of the Interim Report. More importantly, we agree with the European Union that the submission cited by China contains no evidence that would substantiate China's assertion that the Commission's selection of the sample of EU producers was irrevocable. Indeed, the cited paragraph does not even refer to the alleged irrevocability of the Commission's sampling selection. We therefore continue to consider that while China has presented as an uncontested fact that the Commission's selection of the sample of EU producers was irrevocable, it has provided no evidence in support of this assertion, and therefore we have made no changes to either paragraph 7.615 or paragraph 7.621 in response to China's request.

6.113 **Paragraph 7.623**: China requests that the Panel either delete or modify the third sentence of this paragraph, asserting that it is not correct, referring in this regard to paragraph 957 of its second written submission.[102] The European Union notes that paragraph 957 of China's second written submission refers to the names of the selected companies and not to the number in each member State, which is the topic addressed by the Panel in this paragraph of its Report.[103]

6.114 We share the European Union's understanding of paragraph 957 of China's second written submission. We therefore continue to consider that China has not explained how the "number" of the sampled companies from each member State was relevant to or considered by the Commission in its selection of the sample, and therefore have made no changes to this paragraph in response to China's request.

6.115 **Paragraph 7.630**: China requests that the Panel review the third, fourth, and fifth sentences of this paragraph, contending that they misrepresent the facts and China's arguments, referring in this regard to paragraphs 966-967 of its second written submission where, China asserts, it specifically referred to instances in the Review Regulation showing that the European Union used the revised data.[104] The European Union disagrees with China, and considers that the Panel's account of the situation is correct.[105]

6.116 We have carefully reviewed paragraphs 966-967 of China's second written submission, and the parts of the Review Regulation referred to in these paragraphs, and do not agree that they demonstrate, as China asserts, that the Commission used the revised production and sales data of all the EU producers, the complainants, and all the sampled EU producers to determine the total production represented by the sample after the discovery that one sampled producer had discontinued production during the review investigation period. We therefore see no basis for China's contention that paragraph 7.630 of the Interim Report misrepresents the facts or the arguments of China, and have therefore made no changes to this paragraph in response to China's request.

6.117 **Paragraph 7.640**: China requests that the Panel review or clarify the third sentence of this paragraph, asserting that the fundamental aim of the various provisions of Article 6 is to ensure that all interested parties have a full opportunity for the defense of their interests, and contending that if interested parties may not participate in the proceeding as and when they choose, Article 6.2 would be rendered nugatory and irrelevant. In light of the foregoing, China requests that the Panel review its

[101] European Union, comments on China's request for interim review, p. 4.
[102] China, request for interim review, para. 61.
[103] European Union, comments on China's request for interim review, p. 4.
[104] China, request for interim review, para. 63.
[105] European Union, comments on China's request for interim review, p. 4.

conclusions as well.[106] The European Union considers that the Panel's position regarding the participation of parties in the investigation is clearly established in the report, and gives no grounds for China's notion that the right of parties to defend their interests would be rendered nugatory or irrelevant.[107]

6.118 Our statement in the third sentence of this paragraph is based on the report of the Appellate Body in *US – Oil Country Tubular Goods Sunset Review*, which states that Article 6.2 does not provide an "indefinite" right to parties to defend their interest, and does not extend so far "as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose."[108] However, to clarify the basis for our statement, we have included, in footnote 1127 (now footnote 1277) a cross-reference to paragraph 7.604 of the Interim Report, where the Appellate Body's report in *US – Oil Country Tubular Goods Sunset Review* is quoted and cited, and have added new footnotes 1249, 1269, and 1474 making the same reference.

6.119 **Paragraph 7.647**: China requests that the Panel review its conclusion in this paragraph, asserting that it is not correct in light of its finding in paragraph 7.806.[109] The European Union did not comment on this request.

6.120 We note that while China's request refers to paragraph 7.647 of the Interim report, the text to which it refers is in paragraph 7.648. More importantly, we have reviewed our conclusion in paragraph 7.648, and conclude that as set forth, it is indeed inconsistent with the conclusion in paragraph 7.806. We have therefore reconsidered the parties' arguments in this regard. On the basis of that reconsideration, we conclude that China has not demonstrated that the European Union violated Articles 6.4 and 6.2 with respect to the PCN information of the producers referred to by China, because there is no evidence that interested parties requested to see the information of the producers at issue and were denied an opportunity to do so. We have therefore modified paragraph 7.648 of the Final Report to set out this different reasoning, rejecting China's claims under Articles 6.2 and 6.4, and made a conforming modification to paragraph 7.650 of the Final Report.

6.121 **Paragraph 7.693**: China requests that the Panel revise the last sentence of this paragraph, which it considers to be incorrect in light of the first sentence of paragraph 7.697 of the Interim Report, and presents two alternative proposed modifications.[110] The European Union considers that the second alternative proposed by China would radically change the Panel's conclusion, and that China has presented no basis for justifying such a change, but does not comment on China's first proposed modification.[111]

6.122 Paragraph 7.693 of the Interim Report reflects the fact that, in the complaint and the accompanying letter, the CEC claimed confidential treatment and demonstrated good cause on behalf of the complainants and supporters. China does not dispute that the complaint and accompanying letter set forth a request for confidential treatment and demonstration of good cause by the CEC on behalf of the complainants and supporters. China does dispute that such a request and demonstration are a sufficient basis for granting confidential treatment, arguing that the supporters declared support for the complaint, but did not formally authorize the CEC to act on their behalf. Therefore, China asserts, the CEC was in fact acting only on behalf of complainants. The last sentence of paragraph 7.693 does not make a conclusion as to whether the CEC was empowered to act on behalf of supporters, but merely states the fact that the complaint and accompanying letter set forth a request

[106] China, request for interim review, para. 64.
[107] European Union, comments on China's request for interim review, p. 4.
[108] Appellate Body Report, *US - Oil Country Tubular Goods Sunset Reviews*, para. 241.
[109] China, request for interim review, para. 65.
[110] China, request for interim review, para. 66.
[111] European Union, Comments on China's request for interim review, p. 4.

for confidential treatment on behalf of, *inter alia*, the supporters of the complaint. We therefore consider that the last sentence of this paragraph accurately reflects the facts, and have made no change to this paragraph in response to China's request.

6.123 **Paragraph 7.694**: China requests that the Panel revise the first and last sentences of this paragraph. According to China, these sentences are based on the factually incorrect premise that the CEC filed information on behalf of supporters, as the 36 declarations of support were filed by the "supporters" themselves in response to a request by the European Union, referring in this regard, to Exhibit CHN-108 and paragraph 773 of the European Union's first written submission.[112] The European Union acknowledges that the 36 declarations of support referred to by China were submitted by the companies concerned to the Commission in response to enquiries by the Commission, but argues that the companies were giving their support to the complaint, which requested confidentiality for complainants and supporters.[113]

6.124 Paragraph 7.694 of the Interim Report addresses China's argument with respect to the confidential treatment granted by the European Union to the names of the "complainants" and "sampled producers", not the confidential treatment accorded to the names of the 36 supporting producers. We thus fail to see the relevance of China's arguments and therefore have made no change to this paragraph in response to China's request.

6.125 **Footnote 1254**: China disagrees with the footnote 1254 of the Interim Report, referring in this regard to paragraph 1331 of its first written submission, where it alleged that no meaningful summaries or no summaries at all were provided of the blanked out information in the non-confidential versions of these declarations of support, but does not make any specific request for modification.[114] The European Union notes that should the Panel address the issue of non-confidential summaries, the confidential information in the support statements was summarised in the Note for the File of 6 July 2005, Exhibits CHN-108 and EU-16.[115]

6.126 We have reviewed the arguments referred to by China, which indicate that China did contest the adequacy of the non-confidential versions of the 229 declarations of support. Indeed, we addressed China's arguments in this regard in paragraphs 7.722 and 7.732-7.735 of the Interim Report. We therefore have deleted footnote 1254, as it was incorrect. In order to clarify our findings in this regard, we have amended paragraph 7.735 of the Final Report by adding the following statement: "Having found no violation of Article 6.5, we consider that there is no basis for China's claim under Article 6.5.1, which we recall applies only with respect to confidential information provided by interested parties."

6.127 **Footnote 1277 (now footnote 1426)**: China considers it necessary to clarify that what the Panel refers to as "what appears to be the first page of these support forms" which "contains no data" is found on all ten support forms of the 36 producers that supported the complaint, and that what China refers to as the "deleted" information in the example in paragraph 1328 of its first written submission refers to the 229 declarations of support of producers on behalf of which the complaint was filed. China further clarifies that it included one example of these declarations, in Exhibit CHN-108, because all the other 228 pages are virtually identical, but remains at the Panel's disposal to provide a copy of the remaining 228 declarations of support, if necessary. However, China makes no specific request for modification of the Interim Report.[116] The European Union notes that the reason given by China for not including all 229 declarations of support in Exhibit CHN-108 (i.e. because

[112] China, request for interim review, para. 67.
[113] European Union, comments on China's request for interim review, p. 4.
[114] China, request for interim review, para. 68.
[115] European Union, comments on China's request for interim review, p. 5.
[116] China, request for interim review, para. 69.

they were "virtually identical") is exactly the same as the reason for the Commission not including all 814 declarations in the non-confidential file.[117]

6.128 Given that China has not requested any modification or amendment of the Report, we see no reason to make any changes in response to its comments. However, in order to clarify our reference to the example provided by China of the 229 declarations of support in Exhibit CHN-108, we have modified paragraph 7.734 and footnote 1277 (now footnote 1426).

6.129 **Paragraph 7.718**: The European Union requests that the Panel modify its finding in the third sentence of this paragraph, noting that at paragraphs 7.693 et seq., the Panel found that the CEC's request for confidential treatment for those producers who filed the complaint, and who presented the statements of support, was justified.[118] China considers that the European Union misunderstands the scope of paragraph 7.718, which it asserts relates to the missing questionnaire response and not the missing declarations of support. In any event, China notes that the Panel's findings in paragraph 7.693 et seq. concern the showing of good cause in relation to the names of the companies and other such information, and do not apply to other information contained in the document the confidentiality of which is not necessary "in order to maintain the confidentiality of information accorded such treatment", and indeed, the document itself.[119]

6.130 The third sentence of this paragraph sets out our conclusions with respect to the missing questionnaire response of one sampled EU producer, while the European Union's objection appears to refer to the declarations of support of the supporting producers. At paragraphs 7.693 et seq. of the Interim Report, we addressed the confidential treatment granted to the names of the EU producers, including the names of the supporting producers, and not the confidential treatment granted to the information contained in the questionnaire responses of the EU producers or the questionnaire responses themselves. Thus, in our view, the latter findings do not undermine the statement in the third sentence of paragraph 7.718 to which the European Union objects, and we have therefore made no change to this paragraph in response to the European Union's request.

6.131 **Paragraph 7.761**: China requests that the Panel delete the phrase "which China does not contest" from the last sentence of this paragraph, referring in this regard to paragraphs 1068-1074 of its second written submission.[120] The European Union asserts that nothing in the paragraphs cited by China contradicts the factual assertion by the CEC in the passage quoted by the Panel. Rather, these paragraphs address the kind of evidence that would be relevant to such an assertion.[121]

6.132 While it is true that China contended that the alleged fear of retaliation was unreasonable, unfounded and untrue, it did not dispute the CEC's statement that certain EU producers had been "subject to severe pressure to stop cooperating in the investigation and to withdraw their support". Nor do the cited paragraphs of its second written submission demonstrate that this statement by the CEC was untrue or unfounded, or even address it. We therefore have made no changes to this paragraph in response to China's request.

6.133 **Paragraph 7.763**: The European Union requests that the Panel modify this paragraph, asserting that although China included a claim under Article 6.5.1 in respect of the names of the complainants (and others), its arguments were exclusively directed at the eligibility of the names for confidential treatment, and never addressed the question whether, if those names were entitled to such treatment, the European Union had failed in its obligations under Article 6.5.1. In the absence of an

[117] European Union, comments on China's request for interim review, p. 5.
[118] European Union, request for interim review, p. 5.
[119] China, comments on the European Union's request for interim review, para. 9.
[120] China, request for interim review, para. 70.
[121] European Union, comments on China's request for interim review, p. 5.

accusation by China, the European Union contends that the Panel is not entitled to reach its own conclusions on the matter.[122] China does not consider that the Panel's conclusion needs to be modified, arguing that the European Union erroneously asserts that China's arguments were "exclusively" directed at the eligibility of the names for confidential treatment. China contends that it argued the violation of Article 6.5.1 by the European Union in the context of the names of the complainants, and that the European Union addressed China's arguments in this regard.[123]

6.134 It is true that China's arguments focused on whether the names of the EU producers could be treated as confidential. However, China clearly made a claim under Article 6.5.1 with respect to this information and presented arguments, although general, in support of its claim.[124] We therefore have made no change to this paragraph in response to the European Union's request.

6.135 **Paragraph 7.771**: The European Union requests that the Panel modify its finding regarding Article 6.5.1 in the fourth and fifth sentences of this paragraph. The European Union asserts that the CEC's statement that it "was acting on behalf of the producers of the product concerned representing 38% of the total EU 27 production" was a summary of the table at Annex 1 of the complaint, and also analysed the data, including the countries of origin and production quantities, that the companies had included in their support statements. Thus, the European Union contends, this statement also constitutes a summary of the information regarding countries of origin and company production figures in the confidential versions of the support statements. The European Union rejects China's argument that the summary should have contained "individual data of the complainants" or mention of the member States in which the complainants were located, noting that this is data which the Panel concluded were justifiably treated as confidential.[125] China argues that the European Union imports a kind of automatism in the application of Article 6.5.1 that is not permitted by the text of that Article. China argues that the mere fact that such data were held to be confidential by the Panel does not permit, as the European Union proposes, that it automatically implies that the European Union complied with its obligation under Article 6.5.1. China therefore does not consider that the European Union's argument merits a reconsideration of the issue by the Panel.[126]

6.136 We recall that the information at issue concerns the answers provided by the applicants, their home countries, and a table regarding the standing of CEC, referred to in Annex 1 of the complaint. We found that the CEC's statement that "the CEC was acting on behalf of the producers of the product concerned representing 38% of the total EU 27 production" constituted a summary only of the confidential information in the table regarding the standing of the CEC, but not of the remainder of that information. The European Union now argues that the CEC's statement was also a summary of the information regarding the home countries and production figures, asserting that the table regarding the standing of CEC analysed the data, including home countries and production quantities, but has not pointed out where it made this argument during the proceedings before the Panel. Paragraph 445 of its first written submission, referred to by the European Union in this regard, states that the individual production volumes of the supporting producers were "effectively summarized in the Review Request", but does not refer to the answers provided by the applicants and their home countries, and does not indicate where in the request the summary of the individual production volumes of the supporting producers could be found. Moreover, while at paragraph 339 of its opening oral statement at the second meeting, the European Union stated that summarized information from the answers provided by the applicants "appears at various points" in the complaint, it did not indicate where in the complaint such summarization was provided. Regarding the home

[122] European Union, request for interim review, p. 5.
[123] China, comments on the European Union's request for interim review, para. 8.
[124] For example, China, second written submission, paras. 1027 et seq. (arguments regarding Article 6.5.1 with respect to different kinds of information, including the names of the EU producers).
[125] European Union, request for interim review, pp. 5-6.
[126] China, comments on the European Union's request for interim review, para. 10.

countries of the applicants, the European Union did not even argue that summarization of this information was provided. Based on the foregoing, we see no basis to revisit our conclusion, and therefore have made no changes to this paragraph in response to the European Union's request.

6.137 **Paragraph 7.785**: The European Union requests that the Panel revisit the first, second, fourth and fifth sentences of this paragraph and modify its conclusions. The European Union argues first that its assertion that the four companies which completed standing forms were among the 196 supporters of the expiry review request was not contested by China, and the Panel was therefore not justified in reaching the conclusion in the first sentence that it could not "determine whether the four companies which completed the standing forms were among the 196 supporters of the expiry review request, as the European Union contends." The European Union contends that since this conclusion is the basis for the Panel's conclusion in the second sentence concerning the contents of the standing forms, that conclusion is also unjustified. The European Union disagrees with the Panel's finding in the fourth sentence that "it is not clear that [the information sought in the standing forms] would fall within the scope of information for which the need to protect their identities would establish good cause for confidential treatment, and the European Union has not asserted otherwise", maintains that it denied China's accusation that no request for confidentiality was made in respect of the information presented by companies in the "standing forms",[127] and therefore argues that the issue of whether this information was entitled to confidential treatment is one that the Panel can and should decide. Finally, the European Union notes that it gave an explanation of the contents of this information, which China did not attempt to refute.[128] The European Union therefore requests that the Panel review its conclusion that the European Union violated Article 6.5.[129]

6.138 With respect to the European Union's first and second points, China contends that it is incorrect that China did not address the issue whether the four companies which completed the standing forms were amongst the 196 supporters, referring in this regard to paragraphs 644, 940 and 1077 of its second written submission, paragraph 100 of its closing statement at the second meeting with the Panel, and its response to Panel question 116, where it noted that interested parties were never provided any opportunity to see these standing forms and that the European Union provided no proof to show that indeed the standing forms were filed by "some" or four producers. Furthermore, referring to paragraph 100 of its closing statement at the second meeting with the Panel and its response to Panel question 116, China argues that it contested the European Union's assertion by stating that "China considers this to be patently incorrect. The EU's own Exhibit EU-20 shows that the information requested in the standing form was far more extensive than that provided in the declaration of support (see Exhibit CHN-30)".[130] With respect to the European Union's third point, China contends that it demonstrated that the information requested in the standing form was far more extensive than that provided in a declaration of support, and that the European Union did not refute or demonstrate that all information provided therein fell within the scope of the information for which confidential treatment was requested by the four companies in question. In addition, China argues that the references cited by the European Union do not contain any arguments and/or do not refute China's claims. Finally, China objects to the European Union's statement that China did not attempt to refute the European Union's explanation "of the contents of th[e] information [at issue]", noting that it did not have the opportunity to further comment and/or refute the European Union's comments on China's answers to questions from the Panel's second set of questions. In the alternative, China argues

[127] The European Union refers to paragraph 19 of its comments on China's response to Panel question 116 in this regard. European Union, request for interim review, p. 6.
[128] The European Union refers to paragraph 22 of its comments on China's response to Panel question 116 in this regard. European Union, request for interim review, p. 6.
[129] European Union, request for interim review, p. 6.
[130] China, comments on the European Union's request for interim review, para. 11.

that if the Panel were to review its conclusion, it should also review its conclusion not making any additional findings as regards the violation of Article 6.5.1 by the European Union.[131]

6.139 With respect to the European Union's first and second points, we recall that a party asserting a fact has the burden of providing proof thereof. In this case, the European Union has provided no evidence in support of its assertion that the four companies which completed standing forms were among the 196 supporters of the expiry review. Moreover, since it was for the European Union to substantiate its assertion of fact, we fail to see the relevance of the European Unions' contention that China allegedly did not contest this assertion. We therefore have made no change in response to the European Union's request regarding the first and second sentences of this paragraph, recalling that its request with respect to the second sentence is dependent on acceptance of its request with respect to the first sentence. Regarding the European Union's requests concerning the fourth and fifth sentences of this paragraph, we are of the view that the European Union has not established that confidential treatment was requested in respect of the information presented by the four companies in the standing forms concerned. While it is true that in its comments on China's response to Panel question 116, the European Union rejected China's claim that no request for confidentiality was made in respect of the information presented by companies in the "standing forms", nothing in these comments demonstrates that confidential treatment for this information was in fact requested and/or that this information "fall[s] within the scope of information for which the need to protect [the] identities [of these companies] would establish good cause for confidential treatment". We therefore have not made the changes to this paragraph requested by the European Union. However, we have modified the fourth sentence of paragraph 7.785 by replacing the word "asserted" with the word "demonstrated", so as to better reflect the basis for our conclusion.

6.140 **Paragraph 7.789**: The European Union requests that the Panel review its conclusion in the second sentence of this paragraph. The European Union contends that the data in the standing forms were summarised in a Note for the File issued on 2 October 2008, Exhibit EU-19.[132] China argues that the European Union's request should be rejected. China notes that while the Panel's finding in paragraph 7.789 concerns the failure of the European Union to request a non-confidential summary of the information provided in the "declarations of support", the European Union's objection concerns the "standing forms". In addition, China alleges that paragraph 22 of the European Union's comments on China's response to Panel question 116 supports the Panel's findings. In fact, China argues, in that paragraph the European Union clearly stated that there were several questions, including among others concerning "production", that "in accordance with its usual practice, the Commission did not regard as capable of individual summarization". Further, China alleges that Exhibit EU-19 only provides aggregates figures and does not contain a non-confidential summary of the 2007 and January 2008 production data of the supporters and the names of their countries, or a statement of reasons as to why a non-confidential summary of this information was not possible.[133]

6.141 We recall that the information at issue is certain information in the declarations of support, regarding the countries and production volume of the supporting producers for the year 2007 and 2008. However, the Note for the File dated 2 October 2008, to which the European Union refers, does not contain any summary of the countries and production volume data for the year 2008. Moreover, with respect to the production volume for the year 2007, the Note only provides an overall estimation of the total production in the European Union for this year. Thus, we have made no change to this paragraph, which accurately reflects our views, in response to the European Union's request.

[131] China, comments on the European Union's request for interim review, para. 12.
[132] European Union, request for interim review, p. 6.
[133] China, comments on the European Union's request for interim review, para. 13.

6.142 **Paragraph 7.792**: China requests that the Panel review its conclusion in this paragraph. China alleges that the Panel accepted the European Union's contention, in the absence of any evidence or proof, that the questions for which no answers were provided in the non-confidential version of the questionnaire responses of the sampled EU producers were also unanswered in the confidential version. China contends that the European Union made a passing statement in its response to question 59 that "in the vast majority of cases the entries in the confidential and non-confidential files are identical, or have differences…that are not significant", and considers that this is an insufficient basis for the Panel to accept the European Union's assertion as fact. China also argues that the Panel's statement that China had not demonstrated that the information it challenged was treated as confidential, and that there was no factual basis to conclude that the unanswered questions were treated as confidential, is not correct. China asserts in this regard that it provided the entire proof available to it on this issue, the non-confidential questionnaire responses, the detailed comments made by EFA and the Commission's response to EFA showing that pursuant to EFA's comments the complainant producers added additional information to the questions previously left blank. In addition, China alleges that the very fact that the European Union argued that "for information that is 'by nature' confidential, good cause is shown by establishing that the information falls into that category", makes clear that for all information considered confidential by nature, the European Union exempted the EU producers from requesting confidential treatment and automatically granted confidential treatment to such information. Moreover, referring to the European Union's response to Panel question 59, where the European Union explained that a general request for confidential treatment was made at the beginning of the non-confidential questionnaire response applied to all parts of the information considered confidential and therefore not disclosed in the subsequent non-confidential versions of the same response of the same company, China takes the view that this demonstrates that confidentiality was applied to the unanswered questions.[134]

6.143 The European Union argues that in its response to Panel question 59, it first made a general statement about the instances listed in Exhibit CHN-65, and then examined the particular cases where substantive differences existed between the confidential and non-confidential documents. In addition, the European Union alleges that the evidence referred to by China, independently of whether it amounts to "the entire proof available to it", does not put in doubt the Panel's conclusion. With respect to China's second objection, the European Union points out that the development during the course of the investigation of the information supplied by parties was part of the normal process by which the Commission verifies and analyses the data supplied to it and was not, as China pretends, specifically the consequence of particular representations made by EFA.[135]

6.144 Footnote 1378 of the Interim Report (now footnote 1528) to paragraph 7.792 makes clear that we considered the European Union's assertion that "in the majority of instances referred to by China, the confidential and non-confidential responses of the sampled EU producers were the same" and had no "evidentiary basis that would justify rejecting this assertion as untrue". We do not agree with China that we did not have a sufficient basis for accepting the European Union's assertion in this regard. The absence of any evidence to the contrary suffices, in our view, to accept this assertion. In any event, our conclusion, that there was "no factual basis on which to conclude that the [questions not answered in the questionnaire responses of the sampled EU producers were] accorded confidential treatment inconsistently with Article 6.5 of the AD Agreement", is mainly based on China's failure, as the complainant, to demonstrate that the information at issue was actually treated as confidential by the Commission. We therefore have made no change to paragraph 7.792 in response to China's request in this regard. With respect to China's second objection, we note that the arguments presented by China do not demonstrate that the information at issue was treated as confidential or that there was a factual basis for a conclusion that the unanswered questions were granted confidential treatment. First, with respect to the non-confidential questionnaire responses, we noted, in paragraph 7.792 of

[134] China, request for interim review, para. 71.
[135] European Union, comments on China's request for interim review, p. 5.

the Interim Report, that nothing in these responses indicates that confidential treatment of information was requested and granted with respect to the blank answers at issue. Moreover, concerning the alleged comments made by EFA and the Commission's response to EFA showing that pursuant to EFA's comments the complainants added additional information to the questions previously left blank, we note that China has not shown where in its submissions such arguments were made, nor does China indicate where in the record such comments/response can be found. Similarly, while China now argues that certain statements/responses of the European Union show that confidential treatment was applied to the unanswered questions, it made no such arguments previously. We have therefore made no changes to paragraph 7.792 in response to China's request in this regard.

6.145 **Footnote 1379 (now footnote 1529)**: The European Union requests that the Panel modify its finding regarding Article 6.5 in the fourth sentence of this footnote. The European Union argues that by the very act of presenting a non-confidential summary of the data, the producer at issue was implicitly invoking confidentiality. Moreover, the European Union alleges that, as it stated in paragraph 195 of its answer to Panel question 59, it had an established practice of regarding sales data as by nature entitled to confidentiality, and therefore did not require parties to justify this treatment.[136] China considers that "implicit invoking of a confidentiality rule by providing non-confidential data" cannot replace the explicit requirement to demonstrate "good cause" in Article 6.5, and therefore the European Union's argument that the European Union recognizes this information as confidential by nature is irrelevant. In addition, China asserts that the European Union never argued that its legislation or "established practice" pre-defines the information at issue as information which is confidential by nature, but merely claimed that "the EU regards such data as 'by nature confidential', given their character", which statement cannot be equated to "established practice". Furthermore, China alleges that nowhere in EU legislation or the "Guides for the preparation of questionnaires", is it stated that this information is confidential by nature, and the fact that other producers requested confidential treatment for this information establishes this point. China also argues that even if the European Union were to indicate that the "Guides" for the preparation of the questionnaire constitute evidence of its practice, the European Union made it clear that at least in the review investigation the "Guides" were not issued to the EU producers.[137]

6.146 We recall that Article 6.5 of the AD Agreement requires that good cause be shown for confidential treatment of information which is by nature confidential, as well as for confidential treatment of information which is submitted on a confidential basis. We therefore fail to see any legal basis for or relevance of the European Union's contention that "by the very act of presenting a non-confidential summary of the data the producer at issue was implicitly invoking the confidentiality rule" in the absence of a showing of good cause, which the European Union does not assert was made. Moreover, nothing in paragraph 195 of the European Union's answer to Panel question 59 indicates that the European Union had an established practice which defines in advance that certain information, and specifically the information at issue here, will be treated as "by nature confidential" by the Commission such that coming within that category will suffice to satisfy the good cause requirement. This is further confirmed, as China notes, by the fact that at least one other producer, referred to in paragraph 195 of the European Union's answer to Panel question 59, requested confidential treatment for the information concerned. We therefore have made no change to our finding regarding Article 6.5 in footnote 1379 (now footnote 1529) in response to the European Union's request.

6.147 **Paragraph 7.806**: The European Union requests that the Panel modify its finding regarding Article 6.5 in this paragraph. The European Union disagrees with the Panel's view that the "European Union has not established that its legislation or practice defines in advance the categories of information that the Commission will treat as 'by nature confidential'". In this regard, the

[136] European Union, request for interim review, p. 6.
[137] China, comments on the European Union's request for interim review, para. 14.

European Union argues the "Guide for the preparation of the non-confidential version of Union Producers Questionnaire", Exhibit CHN-55, and paragraph 227 of its answer to Panel question 73 demonstrate that at the time of the expiry review at issue it had an established set of practices regarding what information would be regarded as by nature confidential. The European Union notes that the topics addressed in the "Guide" include all those considered by the Panel in paragraph 7.806 - sales prices, profit/loss/selling and expenses, and PCN information - and adds that its answer to Panel question 73 makes clear that such practice was not confined to EU producers' information.[138] China disagrees with the European Union's contention that at the time of the expiry review its practice mentioned in the "Guide" defined the information at issue to be considered "by nature confidential". China contends that the European Union never argued in the course of this proceeding that the "Guides" were issued to the analogue country producers, provided no evidence with respect to the existence of its alleged practice or that it was made known to analogue country producers in advance that the information at issue would be considered confidential by nature. In any event, China argues that the European Union has made it clear that the "Guides" did not exist at the time the analogue country producers completed the questionnaire responses and the analogue country producers were not made known that such information would be treated as confidential by nature. Furthermore, China notes that Exhibit CHN-55 states that PCN information is not information that is "confidential by nature", and profit and loss information is also not confidential by nature when the company involved is a publicly listed entity.[139]

6.148 In our view, nothing in the European Union's answer to Panel question 59, or in Exhibit CHN-55, demonstrates that, at the time of the expiry review at issue, the European Union had in place an established practice regarding what information would be regarded as by nature confidential and/or granted confidential treatment. On the contrary, in its answer to this question, the European Union makes clear that Exhibit CHN-55 (entitled "Guide for the preparation of the non-confidential version of Union Producers Questionnaire") is a "guide for Commission case-handlers in setting-up the non-confidential file". Moreover, at paragraph 317 of its oral statement at the second meeting, the European Union clarified that the "very title of the guides ('for the preparation', and not 'for the completion', of questionnaires) indicates that they are primarily intended for Commission staff, even if parts are sometimes made available to companies". Thus, it is clear to us that this document is mainly directed to Commission staff, and does not establish a practice by which parties (as opposed to Commission staff) in an anti-dumping investigation would know in advance what information would be treated as confidential. We therefore reject the European Union's argument that this "Guide" demonstrates that at the time of the expiry review at issue the European Union had an established practice regarding what information would be regarded as by nature confidential. In any event, we note that this Guide addresses the questionnaire responses of EU producers and not the questionnaire responses of the analogue country producer responses at issue in paragraph 7.806. The European Union argues that it made clear that its alleged practice was not confined to EU producers' information. However, in its answer to Panel question 73 the European Union refers to "parallel guides" for "exporters and importers" but provides no evidence in this regard. In addition, the European Union itself recognized that copies of these guides "are **sometimes** made available to interested parties" and "there is no established procedure in this respect".[140] We therefore have made no change to our conclusion in paragraph 7.806 in response to the European Union's request.

6.149 **Paragraph 7.829**: China requests that the Panel modify the first sentence of this paragraph to reflect that the Panel Report in *EC – Salmon (Norway)* was first referred to by the European Union in support of its own position.[141] The European Union did not comment on this request.

[138] European Union, request for interim review, pp. 6-7.
[139] China, comments on the European Union's request for interim review, para. 15.
[140] European Union, answer to Panel question 73 (emphasis added).
[141] China, request for interim review, para. 73.

6.150 Paragraph 7.829 is part of our analysis of the parties' claims and arguments. While it is true that the European Union first referred to the Panel Report in *EC – Salmon (Norway)* in support of its position in responding to China's arguments, it is also true that China, in addressing the European Union's response, itself relied on that same report in support of its position. We do not see the relevance of the sequence in which the parties relied on that report, and consider that the first sentence of this paragraph is accurate, and therefore have made no change to it in response to China's request.

6.151 **Paragraph 7.891**: China requests that the Panel revise or delete the phrase "and China makes no arguments in this regard" in the second sentence of this paragraph in order to more accurately reflect China's arguments, referring in this regard to paragraph 1529 of its second written submission.[142] The European Union did not comment on this request.

6.152 Paragraph 7.891 states that China made no arguments regarding how the number of MET/IT responses received could be material to the investigating authority or be considered to have led to the imposition of the anti-dumping duty. Nothing in paragraph 1529 of China's second written submission refers to how the number of MET questionnaires received could be material to the investigating authority, or considered to have led to the imposition of the anti-dumping duty, the point as to which this paragraph states that China made no argument. We have modified this paragraph in order to clarify our views, but have not otherwise changed it in response to China's request.

6.153 **Paragraph 7.924**: The European Union requests that the Panel modify this paragraph in order to more accurately express what it understands to be the Panel's intention.[143] China did not comment on this request.

6.154 We agree that the European Union's proposed modification better expresses our view, and have modified this paragraph accordingly.

VII. FINDINGS

A. INTRODUCTION

7.1 This dispute concerns three measures introduced by the European Union: (1) Article 9(5) of Council Regulation (EC) No. 1225/2009 on Protection against Dumped Imports from Countries not Members of the European Community (the "Basic AD Regulation"); (2) Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 maintaining the definitive anti-dumping duties on imports of certain footwear with uppers of leather originating *inter alia* in China following an expiry review (the "Review Regulation"); and (3) Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating *inter alia* in China (the "Definitive Regulation"). China's claims with regard to Council Regulation No. 1225/2009 challenge that measure "as such", while its claims in connection with Council Regulations Nos. 1294/2009 and 1472/2006 challenge the specifics of those measures, and include, with respect to the Definitive Regulation, aspects of the Basic AD Regulation "as applied". China's claims pertain to various provisions of the Anti-Dumping Agreement ("AD Agreement"), the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") as well as the Protocol on the Accession of the People's

[142] China, request for interim review, para. 75.
[143] European Union, request for interim review, p. 7.

Republic of China[144] ("China's Accession Protocol"), and the Report of the Working Party on the Accession of China[145] ("China's Accession Working Party Report").

7.2 The European Union raised a number of preliminary issues in its request for a preliminary ruling and in its written submissions. The European Union contends that many of the claims addressed in China's panel request and written submissions are not within the Panel's terms of reference either because they were not subject to consultations, because they were not identified at all in China's panel request, or because they were not identified in the panel request consistently with the requirements of Article 6.2 of the DSU. Further, the European Union contends that all claims made by China under Article 17.6(i) of the AD Agreement are not before the Panel, as this provision does not impose a self-standing obligation on Members and therefore it cannot be subject of a claim by a party, and that none of China's Article 17.6(i) claims satisfy the requirements of Article 6.2 of the DSU. Finally, the European Union contends that China fails to make a *prima facie* case with regard to some claims addressed in its written submissions. We address the European Union's request for a preliminary ruling below, before considering the substantive issues in dispute.

B. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF

7.3 While the parties have not raised questions concerning these matters *per se*, they have each referred to them in the course of their submissions. We set out below the framework that we will apply in these proceedings with respect to the standard of review, treaty interpretation and burden of proof.

1. Standard of Review

7.4 Article 11 of the DSU provides the standard of review for WTO panels in general. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.[146]

7.5 Article 17.6 of the AD Agreement, which sets forth the special standard of review applicable to disputes under the AD Agreement, provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in

[144] WT/L/432.
[145] WT/ACC/CHN/49 and Corr.1.
[146] Article 11 of the DSU provides, in pertinent part:
"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

> conformity with the Agreement if it rests upon one of those permissible interpretations."

Taken together, Article 11 of the DSU and Article 17.6 of the AD Agreement establish the standard of review we must apply with respect to both the factual and the legal aspects of the present dispute.

7.6 The Appellate Body has clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

> "It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities.'"[147]

The Appellate Body has also clarified the relationship between Article 11 of the DSU and Article 17.6(i) of the AD Agreement:

> "In considering Article 17.6(i) of the *Anti-Dumping Agreement*, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the *Anti-Dumping Agreement*, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the facts. To that end, Article 17.6(i) requires panels to make an "*assessment* of the *facts*". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment* of the *facts*". Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is "*objective*". However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the

[147] Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* ("*US – Softwood Lumber VI (Article 21.5 – Canada)*"), WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865, para. 93 (footnote omitted).

> matter". In this respect, we see no "conflict" between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU."[148]

7.7 Therefore, with respect to the challenged anti-dumping measures at issue here, that is, the Review Regulation and the Definitive Regulation, we may find disputed aspects to be consistent with the AD Agreement if we find that the EU investigating authority, the Commission of the European Union ("Commission"), established the facts properly and evaluated them in an unbiased and objective manner, and that the determinations in question were based on a permissible interpretation of the relevant treaty provisions.[149] Pursuant to Article 17.5(ii) of the AD Agreement, in our assessment of the matter, we must base our examination upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." We will not undertake a *de novo* review of the evidence before the Commission during the proceedings, and if we find that the establishment of the facts by the Commission was proper and the evaluation was unbiased and objective, we will not substitute our own judgement for that of the Commission, even though we might have made a different determination were we examining the evidence that was before the investigating authority ourselves.

2. Rules of Treaty Interpretation

7.8 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Article 31(1) of the Vienna Convention provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

A number of reports address the application of the Vienna Convention provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty,[150] but that the context of the treaty also plays a role. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[151] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[152]

7.9 As noted above, Article 17.6(ii) of the AD Agreement sets forth a special provision concerning the interpretation of the AD Agreement.[153] The Appellate Body has addressed the relationship between Article 17.6(ii) of the AD Agreement and the DSU, stating:

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[148] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 55.

[149] See paragraph 7.9 below.

[150] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11.

[151] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents (US)")*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45.

[152] Appellate Body Report, *India – Patents (US)*, para. 46.

[153] As the Appellate Body has noted:

> "The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *AD Agreement* 'in accordance with customary rules of interpretation of public international law.' Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'). Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *AD Agreement*. …
>
> The *second* sentence of Article 17.6(ii) … *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *AD Agreement*, which, under that Convention, would both be '*permissible* interpretations.' In that event, a measure is deemed to be in conformity with the *AD Agreement* 'if it rests upon one of those permissible interpretations." [154]

Thus, under the AD Agreement, a panel is to follow the same rules of treaty interpretation as in any other dispute when considering the interpretation of provisions of the AD Agreement. The difference is that Article 17.6(ii) provides explicitly that if the panel reviewing an anti-dumping measure finds more than one permissible interpretation of a provision of the AD Agreement, the panel may uphold a measure that rests on one of those interpretations.

3. Burden of Proof

7.10 The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member assert and prove its claim.[155] China, as the complaining party in this dispute, must therefore make a *prima facie* case of violation of the relevant provisions of the WTO agreements it cites, which the European Union must refute. We note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[156] In this respect, therefore, it is for the European Union to provide evidence of the facts which it asserts.

7.11 The amount and type of evidence required to establish a presumption that what is asserted is true "will necessarily vary from measure to measure, provision to provision, and case to case."[157] Nevertheless, we also recall that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[158] In this dispute, European Union has asserted that, with respect to a number of its claims, China has failed to make a *prima facie* case. Should we agree, we need not analyse such claims further, but will dismiss them.

> "Article 17.6 is divided into two separate sub-paragraphs, each applying to different aspects of the panel's examination of the matter. The first sub-paragraph covers the *panel's* "*assessment* of the *facts* of the matter", whereas the second covers its "*interpret[ation* of] the *relevant provisions*". (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel's assessment of the facts and its legal interpretation of the *Anti-Dumping Agreement*."

Appellate Body Report, *US – Hot-Rolled Steel*, para. 54 (emphasis in original).

[154] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 57 and 59 (emphasis in original).

[155] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323, pp. 14-16.

[156] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 14-16.

[157] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[158] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 104.

C. REQUEST FOR A PRELIMINARY RULING BY THE EUROPEAN UNION

7.12 The European Union submitted a request for a preliminary ruling on 22 July 2010, objecting to a number of China's claims on various grounds. Specifically, the European Union asserts that China's "as such" claims against Article 9(5) of the Council Regulation No. 1225/2009 do not meet the requirements of, in particular, Article 6.2 of the DSU. Next, the European Union asserts that China's claims based on Article 17.6(i) of the AD Agreement fail to satisfy requirements of Article 6.2 of the DSU. Third, the European Union contends that certain of China's claims are not within the Panel's terms of reference because the claim was not identified sufficiently clearly in China's panel request, as required by Article 6.2 of the DSU. Finally, the European Union argues that certain of China's claims are not within the Panel's terms of reference because there were no consultations with respect to them.[159] China responds by arguing that all the challenged claims are in fact properly before the Panel and within its terms of reference. Although we did not issue a ruling on the European Union's request during the course of the dispute, we consider it appropriate to dispose of the issues raised by that request before turning to the substantive claims in dispute.

7.13 We recall that it is the complaining Member's panel request that determines the terms of reference of a WTO panel. Article 6.2 of the DSU provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, **identify the specific measures at issue** and **provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly**." (emphasis added)

Together, the measures and claims identified in the panel request constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU. It is important that the panel request be sufficiently clear for two reasons. First, it defines the jurisdiction of the panel, since only the claims raised in the panel request fall within the panel's terms of reference. Second, it serves the due process objective of notifying the parties and potential third parties of the nature of a complainant's case.[160] In order to ensure that these objectives are met, a panel must examine the panel request "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[161] The Appellate Body has observed that such compliance must be demonstrated on the basis of the text of the panel request read as a whole.[162]

7.14 Thus, with respect to the European Union's argument that certain claims raised by China were not identified in its panel request consistently with the requirements of Article 6.2 of the DSU, we will consider the text of China's panel request with respect to each claim objected to, and decide whether it is set forth consistently with Article 6.2. Clearly, at a minimum, the panel request must cite the relevant provision(s) of the AD Agreement or other covered agreement in connection with the measure(s) alleged to be in violation of that provision.[163] The more complex question is whether the

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[159] European Union, request for preliminary ruling, para. 4.

[160] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, p. 22; Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing*"), WT/DS350/AB/R, adopted 19 February 2009, para. 161.

[161] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142.

[162] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779, para. 127.

[163] China makes arguments under Article 6.10.2 of the AD Agreement in connection with Article 9(5) of the Basic AD Regulation (claim I.1), and under Article 2.1 of the AD Agreement in connection with the dumping determination in the Definitive Regulation (claims III.3 and III.20) which are not identified on the face

panel request contains "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.15 The Appellate Body report in *Korea – Dairy* offers guidance as to how a panel should address the issue of whether a panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in accordance with Article 6.2 of the DSU. First, the issue is to be resolved on a case-by-case basis.[164] Second, the panel must examine the panel request very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.[165] Third, the panel should take into account the nature of the particular provision at issue – i.e. where the Articles listed establish not one single, distinct obligation, but rather multiple obligations, the mere listing of treaty Articles may not satisfy the standard of Article 6.2.[166] The panel in *EC – Fasteners (China)* observed that this standard required it

> "in each instance, to consider the text of China's panel request to determine whether it identifies the specific measure, and provides a brief summary of the legal basis of the complaint, and potentially whether the European Union has been prejudiced by the formulation of the panel request. Moreover, as stated by the Appellate Body, compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the basis of the text of the panel request read as a whole, and defects in the panel request cannot be cured in the subsequent submissions of the parties."[167]

Based on the foregoing, we consider each aspect of the European Union's request for a preliminary ruling in turn below.

1. China's "as such" claims against Article 9(5) of Council Regulation No. 1225/2009

7.16 The European Union argues that China's "as such" claims regarding Article 9(5) of the Basic AD Regulation do not satisfy the requirements of, in particular, Article 6.2 of the DSU. The European Union contends that Article 9(5) of the Basic AD Regulation relates to the imposition of anti-dumping duties, and thus, the only issue which results from this provision is the imposition of anti-dumping duties on a country-wide basis or on an individual basis if certain criteria are met in the case of imports from non-market economy countries. For the European Union, since the meaning and content of the provision are clear on its face, the Panel should assess the consistency of the measure "as such" on that basis alone.[168]

7.17 Turning to China's claims, according to the European Union, China described the matter in its panel request in a

> "*very specific and narrow manner*, (i) by reference to a legal provision (i.e. Article 9(5) of Council Regulation No. 1225/2009; and (ii) with respect to a very precise aspect contained therein (i.e. the imposition of a single anti-dumping duty for the supplying country concerned and the imposition of an individual anti-dumping

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of the panel request. However, we do not understand the European Union to have objected to these arguments on jurisdictional grounds.

[164] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 127.

[165] Appellate Body Report, *Korea – Dairy*, para. 130.

[166] Appellate Body Report, *Korea – Dairy*, para. 124.

[167] Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China ("EC – Fasteners (China)")*, WT/DS397/R, circulated to WTO Members 3 December 2010 [appeal in progress], para. 7.15, quoting Appellate Body Report, *US – Carbon Steel*, para. 127.

[168] European Union, request for preliminary ruling, paras. 4, 11 and 13.

> duty for suppliers fulfilling certain criteria in case of imports from non-market economy countries."[169]

The European Union asserts that, in the absence of any references to other matters or use of broader terminology in China's panel request, the measure at issue is strictly limited to the specified provision, and the specific aspects, identified by China. Therefore, the European Union asks that the panel find that its terms of reference are limited to those aspects of the measure explicitly identified by China, and anything beyond that question is outside its terms of reference.[170] The European Union considers that other topics, such as "individual treatment" or the "individual treatment regime or practice" of the European Union, or how dumping margins are calculated in cases of non-market economy countries, or any alleged "EU practice" on that subject, were not identified by China, and are thus outside the Panel's terms of reference.[171]

7.18 In addition, the European Union argues that China's panel request does not satisfy the requirements of Article 6.2 of the DSU because it does not present the problem clearly, and therefore its claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement and Article X:3(a) of the GATT 1994 are not properly before the Panel.[172] According to the European Union, China failed to "plainly connect" the challenged measure with the provisions of the covered agreements claimed to have been infringed.[173] In this regard, the European Union argues that China conflates issues with respect to the imposition of anti-dumping duties, dealt with by the challenged measure, and issues of the determination of an individual margin of dumping, addressed in Article 6.10 of the AD Agreement, but not, in the European Union's view, by Article 9(5) of the Basic AD Regulation. Similarly, the European Union asserts that Article 9(5) of the Basic AD Regulation does not address how dumping margins are calculated, or the proper level of anti-dumping duties, which is the subject of Article 9.3 of the AD Agreement. The European Union notes that Article 9(5) of the Basic AD Regulation applies regardless of the use of sampling, while China makes a claim under Article 9.4 of the AD Agreement, which applies in cases where sampling has been used. Finally, the European Union asserts that it fails to see the connection between the measure at issue in the context of an as such claim, and Article X:3(a) of the GATT 1994, which requires that the administration of a Member's laws, regulations, decisions and rulings be uniform, impartial and reasonable, but does not apply to those laws, regulations, decisions and rulings themselves.[174]

7.19 China considers the European Union's "limited" description of the measure to be erroneous. China maintains that it is not challenging "the imposition of a single anti-dumping duty for the supplying country concerned and the imposition of an individual duty for suppliers fulfilling certain criteria in case of imports from non-market economy countries", as asserted by the European Union. Rather, its challenge concerns Article 9(5) of the Basic AD Regulation. China considers that assessing whether a measure is sufficiently identified for purposes of Article 6.2 does not require a substantive inquiry as to the precise contents of the measure at issue. China maintains that its panel request provides the gist of the measure at issue, and the inconsistency with the provisions of covered agreements at issue. Moreover, China contends that its panel request does, in fact, use broader terminology in identifying the nature of the measure and the alleged inconsistency with provisions of the AD Agreement, such that, read as a whole, it is clear that China challenges all aspects of

[169] European Union, request for preliminary ruling, para. 29 (italics in original, footnote omitted).
[170] European Union, request for preliminary ruling, para. 31.
[171] European Union, request for preliminary ruling, fn. 15 and para. 29.
[172] European Union, request for preliminary ruling, para. 32.
[173] European Union, request for preliminary ruling, para. 39.
[174] European Union, request for preliminary ruling, paras. 40-61.

Article 9(5), including the determination of individual dumping margins, which China considers an aspect of the measure.[175]

7.20 China considers that the European Union's preliminary ruling request conflates the substantive issues in dispute with the procedural requirements of Article 6.2 of the DSU, based on its erroneous understanding of Article 9(5) of the Basic AD Regulation. For China, the meaning and operation of the provisions are matters of substance, addressed in China's first written submission. Moreover, China considers that the European Union's preliminary ruling request conflates claims and arguments, noting that while Article 6.2 requires claims to be specified in the panel request, arguments, including arguments explaining how the challenged measures infringe the provisions of the covered agreements invoked, are to be set out in the complaining party's first written submission. Finally, China contends that the European Union has failed to establish that its ability to defend itself in the context of these claims was prejudiced, despite that this must be taken into account in determining whether a panel request satisfies Article 6.2 of the DSU.[176]

7.21 This is not the first time these same questions have been considered in WTO dispute settlement. The recent report of the panel in *EC – Fasteners (China)* addressed these same questions concerning the scope of its terms of reference, raised by the European Union, objecting to China's substantively identical claims against the same measure, Article 9(5) of the Basic AD Regulation.[177] Nothing in the European Union's arguments in this case leads us to conclude that a different outcome from that reached by the panel in *EC – Fasteners (China)* is warranted in this case.[178]

7.22 The *EC – Fasteners (China)* panel concluded that these claims were within its terms of reference. That panel noted that the premise for the European Union's objection with respect to China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement was the allegation that the specific measure at issue, Article 9(5) of the Basic AD Regulation, addresses only the **imposition** of anti-dumping duties whereas the three provisions of the AD Agreement cited by China concern the **calculation of dumping margins**. The panel considered that China was correct in asserting that the European Union confused the identification of the claims in the panel request with the arguments that are to be developed in the subsequent panel proceedings. In this regard, the panel found it relevant and persuasive that the European Union dedicated significant portions of its substantive arguments regarding these three claims to demonstrating that Article 9(5) of the Basic AD Regulation does not concern the calculation of dumping margins and therefore does not fall within the scope of the obligations set forth under these three provisions. The panel concluded that:

[175] China, first written submission, paras. 19, 23, 25 and 26-29.
[176] China, first written submission, paras. 40-43, 53-61 and 63-68.
[177] Panel Report, *EC – Fasteners (China)*, paras. 7.43-7.45. Compare claims set forth in WT/DS397/3, page 2 and those set forth in WT/DS405/2, pages 2-3. We note that there was an additional preliminary issue in the *EC – Fasteners (China)* dispute, concerning whether Regulation 1225/2009 itself was within the scope of the panel's terms of reference. That issue does not arise in this case. As the panel in *EC – Fasteners (China)* concluded that the Regulation 1225/2009 was properly before it, *EC – Fasteners (China)*, para. 7.39, it is clear that the identical measure is at issue in this dispute as was at issue in *EC – Fasteners (China)*.
[178] We note, however, that unlike in this case, in *EC – Fasteners (China)*, the European Union raised its objections in its first written submission, and not in a request for preliminary ruling. See Panel Report, *EC – Fasteners (China)*, fns. 222, 277, 459, 582, 789 and 1073.

> "it is clear to [the panel] that whether Article 9(5) of the Basic AD Regulation is limited to the imposition of dumping duties, or also relates to the calculation of dumping margins or the establishment of the level of anti-dumping duties, is a disputed matter that must be resolved as part of the substance of this case, rather than a matter to be assumed in the context of resolving a preliminary objection.[223]

[223] We note that we do not mean to suggest that we agree with European Union's characterization of China's claims as concerning the calculation of dumping margins, but that even assuming this to be the case, the scope of Article 9(5) of the Basic AD Regulation is not so clear as to preclude us from considering them."[179]

7.23 Both parties have submitted substantially the same arguments on this preliminary ruling request in this case. Like the panel in *EC – Fasteners (China)*, we consider that the European Union's preliminary objection goes to a question of substance, that must be decided on the basis of the arguments of the parties. We do not consider that the import of Article 9(5) of the Basic AD Regulation is so clear on its face as to allow us to grant the European Union's request for a preliminary ruling. We therefore deny that request with respect to these three claims, and conclude that they are within our terms of reference.

7.24 With regard to China's claim under Article X:3(a) of the GATT 1994, the European Union made substantially the same objection in *EC – Fasteners (China)*, asserting that there is no connection between the specific measure at issue, i.e. Article 9(5) of the Basic AD Regulation, and the obligations set out under Article X:3(a) of the GATT 1994. The European Union's objections, and China's response, are substantially the same in this case. According to the European Union, "China's Panel Request fails to explain *how* the "provisions" of Article 9(5) of Council Regulation No. 1225/2009 are not administered in a uniform, impartial and reasonable manner."[180] Here too, the panel in *EC – Fasteners (China)* took the view that the European Union confused the identification of a claim with the arguments presented in support of a claim. The European Union maintains that the obligation set out under Article X:3(a) of the GATT 1994 cannot apply to laws, regulations, decisions and rulings themselves, but only to their administration. Like the panel in *EC – Fasteners (China)*, we recall that, for purposes of Article 6.2 of the DSU, what is important is whether a claim is described sufficiently clearly in the panel request so that the respondent is informed of the nature of the claim and can begin to prepare its defence. Whether the description of the claim makes legal sense is something to be scrutinized by the panel in the course of the dispute settlement proceedings, on the basis of the arguments developed by the parties and the evidence presented. We note that China's panel request, on page 2, last tiret, clearly identifies a claim under Article X:3(a) of the GATT 1994 with respect to Article 9(5) of the Basic AD Regulation. Therefore, we are of the view that China's claim under Article X:3(a) of the GATT 1994 with respect to Article 9(5) of the Basic AD Regulation is within our terms of reference, and deny the European Union's request for a preliminary ruling in this regard.

2. China's claims based on Article 17.6(i) of the AD Agreement

7.25 China raises eight claims of violation of Article 17.6(i) of the AD Agreement, concerning different aspects of the Review Regulation and the Definitive Regulation.[181] China makes separate

[179] Panel Report, *EC – Fasteners (China)*, para. 7.44.

[180] European Union, request for preliminary ruling, para. 57. Compare with "China's panel request fails to explain *how* the "provisions" of Article 9(5) of Council Regulation No. 384/96 are not administered in a uniform, impartial and reasonable manner." Panel Report, *EC – Fasteners (China)*, para. 7.45, quoting European Union, first written submission, para. 67.

[181] Claims of violation of Article 17.6(i) of the AD Agreement are raised by China under items II.2, II.3, II.4, II.5, II.13, III.5, III.6, and III.20 of its panel request.

arguments with respect to each of these claims. The European Union objects to China's claims under Article 17.6(i), arguing that these claims do not comply with the requirements of Article 6.2 of the DSU, and requests the Panel to rule that these claims are outside the its terms of reference.[182]

(a) Arguments of the parties

(i) China

7.26 China argues that Article 17.6(i) of the AD Agreement implicitly imposes an obligation on investigating authorities in anti-dumping cases to properly establish facts, and to evaluate those facts in an unbiased and objective manner.[183] China asserts that Article 17.6(i) incorporates in the AD Agreement broad standards of general applicability with respect to all factual determinations made by investigating authorities throughout anti-dumping investigations. In China's view, Article 17.6(i) is the "sole source of the concepts of 'proper establishment of the facts' and 'unbiase[d]ness' [and as such] should not only be regarded as imposing an obligation, but imposing one of substance beyond that otherwise contained in the *Anti-Dumping Agreement*."[184] The claims China raises under Article 17.6(i) fall into two distinct groups.[185] The first group comprises claims involving an alleged violation of Article 17.6(i) together with an alleged violation of another provision of the AD Agreement that has "some sort of fairness or due process language [] built into it."[186] With respect to these claims, China contends that the issue is whether "the concepts of 'bias' and 'proper establishment of facts' contain[] any substance beyond that already contained in, for example, the 'positive evidence' and 'objective examination' language contained in Article 3.1" of the AD Agreement.[187] The second group of claims comprises alleged violations of Article 17.6(i) independent of any claims of violation of Article 3.1.[188] With respect to this group, China argues that the issue is the relationship between Article 17.6(i) and "those parts of an investigation *not* arising under a provision [of the AD Agreement] with some sort of fairness or due process language already explicitly built into it, such as the analogue country selection process or the determination of whether an exporter or industry qualifies for 'Market Economy Treatment'".[189] China maintains that the "resolution of the second question is one of first impression for the Panel"[190].

7.27 China contends that if the Panel finds that the Commission did not meet the broad standards which China posits are established by Article 17.6(i), the Panel must conclude "that the '*regulations at issue*' are 'inconsistent' with [Article 17.6(i)] of the *Anti-Dumping Agreement*." China believes that claiming direct violation of Article 17.6(i) is preferable to either "bootstrapping those claims onto the substantive provisions ... or hoping that the panel raises the issue *sua sponte*." China asserts that the former would lead to difficulties associated with aspects of an investigation which are subject to the standard established by Article 17.6(i), but do not have precisely corresponding provisions in the AD Agreement, while the latter is undesirable from a practical standpoint.[191]

[182] European Union, request for preliminary ruling, para. 84.
[183] China, first written submission, para. 377; answer to Panel question 1, paras. 13-16.
[184] China, first written submission, para. 103; answer to Panel question 1, paras. 3-4.
[185] China, second written submission, paras. 1-3; opening oral statement at the first meeting with the Panel, para. 18.
[186] China, answer to Panel question 3, paras. 36-37; opening oral statement at the first meeting with the Panel, para. 18.
[187] China, opening oral statement at the first meeting with the Panel, para. 18.
[188] China, answer to Panel question 3, paras. 36-37; first written submission, para. 113.
[189] China, second written submission, para. 3.
[190] China, first written submission, para. 115; closing oral statement at the first meeting with the Panel, para. 2; answer to Panel question 2, para. 23; second written submission, para. 3.
[191] China, first written submission, paras. 99, 104, 122 and 114.

(ii) European Union

7.28 The European Union requests the Panel to rule, as a preliminary matter, that China's claims invoking Article 17.6(i) of the AD Agreement are not within its terms of reference, because they do not comply with the requirement of Article 6.2 of the DSU to provide certain information in a manner "sufficient to present the problem clearly", for two reasons.

7.29 First, the European Union argues that Article 17.6(i) of the AD Agreement imposes obligations solely upon panels, and does not establish any self-standing and separate obligations on WTO Members. The European Union asserts that Article 17.6(i), like Article 11 of the DSU, establishes a standard of review to be applied by panels, and therefore cannot create additional obligations to WTO Members.[192] The European Union contends that because China's panel request merely lists Article 17.6(i), its claims under that Article do not comply with the requirement of Article 6.2 of the DSU to provide certain information in a manner "sufficient to present the problem clearly", due to the "unequivocal" language of Article 17.6(i), establishing obligations solely on panels and not on WTO Members. Second, the European Union asserts that even assuming, *arguendo*, that Article 17.6(i) did impose certain obligations on WTO Members, China's claims based on Article 17.6(i) would still not comply with the requirements of Article 6.2 of the DSU. In this context, the European Union contends that taking into account the text and context of Article 17.6(i), obligations arising from this provision would likely have to be multiple and "in the case of complex legal provisions involving multiple obligations, it is not enough to merely list a legal provision to satisfy the requirements of Article 6.2 DSU." Therefore, the European Union argues that by merely listing the provision in its panel request, without identifying which of the legal obligations allegedly imposed by Article 17.6(i) was allegedly violated by equally insufficiently identified specific parts of certain EU measures, China failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[193] The European Union asserts that China misunderstands Article 17.6(i) of the AD Agreement, and that China attempts to rewrite the AD Agreement. In addition, the European Union argues that China did not rebut the arguments presented by the European Union in its request for a preliminary ruling.[194]

7.30 In its written submissions, in addition to referring to the arguments in its request for a preliminary ruling, the European Union addresses certain of China's Article 17.6(i) claims more specifically.[195] Regarding China's claim of violation of Article 17.6(i) of the AD Agreement in the analogue country selection procedure, the European Union argues that China ignores the distinction between the "establishment" and the "evaluation" of facts made by Article 17.6(i). According to the European Union, "the process of soliciting information from potential analogue country producers is quite obviously one of establishing the facts, but China unconcernedly accuses the European Union of 'biased' behaviour in this respect [which could only be associated to the evaluation of facts]."[196] In addition, the European Union suggests that, with respect to those of China's allegations of violations of Article 17.6(i) not associated with claims of violation of Article 3.1 of the AD Agreement, it may be that China's concern is not provided for in the AD Agreement. The European Union contends that this "does not mean that Article 17.6(i) should be given the role of a catch-all provision for such situations, it merely means that such situations are not regulated by the *Anti-Dumping Agreement* and, hence, the WTO Members are not bound by any particular disciplines in that respect"[197]. The European Union concludes that "China is seeking something what the drafters [of the AD Agreement]

[192] European Union, request for preliminary ruling, paras. 67 and 71.
[193] European Union, request for preliminary ruling, paras. 75-80.
[194] European Union, first written submission, paras. 10-13; second written submission, paras. 8-9 and 11.
[195] European Union, first written submission, paras. 10-19.
[196] European Union, first written submission, para. 180.
[197] European Union, answer to Panel question 6, para. 3.

did not provide for." Finally, the European Union notes that, were the Panel to conclude that Article 17.6(i) applies to some, but not necessarily all situations which could be considered unfair, this would potentially limit any "fairness" obligations inherent in other provisions of the AD Agreement, an outcome it considers the drafters did not intend.[198]

(b) Arguments of third parties

(i) Brazil

7.31 Brazil takes the view that Article 17.6(i) "defines the level of deference panels should afford to WTO Members' determinations under other provisions of the ADA", and therefore establishes obligations "solely upon panels, in the course of their assessment of the conduct of IAs during the investigation." Brazil asserts that the obligation to conduct assessments in an unbiased and objective manner imposed on investigating authorities is found in other provisions of the AD Agreement, such as Article 3.1 of the AD Agreement. Finally, Brazil notes that Article 17.6(i) is a procedural rule that deals with WTO consultations and dispute settlement, and only comes into play after the investigating authority's determinations have been taken and the investigation concluded.[199]

(ii) Colombia

7.32 Colombia considers that, based on WTO jurisprudence, Article 17.6(i) of the AD Agreement cannot be interpreted to establish additional or indirect obligations on investigating authorities. Colombia submits that the only obligations on WTO Members regarding anti-dumping investigations are those set out in substantive provisions, such as Articles 3.1 and 11.3 of the AD Agreement. Colombia concludes that Article 17.6(i) is limited to clarifying the standard of review to be applied by WTO panels in assessing claims under the AD Agreement.[200]

(iii) Japan

7.33 Japan submits that Article 17.6(i) of the AD Agreement "primarily sets out rules applicable to panels" and "does not impose any obligations directly on the [investigating] authorities."[201]

(iv) United States

7.34 The United States asserts that Article 17.6(i) of the AD Agreement does not impose obligations on WTO Members, and to "interpret Article 17.6(i) as imposing an obligation on [WTO] Members is to read into that provision words that are not there, something that may not be done under customary rules of interpretation of public international law."[202] Accordingly, the United States takes the view that it is not possible, through the use of customary rules of treaty interpretation, to interpret the AD Agreement as containing a fairness standard of general application,[203] nor to interpret Article 17.6(i) as imposing "indirect obligations" on investigating authorities.[204] The United States

[198] European Union, second written submission, paras. 8-9.
[199] Brazil, third party written submission, paras. 7-9.
[200] Colombia, answers to questions 3 and 4, paras. 3-5, 6 and 11, citing Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* ("*Egypt – Steel Rebar*"), WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667, para. 7.142, and Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non Alloy Steel and H Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701, para. 114.
[201] Japan, third party written submission, para. 22.
[202] United States, third party written submission, para. 59 (footnote omitted).
[203] United States, answer to Panel question 2, para. 4.
[204] United States, answer to Panel question 3, para. 5.

submits that China seeks to create an additional obligation on investigating authorities through the revision of the text of the AD Agreement.

(c) Evaluation by the Panel

7.35 Article 17.6 of the AD Agreement provides, in pertinent part:

> "In examining the matter referred to in paragraph 5:
>
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"

Article 17.6(i) of the AD Agreement is generally understood as an aspect of the "separate" standard of review to be applied by panels in disputes arising under the AD Agreement, specifically in the consideration of the investigating authority's establishment and evaluation of facts.[205] This provision appears in the section of the AD Agreement entitled "Consultation and Dispute Settlement", and thus is applicable during panel proceedings. The standard of review in Article 17.6(i) places obligations directly, and in our view exclusively, on a panel in the context of its resolution of an anti-dumping dispute, providing that if the panel concludes that the establishment of the facts by the investigating authority was proper, and the evaluation of such facts was unbiased and objective, the evaluation of the investigating authority shall not be overturned by the panel.[206]

7.36 China asserts that because, in its view, the Appellate Body has held that Article 17.6(i) of the AD Agreement explicitly imposes an obligation on panels to overturn an establishment or evaluation of the facts in certain situations,[207] this provision also necessarily and impliedly imposes certain obligations on the investigating authority in the conduct of an anti-dumping investigation, specifically, to properly establish facts, and to evaluate those facts in an unbiased and objective manner. In China's view, another Member can directly challenge all factual determinations in an anti-dumping investigation in dispute settlement under Article 17.6(i), independent of any claim of violation of any other provision of the AD Agreement. The European Union disagrees, and asks the Panel to rule, as a preliminary matter, that China's claims alleging violations of Article 17.6(i) are not within its terms of reference. As we understand it, the European Union's objection comprises two aspects, a substantive aspect, arguing that Article 17.6(i) does not impose any obligations on WTO Members, but only on panels, and that this provision cannot be interpreted as an independent legal basis of a claim, and a procedural aspect, arguing that China failed to state its claims under

[205] *E.g.* Panel Report, *EC – Fasteners (China)*, para. 7.442.

[206] Previous panel reports have clarified that, pursuant to Article 17.6(i) of the AD Agreement, it is not the role of a panel to perform a *de novo* review of the evidence. Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295, para. 8.19; Panel Report, *Egypt – Steel Rebar*, paras. 7.11-7.14. The Appellate Body in *Thailand – H-Beams* concluded that Articles 17.5 and 17.6 of the AD Agreement "place limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority", and that the aim of Article 17.6(i) is to "prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts in unbiased and objective." Appellate Body Report, *Thailand – H-Beams*, paras. 114 and 117. See also Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC – Bed Linen (Article 21.5 – India)*"), WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965, para. 162.

[207] China, answer to Panel question 1, para. 8.

Article 17.6(i) with sufficient clarity to satisfy Article 6.2 of the DSU.[208] China asserts that the question whether Article 17.6(i) of the AD Agreement impliedly imposes obligations on WTO Members is "an issue of first impression for the Panel"[209], at least with respect to the relationship between the broad standards allegedly established by Article 17.6(i) and "those parts of investigation *not* arising under a provision with some sort of fairness or due process language already explicitly built into it".[210] However, China refers to the Appellate Body Report in *US – Hot-Rolled Steel* to support its views, seeming to suggest that the issue has been considered in WTO dispute settlement.[211]

7.37 We consider that the text of Article 17.6(i) of the AD Agreement is clear on its face, and only creates obligations on panels and not on investigating authorities of WTO Members in the conduct of anti-dumping investigations. As discussed above, the customary rules of public international law we are to apply in this dispute establish that treaty provisions shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty taking into account their context, object and purpose.[212] The ordinary meaning of the text of Article 17.6(i) – "the panel shall determine" – is clear, and is specifically and exclusively directed at the actions of panels. There is no suggestion in the text of this provision that it also applies to the actions of WTO Members in general, or to specific aspects of the conduct of anti-dumping investigations by their investigating authorities. Moreover, Article 17 of the AD Agreement is entitled "Consultation and Dispute Settlement", and establishes special rules for the conduct of dispute settlement in the case of anti-dumping measures. This context further supports our view that the provision is directed solely at the actions of panels. It is in our view noteworthy that, where Article 17 is directed at the actions of WTO Members, this is clear from the text itself, as in Articles 17.2, 17.3, and 17.4 of the AD Agreement.[213] In addition, Article 17.5 of the AD Agreement relates exclusively to the actions of the Dispute Settlement Body ("DSB") in establishing a panel in an anti-dumping dispute.[214] Similarly, Article 17.6 refers **only** to the actions of panels in their resolution of an anti-dumping dispute. Our understanding of the

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[208] European Union, request for preliminary ruling, paras. 66-73; second written submission, paras. 5-11; first oral statement, para. 12.

[209] China, first written submission, para. 115; closing oral statement at the first meeting with the Panel, para. 2; answer to Panel question 2, paras. 23 and 27.

[210] China, first written submission, para. 3 (italics in original).

[211] See paragraph 7.41 below.

[212] See paragraphs 7.8 - 7.9 above.

[213] Thus, Article 17.2 of the AD Agreement provides:

> "Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement."

Article 17.3 provides:

> "If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation."

Article 17.4 in turn provides:

> "If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."

[214] Article 17.5 of the AD Agreement provides, in pertinent part, "The DSB shall, at the request of the complaining party, establish a panel to examine the matter" referred to in Article 17.4.

meaning of Article 17.6(i) applies equally to the two distinct groups of claims identified by China[215], that is, alleged violations of Article 17.6(i) where there is also an alleged violation of another provision of the AD Agreement that already contains some sort of fairness or due process language built into it, and alleged violations of Article 17.6(i) alone. It seems clear to us that a provision of the AD Agreement which does not impose obligations on investigating authorities of WTO Members in the conduct of anti-dumping investigations cannot establish an independent legal basis for a claim of violation of the AD Agreement by the investigating authority.

7.38 China's position ignores the ordinary meaning of Article 17.6(i) in its immediate context. The legitimate expectations of WTO Members are reflected in the text of the covered agreements themselves.[216] In our view, to interpret this provision as China argues would impose obligations on WTO Members that were not agreed upon during the negotiation of the AD Agreement, inconsistently with the well-established view that the principles of treaty interpretation in WTO dispute settlement "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[217] To accept China's interpretation would also be inconsistent with Article 3.2 of the DSU, as in our view it would "add to or diminish the rights and obligations provided in the [AD Agreement]", and would be an improper application of the interpretative principles of the Vienna Convention.

7.39 We note that no previous panel or Appellate Body report has ever found a WTO Member to have acted inconsistently with Article 17.6(i) of the AD Agreement. WTO reports regarding Article 17.6(i) in general address the relationship between this provision and the standard of review set forth in Article 11 of the DSU, concluding that there is no conflict between the two provisions.[218]

7.40 We recognize that the panel in *Egypt – Steel Rebar* considered whether a claim of violation of Article 17.6(i) of the AD Agreement was properly presented by Turkey. However, the panel was not required to decide on the admissibility of such a claim, since it dismissed the purported claim of violation of Article 17.6(i) as being outside its terms of reference, due to the absence of any explicit citation of this provision in Turkey's request for the establishment of a panel. Nevertheless, the panel stated that:

> "Furthermore, while, given our dismissal of this claim on procedural grounds, we need not rule on whether a violation of Article 17.6(i) can be the subject of a claim by a party in a dispute, we have considerable doubts in this regard. What is clear nevertheless, and in any case, is that Article 17.6(i) lays down the standard which a panel has to apply in examining the matter referred to it in terms of Article 17.5 of the

[215] China, second written submission, paras. 1-3; opening oral statement at the first meeting with the Panel, para. 18. See also para. 7.26 above.

[216] Appellate Body Report, *India – Patents (US)*, para. 45.

[217] Appellate Body Report, *India – Patents* (*US*), para. 45.

[218] See, *e.g.* Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049, para. 164; Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 84; Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("*EC – Tube or Pipe Fittings*"), WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701, para. 7.34.

> AD Agreement. As such, we are of course bound by it in our consideration of the claims in this dispute."[219]

In *Thailand – H-Beams*, the Appellate Body addressed Articles 17.5, 17.6, and 3.1 of the AD Agreement, stating:

> "Articles 17.5 and 17.6 clarify the powers of review of a **panel** established under the *Anti-Dumping Agreement.* These **provisions place limiting obligations on a panel**, with respect to the review of the establishment and evaluation of facts by the investigating authority. Unlike Article 3.1, **these provisions do not place obligations on WTO Members**. Further, while the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members, those in Articles 17.5 and 17.6 apply only when an injury determination is examined by a WTO panel. The obligations in Articles 17.5 and 17.6 are distinct from those in Article 3.1."[220]

Although it is true, as China argues,[221] that the Appellate Body in *Thailand – H-Beams* focused on the relationship between Articles 3.1, 17.5 and 17.6 of the AD Agreement, this passage reinforces our understanding of the nature of the obligations under Article 17.6(i) of the AD Agreement as affecting exclusively the actions of panels, and not those of investigating authorities of WTO Members in the conduct of anti-dumping investigations.

7.41 China cites the Appellate Body Report in *US – Hot-Rolled Steel* in support of its assertion that Article 17.6(i) of the AD Agreement imposes obligations on investigating authorities.[222] We do not agree with China's reading of this report. In the passage of the report relied upon by China, the Appellate Body stated:

> "In considering Article 17.6(i) of the *Anti-Dumping Agreement*, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the *Anti-Dumping Agreement*, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the facts. To that end, Article 17.6(i) requires panels to make an "*assessment* of the *facts*". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment* of the *facts*". ...
>
> Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels "shall" make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. Thus, panels must assess if the

[219] Panel Report, *Egypt – Steel Rebar*, para. 7.142 (underlining in original). That panel also "recognize[d] that Article 17.6(i) does not apply directly to investigating authorities, and that instead, it is part of the standard of review to be applied by panels in reviewing determinations of investigating authorities." Panel Report, *Egypt – Steel Rebar*, para. 7.45.

[220] Appellate Body Report, *Thailand – H-Beams*, para. 114 (italics in original, bold emphasis added).

[221] China refers to the Appellate Body Report in *Thailand – H-Beams*, but argues that it is irrelevant to its claims under Article 17.6(i) of the AD Agreement. See China, closing oral statement at the first meeting with the Panel, para. 2; answer to Panel question 2, paras. 27 and 34.

[222] China, first written submission, paras. 100-102; answer to Panel question 2, para. 24.

> establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*."[223]

We understand the Appellate Body in this passage to be discussing the relationship between the standard of review established by Article 17.6(i) and that defined by Article 11 of the DSU.[224] This understanding is bolstered by the fact that this section of the Appellate Body Report is under the heading "Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU: Standard of Review". In our view, it is clear that the Appellate Body made no findings suggesting that Article 17.6(i) imposes obligations on investigating authorities. On the contrary, the Appellate Body stressed the different roles of panels and investigating authorities, and indicated in the quoted passage that Article 17.6(i) only contains obligations for panels when assessing determinations taken by investigating authorities.

7.42 Finally, China seeks support for its interpretation of Article 17.6(i) of the AD Agreement in the Appellate Body Report in *Australia – Salmon*.[225] In that case, the Appellate Body stated that although the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") does not contain an explicit provision obliging WTO Members to determine the appropriate level of protection, such an obligation is implicit in several provisions of that agreement.[226] The Appellate Body concluded that "[i]t would obviously be wrong to interpret the SPS Agreement in a way that would render nugatory entire Articles or paragraphs of Articles of this Agreement and allow Members to escape from their obligations under this Agreement."[227] China draws a parallel with *Australia – Salmon* to read an implied obligation on investigating authorities arising from Article 17.6(i)'s explicit obligations on panels, arguing that such "implied obligation would be necessary to ensure the utility of the explicit obligation."[228]

7.43 We fail to see how the Appellate Body's statement in *Australia – Salmon* is relevant to this case. There are numerous factual and legal differences between this dispute and *Australia – Salmon*. Importantly, in *Australia – Salmon*, the Appellate Body found that certain provisions of the SPS Agreement presupposed that a certain action or decision – in that case the determination of the appropriate level of protection – would be taken by a Member, otherwise "it would clearly be impossible to examine" whether that Member was complying with its obligations under the SPS Agreement.[229] China has not shown how or why the obligation it asserts Article 17.6(i) of the AD Agreement implicitly imposes on **investigating authorities** would be necessary to render operational the obligation explicitly imposed by this provision on **WTO panels**. Nor is any such explanation evident to us. Indeed, in our view, a WTO panel is entirely capable of fulfilling its obligations under Article 17.6(i) in the absence of any implicit obligation on investigating authorities such as proposed by China.

7.44 Based on the foregoing, we conclude that Article 17.6(i) of the AD Agreement does not impose any obligations on the investigating authorities of WTO Members in anti-dumping

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[223] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 55-56 (italics in original). China only refers to para. 56 of this Report. See China, first written submission, para. 100.

[224] This is also confirmed by the Appellate Body's position in *EC – Bed Linen*. Appellate Body Report, *EC – Bed Linen*, para. 163 (citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 56).

[225] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, paras. 205-206.

[226] Appellate Body Report, *Australia – Salmon*, para. 205. For example, the Appellate Body noted that it would be impossible to examine whether alternative SPS measures achieve the appropriate level of protection, pursuant to Article 5.6 of the SPS Agreement, if the importing WTO Member were not required to determine its appropriate level of protection. *Id.*

[227] Appellate Body Report, *Australia – Salmon*, para. 206.

[228] China, answer to Panel question 2, paras. 11-16.

[229] Appellate Body Report, *Australia – Salmon*, para. 205.

investigations that could be the subject of a finding of violation, and we therefore dismiss all of China's claims of violation of Article 17.6(i) of the AD Agreement.[230]

3. China's claims against Council Regulations Nos. 1294/2009 and 1472/2006

(a) Alleged lack of specificity

7.45 The European Union also objects to China's claim II.5, with respect to the determination of causation in the Review Regulation, asserting that China's panel request does not present the problem clearly as required under Article 6.2 of the DSU. The European Union notes that in the panel request with respect to this claim, China sets out the relevant text of Article 3.5 of the AD Agreement, and asserts that the Review Regulation fails to respect the obligations established by that provision. The European Union considers this insufficiently specific to comply with Article 6.2 of the DSU. The European Union contends that the extent to which this claim lacks specificity is apparent from a comparison with the parallel claim III.9, concerning the determination of causation of injury in the Definitive Regulation, where China sets out specific grounds, for example, the export performance of EU producers, and changes in the pattern of consumption, as the basis of its claim.[231]

7.46 The European Union also objects to China's claims II.12 and III.19, alleging violations of Article 12.2.2 of the AD Agreement with respect to the adequacy of the explanation of the determinations in the expiry review and original determination. In the panel request, China claims that the Commission violated Article 12.2.2 by failing to give reasons for their decisions, including reasons for the acceptance or rejection of arguments made to them. The European Union asserts that China's panel request gives no indication of how or where this failure arises, simply repeating the text of the Article. The European Union notes that the Regulations at issue in this case are long and complex, and a mere reference to one or the other of the Regulations as a whole is inadequate to satisfy the Article 6.2 requirement to identify the relevant measure with sufficient specificity. Moreover, the European Union asserts that the Article 12.2.2 obligations apply to virtually all aspects of the findings and determinations of the EU authorities in the two proceedings at issue. While China's claims thus potentially cover virtually every element of the Regulations, they give no indication as to which China intends to pursue in the dispute. For the European Union, this demonstrates a failure to identify the measure "with sufficient particularity to indicate the nature of the measure and the gist of what is at issue".[232]

7.47 China argues first that the European Union appears to be requesting that the Panel exclude several of China's key substantive and procedural claims on the basis that China did not cite the page numbers or paragraphs in the Definitive and Review Regulations, which the European Union itself wrote.[233] China asserts that the Regulations at issue are "quite easily navigable", and that matching China's claims with the relevant sections of the Regulations "would take only a small fraction of the amount of time" the European Union expended in requesting preliminary rulings with respect to these claims.[234]

7.48 China notes that panels and the Appellate Body have concluded that the mere listing of provisions can be sufficient to provide a brief summary of the legal basis of a complaint, and asserts

[230] Having dismissed China's claims of violation of Article 17.6(i) of the AD Agreement, we do not consider it necessary to address the European Union's argument with respect to the alleged failure to comply with the requirements of Article 6.2 of the DSU in China's claims regarding Article 17.6(i).

[231] European Union, request for preliminary ruling, paras. 100-102. By drawing this comparison the European Union does not accept that these claims are justified. *Id.*

[232] European Union, request for preliminary ruling, paras. 105 and 109-110, quoting Appellate Body Report, *US – Continued Zeroing*, para. 169 (footnote omitted).

[233] China, first written submission, para. 128.

[234] China, first written submission, para. 129.

that with respect to its claim II.5, its panel request goes beyond a mere listing to describe how the measure violates the provision. China contends that the European Union seems to be suggesting that China either phrase the legal basis on which it is attacking a measure in its own words, or else discuss its actual arguments with respect to the claim, and asserts that neither is required by Article 6.2 of the DSU. China contends that while this might not always be the case, in the context of an anti-dumping investigation, the gist of what is at issue should be clear – in this case, "the European Union's determination of causation, the non-attribution requirement, and the objectivity of the investigating authority with respect to those issues". To require anything further would, in China's view, require "an exposition of China's actual arguments, which ... is certainly not necessary." Moreover, China asserts that a panel request may be clarified by reference to the complaining party's first written submission, and that the European Union has failed to demonstrate prejudice.[235]

7.49 China states that it considers many sections of the Regulations at issue to be in violation of Article 12.2.2, and that it expects the Panel to consider each of them, but asserts that the most appropriate place to specify which precise parts of the Regulations violate this provision is in its first written submission. China considers that the permissibility of consulting the complaining party's first written submission for the purpose of clarifying claims made is especially pertinent with respect to this sort of claim. Finally, China notes that with respect to these claims, the European Union has neither asserted prejudice nor offered supporting particulars.[236]

7.50 With respect to these objections, we have carefully considered the terms of China's panel request. We note that, contrary to China's contention, the panel request with respect to Article 3.5 does not indicate in what respect the Review Regulation is considered inconsistent with Article 3.5, but merely repeats the text of the provision. China asserts that it is "of no consequence" that the language in the panel request "happens to be the same language found in the text of the provision". China concedes that a party cannot cure a defective panel request in a first written submission, but asserts that, to the extent that its panel request may be lacking in specificity, its first written submission expands on the claims set out in the panel request, and sets out the precise arguments to which the European Union will have to respond.[237] In this respect, China relies on the Appellate Body's ruling in *US – Carbon Steel*, that "in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced."[238] Similarly, with respect to the claims under Article 12.2.2, there is no indication whatsoever as to what aspects of the Regulations are alleged by China to be inconsistent with the requirements of that Article, as the panel request simply contains an excerpt from the text of the Article, and alleges a violation thereof. We consider that China's panel request is extremely cursory, and could have been drafted more explicitly in this regard. Nonetheless, when viewed in light of China's first written submission, which does set out more specifically the particulars of China's claims in the arguments made, we conclude that it nonetheless suffices, albeit barely, to give the European Union the gist of what is at stake in the panel request. We therefore deny the European Union's request for a preliminary ruling with respect to claims II.5, II.12 and III.19 and conclude that they are within our terms of reference.

[235] China, first written submission, paras. 138-142.
[236] China, first written submission, paras. 145-148.
[237] China, first written submission, para. 135, citing Appellate Body Report, *EC – Bananas III*, para. 143.
[238] Appellate Body Report, *US – Carbon Steel*, para. 127 (footnote omitted).

(b) Alleged lack of consultations

7.51 The European Union also raises a preliminary objection based on an alleged lack of consultations. The European Union asserts that China's claim III.6, concerning the calculation of the profit margin in the context of the lesser duty determination, is outside this Panel's terms of reference because it was not subject to consultations.[239] This claim reads as follows:

> "Articles 3.1, 3.2, 9.1 and 17.6(i) of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because: ...
>
> the EU inappropriately established the profit margin for the EU industry."[240]

The European Union notes that the request for consultations addresses the profit margin in paragraphs 2.6 and 2.8, which state, respectively:

> "Articles 3.1, 3.2 and 17.6(i) of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because the EU's underselling calculation was based on a very low quantity of exports of the sampled Chinese exporting producers; the EU wrongly calculated the underselling margin by applying a volume-based reduction ratio to the originally calculated price-based margin and by allocating the non-injurious import value in relation to import values for a period outside the investigation period."
>
> "Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because several key injury indicators were analysed on the basis of the data of the whole EU production and not on the data of the sampled EU producers or EU industry; and the EU inappropriately established the profit margin for the EU industry."[241]

7.52 According to the European Union, by incorporating Article 9.1 of the AD Agreement in its request for establishment, when that provision is not mentioned in the request for consultations, China has "radically changed the nature of this claim".[242] The European Union argues that paragraph 2.6 of the request for consultations relates to the issue of injury, but the reference to Article 9.1 coupled with the specific mention of the profit margin in the panel request suggests that China is attempting to include the European Union's implementation of the lesser duty principle, which is an entirely different issue, and arises only after the determination of injury has been made. For the European Union, merely that an issue, such as price undercutting, may be considered in both the injury and

[239] European Union, request for preliminary ruling, para. 113. The European Union also asserts, in its request for a preliminary ruling, that "at least ten" of China's claims were not mentioned in the request for consultations, but stated it would consider them as "merely consequential", reserving the right to challenge them later. European Union, request for preliminary ruling, para. 112. The European Union did not refer to these objections later, and therefore appears to have abandoned them. We thus make no findings with respect to these objections.

[240] European Union, request for preliminary ruling, para. 113, citing Panel request, item III.6.

[241] European Union, request for preliminary ruling, paras. 114-115, citing consultations request, paras. 2.6 and 2.8.

[242] European Union, request for preliminary ruling, para. 116.

lesser duty contexts does not mean that they are not different, such that a request for consultations with respect to one justifies a request for establishment with respect to a claim concerning the other.[243]

7.53 China notes that the exclusion of claims from the terms of reference of a panel based on a difference between the panel request and the request for consultations is rare in WTO jurisprudence.[244] China points out that the difference in this case is the addition of Article 9.1 with the injury claims, which it asserts is a "logical extension of the original claim", asserting that "Article 3 deals with the determination of the extent (if any) of injury, and Article 9.1 calls for a determination of the duty on the basis of the injury determination made on the basis of Article 3."[245] China points out that that all but one of the cases relied on by the European Union deal with the question of changing the measures in dispute, and did not result in the exclusion of the challenged measures from the terms of reference. Even in the one case concerning a change in the claims, the panel did not find the change to justify finding the disputed claim outside its terms of reference.[246] China contends that the additional considerations in its claim III.6 should be determined to have "naturally evolved" from the analogous claim in the request for consultations.[247]

7.54 This portion of the European Union's terms of reference objections raises the question of the relationship between a complaining party's request for consultations and the panel's terms of reference. We recall that the DSU does not contain a provision that directly addresses this issue. Article 4 of the DSU, entitled "Consultations", provides in relevant part:

> "4. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including **identification of the measures at issue** and an indication of the **legal basis** for the complaint. ...
>
> 7. **If the consultations fail** to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party **may request the establishment of a panel**. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute." (emphasis added)

Article 17 of the AD Agreement also contains provisions regarding consultations between WTO Members in disputes under that Agreement, providing in relevant part:

> "17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement. ...
>
> 17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, **request in writing consultations with the Member or Members in question**. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

[243] European Union, request for preliminary ruling, para. 119.
[244] China, first written submission, para. 157.
[245] China, first written submission, para. 159.
[246] China, first written submission, paras. 161 and 167, referring to Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* ("*Mexico – Anti-Dumping Measures on Rice")*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853.
[247] China, first written submission, para. 168.

> 17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB")." (emphasis added)

7.55 Thus, Article 4.4 of the DSU provides that a request for consultations has to identify the measures at issue and indicate the legal basis of the complaint, and Article 4.7 of the DSU, in turn, stipulates that if parties fail to settle the dispute within 60 days from the receipt of the consultations request, the complaining party may request the establishment of a panel. Article 17.1 of the AD Agreement states that the DSU applies to the consultations and the settlement of disputes that arise under the AD Agreement. Article 17.3 of the AD Agreement provides that if a Member considers that any benefit accruing to it, directly or indirectly, under the AD Agreement is nullified or impaired, or that the achievement of any objective is impeded by another Member, it may request consultations with the Member concerned. Article 17.4 states that if parties fail to settle the dispute through consultations, the complaining Member may refer the matter to the DSB to seek the establishment of a panel. Finally, Article 17.5 provides that the DSB would, in such a situation, establish a panel to resolve the dispute.

7.56 However, in our view it is clear that none of these provisions supports the proposition that a complaining Member is precluded from identifying in its panel request claims not identified in its request for consultations. Article 6.2 of the DSU requires that a panel request mention whether consultations were held, but it does not say that the scope of the request for consultations also determines the scope of the subsequent panel request. Article 17.4 provides that "the matter" may be referred to the DSB, but does not say that the scope of the consultations defines that "matter".

7.57 The effect of a complaining Member's request for consultations on a panel's terms of reference has been discussed extensively in prior reports. In *Canada – Aircraft*, for instance, the respondent argued that certain claims raised with respect to measures that were not identified in the complaining Member's request for consultations fell outside the panel's terms of reference. The panel rejected this argument. The panel underlined the fact that a panel's terms of reference were determined by the complaining Member's panel request, adding that as long as the request for consultations and the panel request concerned the same "dispute", the claims raised in the panel request would fall within its terms of reference even if they were not raised in the request for consultations. In the panel's view, "this approach [sought] to preserve due process while also recognising that the "matter" on which consultations are requested [would] not necessarily be identical to the "matter" identified in the request for establishment of a panel."[248] It follows from this reasoning that the scope of a request for consultations and that of a panel request do not have to be identical. The panel's findings on this particular issue were not appealed.

7.58 A similar issue arose in *Brazil – Aircraft*. The respondent in that case argued that certain subsidy programmes not identified in the complainant's request for consultations were not within the panel's terms of reference, even though they were identified in the panel request. The panel noted that under the DSU, the terms of reference of a WTO panel were determined by the complaining Member's panel request, not its request for consultations. While acknowledging the importance of the consultations in terms of clarifying the situation between the parties to the dispute, the panel nevertheless reasoned that "to limit the scope of the panel proceedings to the identical matter with

[248] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/R, adopted 20 August 1999, as upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443, para. 9.12.

respect to which consultations were held could undermine the effectiveness of the panel process."[249] According to the panel:

> "[A] panel may consider whether consultations have been held with respect to a "dispute", and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute. We do not believe, however, that either Article 4.7 of the DSU or Article 4.4 of the SCM Agreement requires a **precise identity** between the matter with respect to which consultations were held and that with respect to which establishment of a panel was requested." [250]

On appeal, the Appellate Body agreed with the panel's reasoning:

> "**We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel**. As stated by the Panel, "[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel." We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX."[251]

7.59 More recently, the Appellate Body, in *US – Upland Cotton* underlined the importance of not inappropriately limiting the scope of the dispute on the basis of the request for consultations, observing:

> "As long as the complaining party does not expand the scope of the dispute, **we hesitate to impose too rigid a standard for the "precise and exact identity" between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request**. According to Article 7 of the DSU, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise."[252]

7.60 In *Mexico – Anti-Dumping Measures on Rice*, the respondent argued that the complainant had broadened the scope of the legal basis of the complaint in the panel request compared with the request for consultations and asked the panel to find that the claims associated with the new legal provisions cited in the panel request were outside the panel's terms of reference. The panel declined the request on the following grounds:

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[249] Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221, para. 7.9.

[250] Panel Report, *Brazil – Aircraft*, para. 7.10 (emphasis added).

[251] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 132 (footnote omitted, italics in original, **bold** emphasis added).

[252] Appellate Body Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3, para. 293 (footnotes omitted, emphasis added).

> "In our view, the fact that certain provisions were added to the list of alleged violations in the request for establishment compared to the request for consultations is a consequence of the consultation process which serves the purpose of clarifying the facts of the situation enabling the complainant to focus the scope of the matter with respect to which it seeks the establishment of a panel. It does not mean that no consultations were held on the matter, as the only difference between the request for consultations and the request for establishment consists of the fact that a number of closely related legal provisions alleged to have been violated were added. The measures remained the same and so did the legal basis for the complaint, as is evident from the narrative provided in the request for establishment. In our view, consultations were thus held on the matter on which the establishment of a Panel was requested. We therefore reject Mexico's request in this respect."[253]

The Appellate Body upheld the panel's findings in this regard. The Appellate Body recalled its previous findings on this issue and pointed out that the reasoning of prior reports regarding the difference between the scope of the request for consultations and the panel request with respect to the specific measures at issue equally applied to the difference between these two documents with respect to the legal basis of the complaint. The Appellate Body emphasised that the role of consultations was to allow the exchange of information necessary to refine the contours of the dispute, as a result of which the complaining Member might reformulate its claims in its panel request. According to the Appellate Body:

> "[It] is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may **reasonably be said to have evolved** from the "legal basis" that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint."[254]

7.61 Based on the foregoing, we also conclude that there does not have to be precise identity between China's request for consultations and its panel request either with regard to the specific measures at issue or with regard to the legal basis of the complaint. As long as the request for consultations and the panel request concern "the same matter" or, put differently, as long as the legal basis of the panel request "may reasonably be said to have evolved from the legal basis identified in the request for consultations", a claim, even if not specifically identified in the request for consultations, may be found to have been properly identified in the panel request and within the scope of the request for consultations, and therefore within a panel's terms of reference. In our view, that is the situation in this case. We therefore deny the European Union's request for a preliminary ruling, and conclude that China's claim III.6, concerning the calculation of the profit margin in the context of the lesser duty determination, is within our terms of reference.

D. CLAIMS REGARDING COUNCIL REGULATION 1225/2009 (THE BASIC AD REGULATION) "AS SUCH"

7.62 In this section of our report, we address China's claims asserting that Article 9(5) of the Basic AD Regulation is inconsistent with various provisions of the AD Agreement, GATT 1994, and the WTO Agreement. Before doing, so, however, we set forth below our understanding with respect to the operation of relevant provisions of the Basic AD Regulation.

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[253] Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* ("*Mexico – Anti-Dumping Measures on Rice*"), WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007, para. 7.43.

[254] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138 (emphasis added).

1. Relevant Provisions of the Basic AD Regulation

7.63 Council Regulation 1225/2009, the Basic AD Regulation, is the currently-in-force EU legislative instrument that lays down the substantive and procedural requirements pertaining to anti-dumping investigations in the European Union. Article 2 of the Basic AD Regulation addresses the determination of dumping, including the determination of normal value. The basic rules set out in Article 2(1)-(6) for the determination of normal value essentially replicate the provisions of Article 2.2 of the AD Agreement, and apply to investigations of allegedly dumped imports from market economy countries, whether or not Members of the WTO. Paragraph 7 of Article 2 contains specific rules on the determination of normal value in investigations of allegedly dumped imports from non-market economies ("NMEs"). It treats NMEs in two distinct categories, and establishes different rules for the determination of normal value for these two categories of NME:

- Paragraph 7(a) provides that, "[i]n the case of imports from non-market economy countries [including Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan and Uzbekistan], normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin."

- Paragraph 7(b) provides that, "[i]n anti-dumping investigations concerning imports from the People's Republic of China, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c), that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply."

Paragraph 7(c) sets out the criteria on the basis of which a foreign producer/exporter in a country falling within the category defined by paragraph 7(b), in this case China, may make a claim, in writing, providing evidence that it operates under market economy conditions.[255] If successful, such a producer/exporter will be treated under the first option in paragraph 7(b). That is, if successful, the determination of normal value for such a producer will be made in accordance with the rules applicable to market economy countries, as set out in Articles 2(1) – 2(6) of the Basic AD Regulation. There are no claims in this dispute with respect to the market economy test *per se*, either as such, or as applied in the original investigation or the expiry review.

[255] The relevant criteria, referred to as the "market economy test", require evidence that:

(a) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

(b) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

(c) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

(d) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

(e) exchange rate conversions are carried out at the market rate.

7.64 The subject of China's "as such" claims is paragraph 5 of Article 9 of the Basic AD Regulation, which explains the modalities with regard to the imposition of anti-dumping duties. It reads, in relevant part:

> "An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except for imports from those sources from which undertakings ... have been accepted. **The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned**." (emphasis added)

Thus, Article 9(5) sets out two circumstances in which a duty for each supplier will **not** be specified: (1) where it is impracticable to name each supplier, and (2) in general, where Article 2(7)(a) of the Basic AD Regulation applies – that is, where normal value is determined "on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin." In these cases, the regulation imposing the duty will specify a duty rate for the "supplying country concerned" rather than for "each supplier". In other words, a single "country-wide" duty rate will be specified, rather than an individual duty rate for "each supplier".

7.65 Nonetheless, pursuant to Article 9(5) of the Basic AD Regulation, the Commission will specify an individual duty rate in investigations where Article 2(7)(a) applies for producers/exporters who can demonstrate that they satisfy **all** of the following criteria:

> "(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
>
> (b) export prices and quantities, and conditions and terms of sale are freely determined;
>
> (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
>
> (d) exchange rate conversions are carried out at the market rate; and
>
> (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty."

These criteria are referred to as the "individual treatment" ("IT") test. If a producer/exporter in an investigation where a single country-wide duty rate is specified under Article 9(5) of the Basic AD Regulation demonstrates that it satisfies these conditions, the Commission will specify an individual duty rate for that producer/exporter. Producers/exporters who do not satisfy the IT test will be subject to the country-wide duty rate.

7.66 In sum, for a Chinese producer/exporter subject to an anti-dumping investigation in the European Union, the following are the possibilities with respect to the determination of normal value and the imposition of duty:

- If the producer/exporter fulfils the market economy conditions, that is, if it can demonstrate that it operates under market economy principles, then under Article 2(7)(b), its normal value will be determined on the same basis as for producers in market economies, under paragraphs (1)-(6) of Article 2. A dumping margin for that producer/exporter will be calculated by comparing that normal value to the export prices of that producer/exporter, and an individual duty rate will be applied to that producer/exporter.

- If the producer/exporter fails to fulfil the market economy conditions, then its normal value will be determined, pursuant to Article 2(7)(a), on the basis of an alternative method (typically based on prices in an analogue third country). Whether an individual duty rate is specified for it, based on a comparison of the producer/exporter's own export sales with the normal value determined, will depend on whether the producer/exporter requests and is granted IT.

    - If the producer/exporter makes a request for IT and demonstrates that it satisfies the five criteria set out in Article 9(5) of the Basic AD Regulation, the producer/exporter will have an individual duty rate, calculated on the basis of its own export prices, specified for it.

    - Otherwise, the producer/exporter will be subject to a country-wide duty rate based on the normal value determined. The determination of the export price used to calculate that countrywide duty rate will depend on the level of cooperation on the part of the non-IT exporters altogether. If the level of cooperation is high, *i.e.* if the cooperating non-IT exporters account for close to 100 per cent of all exports, the export price will be based on a weighted average of the actual price of all export transactions effected by these exporters. If, however, the level of cooperation is low, *i.e.* if the non-IT exporters account for significantly less than 100 per cent of all exports, the Commission will resort to facts available to complete the missing information. The selection of the facts available will depend on the gravity of non-cooperation and may include statistical import data.

2. Claims I.1, I.2, I.3 and I.4 - Alleged violation of Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement

(a) Arguments of the parties

7.67 China argues that Article 6.10 of the AD Agreement requires investigating authorities in principle to calculate an individual margin of dumping for each exporter/producer of the allegedly dumped imports. Exceptionally, it allows the use of a sample where the number of exporters, producers, importers or types of products involved is high. For China, the text and context of Article 6.10 make clear that this is the sole exception to the mandatory rule of calculating an individual dumping margin for each known exporter or producer. China argues that Article 9(5) of the Basic AD Regulation creates an additional exception to the general rule of calculating an individual dumping margin for each known producer or exporter. China recognizes that Article 9(5) refers to the imposition of anti-dumping duties, but contends that, "logically the determination of an individual anti-dumping duty presupposes the determination of an individual dumping margin."[256] Given that the determination of dumping margins and anti-dumping duties are loosely linked, China considers that, effectively, whether an exporter/producer qualifies for IT under Article 9(5) determines whether an individual margin will be calculated for it, since only after the determination of such an individual margin can an individual dumping duty be applied to it. By providing that producers/exporters from NMEs will be subject to a country-wide margin of dumping unless they

[256] China, first written submission, paras. 189-191, 196 and 201.

satisfy the criteria in that provision, China asserts that Article 9(5) therefore violates Article 6.10 of the AD Agreement as such.[257]

7.68 Assuming this claim is within the Panel's terms of reference, the European Union contends that Article 9(5) of the Basic AD Regulation is not inconsistent with Article 6.10 of the AD Agreement. The European Union begins its argument by detailing the basic rationale behind Article 9(5) of the Basic AD Regulation, which in the European Union's view reflects, in the case of NMEs, the concept that "the imposition of anti-dumping measures primarily aim at addressing the actual source of price discrimination".[258] The European Union explains that, in its view, in a NME, the State, in view of its control over the means of production and intervention in the economy, can be considered as one supplier whose dumping behaviour can be identified and addressed under the AD Agreement. For the European Union, in view of State control over international trade in a NME, it would not be relevant to name exporting companies which do not act independently from the State, as they collectively constitute a single supplier, the State. Moreover, the European Union contends that application of a single duty is necessary to avoid circumvention of anti-dumping measures by channelling exports through the supplier with the lowest duty rate. The European Union next explains that it is entitled to treat China as a non-market economy, *inter alia* by applying Article 9(5) of the Basic AD Regulation. The European Union contends that Article 6.10 of the AD Agreement cannot be interpreted to mean that sampling is the only exception to the general principle of calculating an individual margin for each producer involved in an investigation.[259] In this regard, the European Union asserts that the panel in *Korea – Certain Paper* established the principle that Article 6.10 permits an investigating authority to treat two or more separate legal entities as a single supplier and determine an individual margin of dumping for that supplier.[260]

7.69 According to the European Union, Article 9(5) of the Basic AD Regulation allows the EU authorities to identify the source of dumping in investigations involving NMEs, i.e. the State as supplier, or independent suppliers.[261] The European Union considers that, in the context of a NME, it is entitled to presume State control of international trade, and therefore the fact that the burden rests on NME exporters/producers to demonstrate that they satisfy the conditions in Article 9(5) of the Basic AD Regulation is justified.[262] The European Union reiterates its view that Article 9(5) of the Basic AD Regulation does not relate to the determination of dumping margins, but merely addresses this threshold question.[263]

7.70 China argues that Article 9.2 of the AD Agreement clearly establishes that an individual anti-dumping duty has to be established for each producer/exporter, that would be the appropriate duty amount for that producer/exporter.[264] For China, the requirement to specifically name the suppliers, read together with Article 6.10, establishes that the duty must be established on an individual basis for each producer/exporter except where it is impracticable to do so because of the large number of producers/exporters involved. Moreover, China considers that the context of Article 9.2, referring in

[257] China, first written submission, paras. 209 and 211.
[258] European Union, first written submission, para. 58.
[259] European Union, first written submission, paras. 61, 69-75 and 79-86; second written submission, paras. 24-29.
[260] European Union, first written submission, paras. 88-90, citing Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* ("*Korea – Certain Paper*"), WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, 10637, paras. 7.159-7.162 and 7.168.
[261] European Union, first written submission, para. 98.
[262] European Union, second written submission, paras. 33-34. In this regard, the European Union also relies on Paragraph 15(d) of China's Accession Protocol, which it asserts establishes that the European Union is entitled to treat China as a non-market economy country until 2016, and provides for a reversal of the burden of proof when determining price comparability. *Id.*, paras. 34-35.
[263] European Union, first written submission, para. 68.
[264] China, first written submission, para. 215.

this regard to Article 9 as a whole, Article 6.10, and Articles 9.4 and 9.5 in particular, lends support to the view that the dumping margin and the anti-dumping duty are each to be established on an individual basis. China contends that Article 9.2 does not allow for automatic imposition of duty on a country-wide basis for producers who fail to satisfy the criteria of Article 9(5) of the Basic AD Regulation, and Article 9(5) of the Basic AD Regulation is therefore inconsistent with Article 9.2 of the AD Agreement.[265] China asserts that, by not determining the duty on an individual basis and imposing a country-wide duty, the European Union fails to collect duties in "appropriate amounts" as required by Article 9.2 of the AD Agreement.[266]

7.71 The European Union contends that Article 9.2 of the AD Agreement does not require an anti-dumping duty to be company-specific, but merely that the suppliers be "named". Thus, for the European Union, Article 9(5) of the Basic AD Regulation does not fall within the scope of that Article. Moreover, the European Union contends that "appropriate amounts" in the context of Article 9.2 refers to the "proper" amount, which may be calculated for the State as one supplier in an investigation involving a NME. In the European Union's view, Article 9.2 permits the imposition of duties on a country-wide basis in the case of imports from NMEs, so long as the duty does not exceed the "appropriate" amount calculated for the "source" or supplier of the imports, the State. In any event, the European Union reiterates that sampling is not the only circumstance in which investigating authorities can depart from the general principle of Article 6.10, first sentence. The European Union contends that the term "impracticable" in the third sentence of Article 9.2 is not a mirror to the situation of a large number of suppliers provided for in Article 6.10, but rather implies that investigating authorities can specify a duty for the supplying country where individual duties would be ineffective, not feasible or not suited for being used for a particular purpose, which in the European Union's view includes a situation where the specification of duties per supplier would render those duties ineffective, that is, without effect on the source of the price discrimination.[267]

7.72 With respect to its claim under Article 9.3 of the AD Agreement, China recalls that Chinese producers who do not qualify for IT under EU law are assigned a margin of dumping calculated on a country-wide basis. China asserts that this country-wide margin, based on a comparison of the normal value calculated for the analogue country with a weighted average of export prices of all cooperating Chinese producers, as opposed to those of the individual producers, is not calculated consistently with Article 2 of the AD Agreement. According to China, a duty based on such a margin is, in turn, inconsistent with Article 9.3, as it will result in the collection of duty from some exporting producers which exceeds their proper dumping margin.[268]

7.73 As an initial matter, the European Union contends that China's claim under Article 9.3 of the AD Agreement is dependent on a finding that Article 9(5) of the Basic AD Regulation infringes Article 9.2, and to some extent, Article 6.10 of the AD Agreement as such. Since the European Union considers that these claims must fail, it asserts that China's Article 9.3 claim should also be rejected. Nonetheless, the European Union asserts that since non-IT suppliers are part of the single entity, the State, and their export prices are used to calculate the dumping margin of the State, the manner in which the dumping margin is calculated for the State does not differ from the manner in which the European Union calculates dumping margins for related companies, and both are consistent with the AD Agreement.[269]

7.74 China asserts that, to the extent that it applies to investigations in which sampling is used, Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.4 of the AD Agreement for two

[265] China, first written submission, paras. 220-222.
[266] China, first written submission, para. 234.
[267] European Union, first written submission; paras. 101, 104-105, 109, 111, 122 and 124.
[268] China, first written submission, paras. 242-243.
[269] European Union, first written submission, paras. 131-134.

reasons. First, the duty rate calculated for non-sampled cooperating producers will reflect the weighted average of the margins calculated for the sampled producers which, to the extent those sampled producers were not granted IT, will be inconsistent with Article 2 of the AD Agreement. Second, China asserts that the last sentence of Article 9.4 of the AD Agreement establishes an unqualified obligation to apply individual duties to any producer individually examined under Article 6.10.2 of the AD Agreement. However, Article 9(5) subjects the right to an individual duty to the fulfilment of additional conditions. Thus, producers examined individually under the EU provision implementing Article 6.10.2 of the AD Agreement will only be assessed an individual duty if they satisfy Article 9(5) of the Basic AD Regulation.[270]

7.75 As an initial matter, the European Union contends that China's claim under Article 9.4 of the AD Agreement is entirely dependent on its claims under Articles 6.10 and 9.2 of the AD Agreement. The European Union asserts that, since Article 9(5) of the Basic AD Regulation is not inconsistent with the obligations set forth under those two provisions, China's claim under Article 9.4 of the AD Agreement should also be rejected. In any event, the European Union asserts that China's claim is wrong as a matter of fact, since it ignores that the dumping margin is calculated for the supplier, the State, and where a sample is involved, the duty imposed on non-sampled cooperating suppliers does not exceed the weighted average dumping margins for both sampled MET/IT suppliers and the intermediate results found for non-IT suppliers.[271]

(b) Arguments of third parties

(i) Brazil

7.76 Brazil argues that the methodology used to calculate dumping margins set out in Articles 2 and 6.10 of the AD Agreement, as well as the exceptions to that methodology, only apply where prices and costs are established according to market-economy rules. Brazil considers that exceptional regimes could apply to the determination of normal value and export price in investigations targeting NMEs, and that the investigating authority enjoys a certain degree of discretion in establishing its methodology for the calculation of the dumping margin in the case of NME countries, and in establishing the criteria that exporters from NME countries must fulfil in order to be receive market economy treatment. Brazil also considers that WTO Members are not prevented from treating legal entities located in NME countries collectively as a single producer/exporter for the purposes of dumping determinations. For Brazil, whether or not a particular company should be classified as a distinct company or as a single producer/exporter in conjunction with other companies under Article 6.10 of the AD Agreement largely depends on the facts in each case. Brazil asserts that, in NMEs, single-exporter treatment is all the more justified. Brazil asserts that what matters is how the European Union's provision is applied in practice, and asks the Panel to assess whether the EU legislation and relevant administrative practice provide adequate opportunities and clear rules for Chinese exporters to show whether they are operating independently from the state in respect of a finite number of clear criteria, and whether, on this basis, they may be entitled to obtain an individual dumping margin.[272] Brazil also asserts that Article 9 of the AD Agreement does not establish that authorities must impose individual duties on each company, nor does it prevent the authorities from considering closely related companies as a single entity for the purposes of dumping margin determination. Brazil considers that a violation of Article 9.2 of the AD Agreement is entirely dependent on a violation of Article 9.3, and that an anti-dumping duty that is in conformity with Article 9.3 is necessarily "appropriate" within the meaning of Article 9.2. Brazil asserts that, since the margin of dumping and the appropriate amount of anti-dumping duty can only be determined after the decision on whether or not companies may be regarded as single entities for dumping margin

[270] China, first written submission, paras. 267, 269 and 271.
[271] European Union, first written submission, paras. 136-137.
[272] Brazil, third party written submission, paras. 15-19 and 22-24.

determination purposes, it would be illogical to conclude that not establishing individual duties for companies which are found to operate as a single exporter is incompatible with Article 9 of the AD Agreement.[273]

(ii) Colombia

7.77 Colombia recalls that the Contracting Parties to the GATT 1947 identified the difficulties of imposing anti-dumping duties on products from non-market economy countries arising from the difficulty in determining the normal value of goods not produced under market conditions. Colombia notes in this regard the Second *Ad* Note to Paragraph 1 of Article VI of the GATT 1994, in Annex 1 of the GATT 1994 ("Second *Ad* Note to Article VI:1 of the GATT 1994"), which is reflected in Article 2.7 of the AD Agreement. Colombia thus considers that WTO Members may use methodologies such as the reconstruction of the normal value through an analogue country to calculate the normal value of goods subject to a dumping investigation from non-market economy countries.[274] Colombia invites the Panel to determine if in the particular circumstances of the case, the differential treatment that the European Union grants to China and other countries, given that those countries do not have a market economy, is allowed under Article 2.7 of the AD Agreement and the second *Ad* Note to Article VI:1 of the GATT 1994.

(iii) Japan

7.78 Japan takes the view that the only exception to the mandatory rule of individual dumping margins established in the first sentence of Article 6.10 of the AD Agreement is that set out in the second sentence, i.e. where the number of known exporters or producers is so large as not to allow for individual calculations. However, Japan notes that neither this nor any other provision of the AD Agreement sets forth any explicit criteria to identify an exporter or a producer. Japan considers that the importing Member has a certain amount of discretion to define the meaning of these terms. Japan notes, in this regard, the report of the panel in *Korea – Certain Paper*, and asserts that, depending on the particular facts of a given case, the authority may find that a group of multiple legal entities constitutes a single exporter. However, Japan distinguishes this question from the obligation to determine an individual margin of dumping for the exporter. Once the authority determines what constitutes an "exporter", Japan considers that the obligation to determine individual margins of dumping applies with respect to the exporters so identified, and individual margins of dumping for such exporters must be calculated unless the exception in the second sentence of Article 6.10 applies. Japan notes that Article 9(5) of the Basic AD Regulation appears to set criteria to identify individual exporters in the context of investigations involving non-market economies. Japan does not take any position whether the specific criteria set forth in Article 9(5) of the Basic AD Regulation would be consistent with Article 6.10 of the AD Agreement, and requests that the Panel carefully review how the criteria in Article 9(5) of the Basic AD Regulation function in antidumping investigations in light the mandatory rule and exception in Article 6.10.[275]

(iv) Turkey

7.79 Turkey takes the view that, under the first sentence of Article 6.10 of the AD Agreement, individual treatment is a general rule, and the second sentence of Article 6.10 is an exception to the general rule allowed where sampling is used. Turkey considers that sampling may not be the sole exception to the general rule envisaged in Article 6.10 of the AD Agreement. According to Turkey, the AD Agreement contains rules for economies operating under market economy conditions. Given that there are no specific rules or exceptions provided in the AD Agreement for economies that are not

[273] Brazil, oral statement, paras. 5-6 and 9.
[274] Colombia, third party written submission, paras. 7-9 and 11.
[275] Japan, third party written submission, paras. 6, 8, 9-11 and 14.

operating under market economy conditions, Turkey believes that it would not be appropriate to look for a non-market economy exception in Article 6.10 itself. However, Turkey considers it is expected that there will be exceptions to the general rules on the calculation of normal value and export price for NMEs, referring in this regard to the second *Ad* Note to Article VI:1 of the GATT 1994 and China's Accession Protocol. In Turkey's view, it is acknowledged by WTO Members that China is not operating under full market economy conditions yet, and both domestic and export sales prices are not freely determined by market economy forces, and it is therefore reasonable to disregard export sales prices as well as domestic sales prices. Moreover, Turkey considers that previous panel and Appellate Body reports demonstrate that it is not inconsistent with Article 6.10 of the AD Agreement to treat distinct legal entities as a single entity if the conditions so require. Turkey also considers that sampling is not the only exception to the general rule in Article 6.10, first sentence, and there could be other situations, including circumstances where thresholds are set for individual treatment, in which the investigating authorities may not determine individual margin of dumping and accordingly, individual anti-dumping duties for each known exporter or producer. Consequently, Turkey considers that a Member can legally set out a threshold reflecting special circumstances in terms of the variables affecting production, sales and prices to provide IT under Article 6.10.[276]

(v) United States

7.80 The United States disagrees with China's claim that Article 9(5) of the Basic AD Regulation is inconsistent as such with Articles 6.10, 9.2, 9.3, and 9.4 of the AD Agreement, considering China's legal arguments to be based on misunderstandings of the relevant provisions of the AD Agreement. The United States considers that the general requirement in Article 6.10 for an investigating authority to calculate an individual margin of dumping applies only in respect of each known "exporter" or "producer," and thus, the investigating authority must first decide whether a particular firm is an "exporter" or "producer." For the United States, since the AD Agreement does not define exporter or producer or set out criteria for determining whether a particular entity constitutes an exporter or producer, an investigating authority is permitted to conclude, based on the facts, which entities constitute an individual producer or exporter as a condition precedent to calculating an individual dumping margin, including establishing which factors may be relevant to making that determination. For the United States, consideration of the relationship between companies and the reality of their respective commercial activities is particularly relevant in the context of producers and exporters from a non-market economy. The United States does not, however, agree with the European Union that the economic realities of firms in NMEs provide an additional exception to the first sentence of Article 6.10, but considers this part of the investigating authority's task in determining the exporters and producers for which it must generally determine an individual margin. The United States submits that, to the extent that Article 9(5) of the Basic AD Regulation is a mechanism for the investigating authority to examine the relationship between firms, that mechanism would not appear to be inconsistent with Article 6.10, but rather would be critical to assist the investigating authority in complying with the general rule in Article 6.10 to calculate a single margin of dumping for every known exporter or producer. The United States contends that, given the influence of the government of China in the commercial practices and decisions of enterprises in China, it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in China without first confirming that the company functions as an exporter separate from and independent of influence by the government, so as to prevent possible shifting of export activities between production facilities and companies that may be legally distinct, in order to avoid anti-dumping duties. Thus, the United States concludes that an investigating authority may apply criteria to determine whether an individual company is an exporter or producer without acting inconsistently with Article 6.10 of the AD Agreement. The United States also submits that China's interpretation of Article 9 is incorrect. Furthermore, for the United States, the decision as to whether a group of companies functions as a single entity is one that an investigating authority must make before it can

[276] Turkey, third party written submission, paras. 3, 5-6, 9-10, 12 and 14-15.

know how duties should be applied to those companies' imports, and if it concludes that multiple companies are closely related and function as a single entity, an investigating authority may apply a single duty to all of those companies' imports, even under China's reading of Article 9. In any event, the United States considers that China's claims pursuant to Article 9 of the AD Agreement appear to be dependent on its claims under Article 6.10, which it maintains are based on an incorrect understanding of that provision, and thus provide no basis for China's consequential claims under Article 9 of the AD Agreement.[277]

(vi) Viet Nam

7.81 Viet Nam considers that the sole exception to the rule of Article 6.10 of the AD Agreement requiring investigating authorities to determine individual margins of dumping for exporters or producers concerned is sampling where the number of exporters, producers and /or importers involved is so large as to make a determination impracticable. Viet Nam asserts that Article 9(5) of the Basic AD Regulation requires exporters and producers from non-market economy country to satisfy additional conditions in order to qualify for Individual Treatment (IT), and is therefore inconsistent with Article 6.10 of AD Agreement. It is Viet Nam's view that Article 9(5) of the Basic AD Regulation only provides for individual duties for exporters which satisfy the IT requirements, which Viet Nam considers extra and discriminatory conditions, and is thus in violation of Article 9.2 of the AD Agreement, which Viet Nam maintains requires individual anti-dumping duties. Viet Nam considers that country-wide anti-dumping duties on non-IT exporters will necessarily exceed the individual dumping margin of some of the exporters/ producers included in the average duty calculation, in violation of Article 9.3 of the AD Agreement. Viet Nam maintains that, because under Article 9(5) of the Basic AD Regulation, the dumping margin for exporter/producers not qualifying for IT will not be calculated on basis of individual evidence of exporters or producers, the investigating authorities are unable to calculate a weighted-average dumping margin of all sampled exporters or producers as stipulated in Article 9.4 of the AD Agreement. In addition, Viet Nam asserts that, by establishing additional conditions before individual duties will be applied, Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.4 of the AD Agreement, which provides that the authorities shall apply individual duties to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation.[278]

(c) Evaluation by the Panel

7.82 We begin by noting that these same claims were recently considered by the panel in *EC – Fasteners (China)*, a dispute between these same parties, in which the parties made substantially the same arguments as those summarized above. The final report of the panel in that dispute was issued to the parties on 29 September 2010, and circulated to WTO Members and the public on 3 December 2010, that is, in sufficient time for the parties to consider the findings of that panel in formulating and presenting their arguments to us.[279] Indeed, in its second written submission, China explicitly relied upon those findings in its arguments concerning these claims.[280] That report is

[277] United States, third party written submission, paras. 2, 5, 6, 9, 10, 13-14 and 16-17; United States, oral statement, paras. 5 and 11.

[278] Viet Nam, third party written submission, paras. 6-7, 9-10, 12 and 13.

[279] The interim report in *EC –Fasteners (China)* was issued to the parties on 10 August 2010. First written submissions were received from the parties in this dispute on 20 August 2010 (China) and 24 September 2010 (European Union). As noted above, the first meeting of the parties with the Panel was 3-4 November 2010. Written rebuttals were received from the parties on 7 December 2010, the Panel having, following a request from the European Union, extended the original deadline. The Panel's second meeting with the parties was held 25-26 January 2011.

[280] China refers to the report of the panel in *EC – Fasteners (China)* in its second written submission in addressing the European Union's preliminary ruling request, as well as in support of its arguments with respect to its "as such" and "as applied" claims regarding Article 9(5) of the Basic AD Regulation. China, second

presently before the Appellate Body as the subject of an appeal and cross-appeal by the parties.[281] A decision in that appellate proceeding is not expected before we issue our final report in this dispute to the parties. The European Union stated, at our second meeting, that only "adopted" panel reports are binding and create legitimate expectations among Members, and suggested that we consider waiting for any Appellate Body report on this issue, in order to take such a report into account before issuing our interim report in the present case, asserting that this would not cause an undue delay in this Panel's proceedings, and would ensure that our findings effectively contribute to a prompt settlement of this dispute.[282] Subsequently, after the appeal had been filed, the European Union requested in writing that we delay issuance of our interim report until after the Appellate Body had ruled in the appeal in *EC – Fasteners (China)*.[283] China opposed the European Union's request.[284] We denied the European Union's request.[285]

7.83 While we recognize that the unadopted report of a panel does not bind the parties, we nonetheless consider that we may take it into account in our own deliberations, and, to the extent we find the analysis, reasoning, and conclusions of that report persuasive on the issues before us, may follow it. In our view, this is a more effective and efficient course of action than to await a decision from the Appellate Body, particularly where, as here, the appeal proceedings have been delayed at the joint request of the parties, and the complainant objects to delay.[286] Thus, we have considered carefully the views of the panel in *EC – Fasteners (China)* in our deliberations on the dispute before us. As discussed in more detail below, we find that panel's analysis and reasoning persuasive on the issues arising in our consideration of China's "as such" claims with respect to Article 9(5) of the Basic AD Regulation, and have therefore largely adopted its reasoning and conclusions as our own in this dispute.

7.84 We begin by noting the disagreement between the parties as to the scope and operation of Article 9(5) of the Basic AD Regulation. The European Union asserts that Article 9(5) of the Basic AD Regulation deals with the imposition of anti-dumping duties, and does not concern the calculation of dumping margins at all. China, on the other hand, considers that Article 9(5) is not limited to determining whether individual NME producers will receive individual anti-dumping duties, but also governs whether individual dumping margins will be determined. Looking at the provision as a whole, we agree with China in this respect. We note that, conceptually, the imposition of an individual anti-dumping duty must logically be preceded by the calculation of an individual dumping margin. It seems clear to us that no other provision of EU legislation or regulation governs whether or not an individual dumping margin will be determined for individual producers/exporters, and the European Union has not argued otherwise. Given the link between the calculation of a dumping margin and the imposition of an anti-dumping duty, it seems to us that, normally, an investigating authority would calculate a dumping margin and impose an anti-dumping duty on the same basis. That is, an individual anti-dumping duty would, and could, only be imposed if an individual dumping

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written submission, paras. 28, 31, 34, 42, 59, 60, 61, 1513 and 1514, fns. 20, 23, 34, 40, 41, 45, 61, 88 and 934. The European Union referred to China's reliance on the report of the panel in *EC – Fasteners (China)* in the context of its response to the preliminary ruling request concerning China's "as such" claims, but not otherwise. European Union, second written submission, paras. 13-14.

[281] Notification of an Appeal by the European Union, WT/DS397/7, dated 29 March 2011; and Notification of an Other Appeal by China, WT/DS397/8, dated 5 April 2011.

[282] European Union, opening oral statement at the second meeting with the Panel, para. 8.

[283] European Union, letter dated 28 March 2011.

[284] China, letter dated 30 March 2011.

[285] Communication from the Panel, dated 6 April 2011.

[286] WT/DS397/6, dated 13 January 2011. The parties proposed, pursuant to a procedural agreement between them, taking into account the workload of the Appellate Body, that the DSB decide to extend to 25 March 2011 the 60-day time period in Article 16.4 of the DSU, as applicable to DS397. The DSB adopted the proposed decision in that document at its meeting of 25 January 2011. WT/DSB/M/291, para. 84, 8 March 2011.

margin were previously calculated. Thus, we consider that whether or not the Commission will calculate individual dumping margins for individual producers/exporters in an investigation involving a NME is resolved exclusively through the operation of Article 9(5) of the Basic AD Regulation. The fact that the provision refers specifically only to the imposition of anti-dumping duties does not affect our views in this regard.

7.85 We note that the same conclusion was reached by the panel in *EC – Fasteners (China)*. We agree with the reasoning of that panel, and its conclusion:

> "Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of margins of dumping. ... in operation, the result of the IT test in Article 9(5) of the Basic AD Regulation determines the nature of the margin calculation the EU authorities will undertake, either individual or country-wide."[287]

7.86 Turning to the substance of China's claims against Article 9(5) of the Basic AD Regulation, we note that China's arguments under Articles 6.10, 9.2, 9.3, and 9.4 of the AD Agreement all rest on the premise that the AD Agreement requires individual treatment for producers/exporters subject to an investigation with respect to the determination of dumping, including calculation of an individual dumping margin based on each producers'/exporters' own export prices, and the imposition of a duty rate based on that individually calculated margin.[288]

7.87 Like the panel in *EC – Fasteners (China)*, we consider it appropriate to consider first the provision of the AD Agreement most directly addressing the question of individual treatment, Article 6.10, and then move on, as necessary, to the other provisions raised by China.[289] Article 6.10 of the AD Agreement provides, in pertinent part:

> "6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated. ...
>
> > 6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged."

[287] Panel Report, *EC – Fasteners (China)*, para. 7.77.

[288] With the exception, of course, of the possible imposition of a lesser duty. However, since the imposition of a lesser duty may occur regardless of the basis on which the dumping margin(s) was(were) calculated, this possibility does not affect our resolution of the issues in this dispute.

[289] Panel Report, *EC – Fasteners (China)*, para. 7.84.

7.88 In our view, it is clear, as the panel in *EC – Fasteners (China)* concluded, that Article 6.10 establishes the principle that an investigating authority must calculate an individual dumping margin for each known exporter or producer of the product under investigation, unless the single exception to that principle, set out in the second sentence, applies. We find nothing in the arguments of the European Union that would support the conclusion that Article 6.10 admits of any other exceptions to the principle of individual dumping margins than the situation outlined in the second sentence. We also consider it clear that Article 9(5) of the Basic AD Regulation does not, in fact, serve to resolve the question whether two legally distinct entities may be treated as a single producer, for which a single dumping margin may be calculated, but rather presumes this to be the case, and requires individual exporters to demonstrate otherwise, on the basis of criteria that do not directly relate to the relationship between the entities in question.

7.89 Thus, and for the same reasons as set out in more detail by the panel in *EC – Fasteners (China)*,[290] we conclude that Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the AD Agreement as such, because it conditions the calculation of individual dumping margins for producers/exporters in investigations involving NMEs on the satisfaction of the IT conditions in the provision.

7.90 Turning to China's claim under Article 9.2 of the AD Agreement, we note that this provision also concerns individual treatment, in the imposition of anti-dumping duties. Article 9.2 provides, in pertinent part:

> "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved."

7.91 Article 9.2, which has remained unchanged since it was negotiated in the Kennedy Round, is a predecessor to the more detailed rules set out in Article 6.10, which was added to the AD Agreement following the Uruguay Round, and further elaborates on the basic principle of individual treatment established in the earlier provision. While the language is somewhat different, in our view, the similar structure of the two provisions supports the conclusion that they concern the same basic principle, that individual exporters and producers in anti-dumping investigations should be treated individually in the determination and imposition of anti-dumping duties. Moreover, we see nothing in the text of Article 9.2 of the AD Agreement, or in its context, that would suggest that the notion of "impracticable" in that provision may relate to the effectiveness of anti-dumping measures imposed.

7.92 Thus, and for the same reasons as set out in more detail by the panel in *EC – Fasteners (China)*,[291] we consider it clear that Article 9.2 is properly understood to require investigating authorities to name the individual suppliers on whom anti-dumping duties are imposed, except where the number of suppliers is so large that it would be impracticable to do so, in which case the supplying country may be named. We therefore find that Article 9(5) of the Basic AD Regulation, which

[290] Panel Report, *EC – Fasteners (China)*, paras. 7.88-7.98.
[291] Panel Report, *EC – Fasteners (China)*, paras. 7.103-7.112.

requires that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, is inconsistent with Article 9.2 of the AD Agreement as such.

7.93 With respect to China's claims under Articles 9.3 and 9.4 of the AD Agreement, we note that that panel in *EC – Fasteners (China)* exercised judicial economy with respect to these claims, concluding this to be appropriate, as a finding would neither contribute to the resolution of the dispute, nor aid in any resulting implementation.[292] Nothing in the arguments before us in this dispute[293] leads us to conclude otherwise, and we therefore, and for the same reasons, consider it appropriate to exercise judicial economy and refrain from making findings with respect to China's claims under Articles 9.3 and 9.4 of the AD Agreement.

3. Claim I.5 - Alleged violation of Article I:1 of the GATT 1994

(a) Arguments of the parties

(i) China

7.94 China claims that Article 9(5) of the Basic AD Regulation violates Article I of the GATT 1994 because this provision only applies to some WTO Members, including China, and not to all WTO Members. For China, the automatic grant of individual treatment in the case of imports from market economy countries constitutes an advantage or favour not granted in the context of imports from China and some other NMEs, in violation of Article I:1 of the GATT 1994. China contends that while the IT conditions have to be satisfied by individual producers/exporters, it is clear that they apply on the basis of the origin of the imports, as the requirements only apply to China and a few other non-market economy countries. Finally, China asserts that the requirement to fulfil the additional criteria of Article 9(5) demonstrates that the advantage of IT is not accorded "unconditionally", as whether an individual margin and individual duty are granted depends on the origin of the imports in question. China maintains that its claim under Article I:1 is independent of its claim that Article 9(5) of the Basic AD Regulation is inconsistent with various provisions of the AD Agreement. In this regard, China contends that there is no conflict between the AD Agreement and Article I:1 of the GATT 1994, and thus the Panel should consider the Article I:1 claim regardless of its findings with respect to the AD Agreement.[294]

(ii) European Union

7.95 The European Union asserts that China's claim under Article I:1 of the GATT 1994 depends on a finding that Article 9(5) of the Basic AD Regulation is not consistent with the AD Agreement. The European Union contends that, if the AD Agreement permits WTO Members to subject the right to an individual margin of dumping to the fulfilment of certain conditions in investigations involving NMEs, by virtue of the *lex specialis* principle and Article II:2(b) of GATT 1994, there can be no violation of Article I of the GATT 1994. The European Union notes that the General Interpretative Note to Annex 1A of the WTO Agreement provides that, in the event of a conflict between a provision of the GATT 1994 and another Agreement of Annex 1A, the provision of the other Agreement prevails. Independently, the European Union also argues that treating two different situations in two different ways would not necessarily violate the most-favoured-nation ("MFN") principle contained in Article I of the GATT 1994. In this regard, the European Union asserts that imports from market and non-market economies may be treated differently in anti-dumping

[292] Panel Report, *EC – Fasteners (China)*, paras. 7.116-7.117.
[293] See China, first written submission, paras. 275-278.
[294] China, first written submission, paras. 285, 288-289, 291 and 294; China, answer to Panel question 9.

investigations because they are different in nature. Finally, the European Union asserts that any advantage in the case of IT is based on the nature of the suppliers involved, rather than linked to the product or its origin, and therefore there is no discrimination between like products in the sense of Article I:1 of the GATT 1994. The European Union argues that China assumes that the AD Agreement does not allow different treatment of suppliers from NMEs in asserting that there is no conflict between the AD Agreement and Article I:1 of the GATT 1994, and argues that this position is circular and should be rejected. In the European Union's view, a conflict exists where there is "incompatibility of contents", which includes situations where one Agreement prohibits what another permits. In this case, should the Panel conclude that Article 9(5) does not violate the non-discrimination requirement of Article 9.2 of the AD Agreement, by definition Article 9(5) of the Basic AD Regulation could not violate the non-discrimination provision of Article I:1 of the GATT 1994.[295]

(b) Arguments of third parties

(i) Colombia

7.96 Colombia asserts that, if the Panel concludes that Article 9(5) of the Basic AD Regulation is consistent with the European Union's obligations under the AD Agreement, it should find that there is no breach of Article I:1 of the GATT 1994. Colombia considers that, in this case, the elements of Article I:1 of the GATT 1994 should be read together with the provisions of the AD Agreement. Thus, Colombia invites the Panel to determine if, in the particular circumstances of the case, the differential treatment that the European Union grants to China and other countries, given that those countries do not have a market economy, is allowed under Article 2.7 of the AD Agreement and the second *Ad* Note to Article VI:1 of the GATT 1994. Colombia also comments on the parties' arguments concerning the term "unconditional" as used in Article I.1 of the GATT 1994. Colombia notes that the term unconditional does not mean that the granting of an advantage cannot be subject to certain requirements. For Colombia, what the Panel must determine is whether the conditions in Article 9(5) of the Basic AD Regulation breach Article I:1 of the GATT 1994, that is, if those requirements are discriminatory based on the origin of the goods. Finally, Colombia recalls China's commitments upon its accession to the WTO, and WTO Members' obligations towards China, as set out in its Protocol of Accession.[296]

(ii) Viet Nam

7.97 Viet Nam recalls that Article I.1 of the GATT 1994 sets out the principle of most-favoured-nation treatment. Viet Nam notes that, under Article 9(5) of the Basic AD Regulation, a NME exporter/producer which fails to satisfy the IT criteria would not receive an individual duty, thus receiving less favourable treatment than market economy exporters/producers. For Viet Nam, that a WTO Member accepts to be recognized as a non-market economy does not mean that it accepts such less favourable treatment.[297]

(c) Evaluation by the Panel

7.98 China claims that Article 9(5) of the Basic AD Regulation violates Article I:1 of the GATT 1994 because this provision subjects certain NME WTO Members, including China, to additional conditions in order for exporting producers to receive IT, while WTO Members with market economies automatically receive IT. According to China, automatically receiving IT is an "advantage" not accorded to imports from NMEs, in violation of Article I:1 of the GATT 1994.

[295] European Union, first written submission, paras. 140, 142-143; European Union, second written submission, paras. 40-41.
[296] Colombia, third party written submission, paras. 16-18, 22 and 25-28.
[297] Viet Nam, third party written submission, paras. 14-15.

7.99 Article I:1 of the GATT 1994 provides:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, **any advantage, favour, privilege or immunity** granted by any contracting party **to any product** originating in or destined for any other country shall be **accorded immediately and unconditionally** to the **like product** originating in or destined for the territories of all other contracting parties." (emphasis added)

Article I:1 codifies the MFN principle, which "has long been a cornerstone of the GATT and is one of the pillars of the WTO trading system."[298] The text of this provision is clear. WTO Members are under the obligation to treat like products equally, irrespective of their origin.[299] That is, discrimination between like products originating in or destined for different countries is prohibited by the MFN principle.[300] The language of Article I:1 establishes that three elements must be demonstrated by a complaining party to establish a violation of Article I:1: (i) an advantage, favour, privilege or immunity of the type covered by Article I, (ii) is not immediately and unconditionally accorded to (iii) all like products of all WTO Members.[301]

7.100 Turning to the facts of this case, it is clear to us that rules and formalities applied in anti-dumping investigations, including Article 9(5) of the Basic AD Regulation, fall within the scope of the "rules and formalities in connection with importation" referred to in Article I:1. It is also clear, based on our conclusions above,[302] that Article 9(5) affects imports from certain countries, establishing criteria for the determination whether the export prices of producers or exporters subject to anti-dumping investigations in the European Union will be taken into consideration, individual margins of dumping calculated, and individual duties imposed upon importation of the relevant product to the European Union. We agree with China that the automatic grant of IT to imports from market economy countries is an "advantage" within the meaning of Article I:1.[303] In our view,

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[298] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Autos*"), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985, para. 69; and Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* ("*EC – Tariff Preferences*"), WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925, para. 101.

[299] Appellate Body Report, *EC – Bananas III*, para. 190; and Appellate Body Report, *EC – Tariff Preferences*, para. 89.

[300] Appellate Body Report, *Canada – Autos*, para. 84.

[301] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201, para. 14.138.

[302] See paragraph 7.84 above.

[303] We recall that the scope of Article I:1 of the GATT 1994 has been interpreted broadly by previous WTO panels as well as GATT panels. The panel in *EC – Tariff Preferences* concluded that

> "the term 'unconditionally' in Article I:1 has a broader meaning than simply that of not requiring compensation. While the Panel acknowledges the European Communities' argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of 'unconditionally' under Article I.1. Rather, the Panel sees no reason not to give that term its ordinary meaning under Article I:1, that is, 'not limited by or subject to any conditions'."

Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* ("*EC – Tariff Preferences*"), WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R, DSR 2004:III, 1009, para. 7.59. The GATT panel in *US – MFN Footwear*

individual treatment ensures that producers and exporters receiving such treatment will not be subject to a duty higher than their own dumping margin, as would be the case for some producers or exporters subject to a country-wide duty imposed on the basis of a margin calculated on average export prices. Moreover, Article 9(5) of the Basic AD Regulation lists the WTO Members, including China, whose producers are not automatically accorded the right to individual dumping margins and anti-dumping duties, but must fulfil the conditions of that provision in order to benefit from that right. Thus, the application of Article 9(5) of the Basic AD Regulation will, in some instances, result in import of the same product from different WTO members being treated differently in anti-dumping investigations by the European Union. This to us establishes that the advantage of automatic IT is conditioned on the origin of the products. We therefore consider that Article 9(5) of the Basic AD Regulation violates the MFN obligation set forth in Article I:1 of the GATT 1994.

7.101 The European Union asserts that treating suppliers in NMEs differently from suppliers in market economies does not violate Article I:1 of the GATT 1994, because they are in different situations. In this regard, the European Union asserts that the availability of an advantage can be subject to conditions, without violating Article I:1, where those conditions relate to the "situation or conduct" of the exporting country.[304] The European Union notes that various provisions in the AD Agreement explicitly provide for differing treatment of products from different Members, and that these do not violate Article I:1. In the European Union's view, imports from market and NME countries may be subject to different treatment in anti-dumping investigations because they are different in nature, and therefore no discrimination can arise.[305] However, in our view, imports from NMEs may be treated differently from imports from market economy countries only to the extent that the AD Agreement or another relevant WTO agreement allows for such differentiated treatment.[306] The European Union, however, has failed to demonstrate that any provision of the AD Agreement, or of any other relevant WTO agreement, would allow the different treatment of imports from NMEs provided for in Article 9(5) of the Basic AD Regulation.

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concluded that rules and formalities applicable to countervailing duties were rules and formalities imposed in connection with importation, and that "automatic backdating of the effect of revocation of a pre-existing countervailing duty order, without the necessity of the country subject to the order making a request for an injury review, is properly considered to be an advantage within the meaning of Article I:1." GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil ("US – MFN Footwear")*, DS18/R, adopted 19 June 1992, BISD 39S/128, para. 6.9. See also *EC – Bananas III (US)*, where the panel referred to the report of the GATT panel in *US – MFN Footwear* in order to support its conclusion that "the licensing procedures applied by the EU to traditional ACP banana imports, when compared to the licensing procedures imposed on third-countries … can be considered as an 'advantage' which the EC does not accord to third-country and non-traditional ACP imports." Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States* ("*EC – Bananas III (US)*"), WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943, para. 7.221. The Appellate Body in *EC – Bananas III* upheld the panel's findings, stating that "the activity function rules are an 'advantage' granted to bananas imported from traditional ACP States, and not to bananas imported from other Members," after also referring to the broad definition given to the term "advantage" in Article I:1 by the GATT panel in *US – MFN Footwear*. Appellate Body Report, *EC – Bananas III*, para. 206.

[304] European Union, second written submission, para. 42.

[305] European Union, first written submission, paras. 141-142.

[306] For example, the second *Ad* Note to Article VI:1 of the GATT 1994, concerning special difficulties in determining price comparability in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State. Similarly, Paragraph 15 of China's Accession Protocol permits different treatment with respect to the determination of normal value in anti-dumping investigations against Chinese imports, provided certain conditions are met. We also note Article 15 of the AD Agreement, which requires "special regard" to be given by developed country Members to the special situation of developing country Members when considering the application anti-dumping measures, and that possibilities of constructive remedies provided for by the AD Agreement be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

7.102 Nor has the European Union demonstrated that there is any relevant difference in the nature of imports from NMEs that justifies different treatment. While the European Union alleges this to be the case, in our view it has not established a sufficient factual basis on which we could conclude that there is a relevant difference in the nature of imports from NMEs and those from market economy countries. Indeed, we note that Article 9(5) of the Basic AD Regulation itself allows individual producers in NMEs to demonstrate that they operate under market economy principles, and qualify for individual treatment. In our view, this suggests that any difference in the nature of imports from NMEs and from market economy countries depends on the specific facts and circumstances of the producer and product in question, and not on the fact that the economy of the exporting country is classified by another WTO Member as a NME.[307]

7.103 The European Union considers that China's Article I:1 claim is dependent on a finding that Article 9(5) of the Basic AD Regulation is in violation of the AD Agreement. China, on the other hand, maintains that its claim under Article I:1 is independent of its claims of violation of the AD Agreement. We note in this regard that, having concluded, as discussed above, that Article 9(5) is inconsistent with Articles 6.10 and 9.2 of the AD Agreement, it is clear, even assuming the European Union's assertion is correct, this condition is satisfied. However, while it is clear that the AD Agreement elaborates on the requirements of Article VI of the GATT 1994 for imposition of an anti-dumping measure,[308] in our view, this does not mean that a violation of GATT 1994, in particular of Article I:1, can only be found after a violation of the AD Agreement has been established. Not only do we consider it possible that a Member might act inconsistently with a provision of Article VI of the GATT 1994 itself, and in addition violate Article I:1, but it is also possible that in certain circumstances a Member might act inconsistently with Article I:1 in the application of its anti-dumping regulations to different Members, without a specific violation of the AD Agreement.

7.104 The European Union also contends that, if the AD Agreement permits WTO Members to subject the right to an individual margin of dumping to the fulfilment of certain conditions in investigation involving NMEs, there can be no violation of Article I:1 of the GATT 1994 by virtue of the *lex specialis* principle and Article II:2(b) of the GATT 1994. We do not agree that Article II:2(b) of the GATT 1994 limits the scope of Article I:1. The chapeau of Article II:2(b) states: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product … any anti-dumping … duty applied consistently with the provisions of Article VI". It is thus clear that Article II:2(b) refers only to Article II of the GATT 1994, establishing a "safe harbour" for anti-dumping measures applied consistently with the provisions of Article VI of the GATT 1994 from the provisions of Articles II:1(a) and (b) governing the maximum amounts of customs duties. Finally, we recall that the General Interpretative Note to Annex 1A of the WTO Agreement provides that, in case of a conflict between a provision of the AD Agreement and a provision of the GATT 1994, the former shall prevail to the extent of the conflict. The European Union attempts to apply this conflict rule to argue that, where something is permitted under the AD Agreement, this permission prevails over the prohibition on discrimination set out in Article I:1 of the GATT 1994. We disagree with this proposition. In our view, there is no conflict between the AD Agreement and the GATT 1994 in this case. That is, we see nothing that would prevent a Member from complying with both its obligations under the AD Agreement and Article I:1 of the GATT 1994, and therefore

[307] We note in this regard that the Basic AD Regulation explicitly lists the countries, including China, the producers of which will be subject to the MET and IT tests. Thus, it is clear that Article 9(5) of the Basic AD Regulation applies to a pre-determined group of WTO Members, without reference to the specific circumstances in individual cases.

[308] We recall that the AD Agreement is formally titled "Agreement on Implementation of Article VI of the GATT 1994".

there is no need to resort to either the *lex specialis* principle or the General Interpretative Note to resolve a conflict between the two.[309]

7.105 On the basis of the foregoing, we conclude that Article 9(5) of the Basic AD Regulation violates the MFN principle contained in Article I:1 of the GATT 1994.[310]

4. Claim I.7 - Alleged violation of Article X:3(a) of the GATT 1994

(a) Arguments of the parties

(i) China

7.106 China argues that the European Union does not administer Article 9(5) of the Basic AD Regulation in a "uniform" manner, because the country-wide duty is not calculated in a uniform manner in each case. Rather, the calculation methodology varies depending on the degree of cooperation on the part of the foreign producers subject to an investigation. Different methodologies are used if the level of cooperation is high or low. Moreover, when the level of cooperation is low, a variety of methodologies, different from those used if the level of cooperation is high, are used. In China's view, such non-uniform application of Article 9(5) of the Basic AD Regulation is inconsistent with the obligation contained in Article X:3(a) of the GATT 1994. In addition, China argues that the European Union does not administer Article 9(5) of the Basic AD Regulation in a "reasonable" manner, because the country-wide dumping margin is established in an unreasonable manner, often through inappropriate use of facts available.[311]

(ii) European Union

7.107 The European Union asserts that the Basic AD Regulation does not require the EU authorities to administer Article 9(5) in a particular manner, but rather, provides for a particular result. Thus, the European Union contends that Article 9(5) does not come within the scope of Article X:3(a) of the GATT 1994. In any event, the European Union considers that the determination of the margin of dumping based on the level of cooperation does not, in and of itself, lead to a lack of uniformity. Finally, the European Union asserts that China's allegation relating to the use of facts available is unsupported by legal reasoning or evidence.[312]

(b) Arguments of third parties

(i) Colombia

7.108 Colombia considers that China's claim raises the question whether it is legally acceptable to claim that a measure "as such" is inconsistent with a Member's obligations under Article X:3(a) of the GATT 1994. For Colombia, since the scope of application of WTO Members' obligations under Article X:3(a) of the GATT 1994 is limited to the administration, that is, the application, of the measures at issue, a claim against the measure "as such" is impermissible. Nonetheless, Colombia suggests that the Panel may consider this claim in the circumstances of this case, in view of China's

[309] For a strict definition of conflict in WTO law, that is between mutually exclusive obligations, see Panel Report, *Indonesia – Autos*, fn. 649; and Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, 2363, para. 9.92.

[310] We note that the panel in *EC – Fasteners (China)* reached the same conclusion, for essentially the same reasons. Panel Report, *EC – Fasteners (China)*, paras. 7.122-7.126.

[311] China, first written submission, paras. 301 and 308.

[312] European Union, first written submission, paras. 145, 147 and 149.

arguments related to the application of the measure, even though the claim is formally against the measure "as such".[313]

(ii) United States

7.109 The United States notes that Article X:3(a) of the GATT 1994 relates to the administration of instruments set out in Article X:1. Such laws and regulations may themselves be challenged under Article X:3(a) where they reflect the administration of an instrument set out in Article X:1, but are not otherwise subject to challenge under Article X:3(a) of the GATT 1994. The United States asserts that Article 9(5) of the Basic AD Regulation does not appear to address the administration of any other legal instrument, but rather appears to provide substantive rules on how anti-dumping duties are to be imposed under certain circumstances. The United States therefore agrees with the European Union that, under these circumstances, Article 9(5) itself cannot be found to breach GATT Article X:3(a).[314]

(c) Evaluation by the Panel

7.110 We recall that we have concluded above that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the AD Agreement. China's claim under Article X:3(a) of the GATT 1994 concerns the manner in which this measure is administered by the Commission. Having found the measure itself to be inconsistent "as such" with Articles 6.10 and 9.2 of the AD Agreement, we see no reason to address whether this WTO-inconsistent measure is administered in a uniform and reasonable manner by the European Union, and therefore exercise judicial economy, declining to make a finding on this claim.[315]

5. Claim I.6 - Alleged violation of Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement

7.111 China asserts that since Article 9(5) of the Basic AD Regulation is inconsistent with the Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement and Article I:1 of the GATT 1994, and the European Union does not administer this provision consistently with Article X:3(a) of the GATT 1994, it follows as a consequence that the European Union has violated Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement, which both require WTO Members to ensure the conformity of their laws, regulations and administrative procedures with their WTO obligations.[316] The European Union, on the other hand, asserts that since China has failed to demonstrate any of the alleged violations, it follows that the Panel should reject this consequential claim.[317]

7.112 Both Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement similarly provide that each WTO Member shall "ensure" the "conformity of its laws, regulations and administrative procedures" with the relevant agreements. We have concluded that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the AD Agreement. We therefore also conclude that the European Union has acted inconsistently with Article XVI:4 of the WTO Agreement, and Article 18.4 of the AD Agreement.[318]

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[313] Colombia, third party written submission, paras. 32-33 and 35-37.

[314] United States, third party written submission, paras. 19-20.

[315] We note that the panel in *EC – Fasteners (China)* reached the same conclusion, for the same reasons. Panel Report, *EC – Fasteners (China)*, para. 7.133.

[316] China, first written submission, para. 313.

[317] European Union, first written submission, para. 152.

[318] We note that the panel in *EC – Fasteners (China)* reached the same conclusion, for the same reasons. Panel Report, *EC – Fasteners (China)*, para. 7.137.

E. CLAIMS REGARDING COUNCIL REGULATION 1294/2009 (THE REVIEW REGULATION) AND COUNCIL REGULATION 1472/2006 (THE DEFINITIVE REGULATION)

1. Introduction

7.113 In this section of our report, we address China's claims with respect to the conduct of and determinations in the original investigation of allegedly dumped imports of footwear from, *inter alia*, China, and with respect to the conduct of and determinations in the expiry review of the anti-dumping measure imposed following that original investigation.

7.114 In its submissions, China presented its claims and arguments with respect to the Review Regulation and various aspects of the conduct of the expiry review first, followed by its claims and arguments with respect to the Definitive Regulation and various aspects of the conduct of the original investigation separately. However, many of China's claims raise similar or identical legal issues with respect to the two measures. In addressing those claims below, we have sought to avoid repetition by grouping China's claims according to the subject and legal issues raised. Thus, our analysis will proceed as follows. After a brief description of the two measures, we will first address China's claims with respect to Article 9(5) of the Basic AD Regulation as applied in the original investigation, as well as China's claim that the European Union wrongly applied a country-wide duty. We will then describe our approach to analysing China's claim under Article 11.3 of the AD Agreement with respect to the Review Regulation. Next, we will address China's claims of violation concerning the dumping aspects of both the Review and Definitive Regulations, followed by consideration of China's claims of violation concerning the injury aspects of both Regulations. We will then address China's claims concerning procedural aspects of both the expiry review and the original investigation, before resolving those of China's consequential claims not addressed in the previous sections of our report. First, however, we briefly describe the measures at issue.

(a) Review Regulation

7.115 Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, i.e. the Review Regulation, extended the definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in *inter alia* the People's Republic of China, imposed by the Definitive Regulation. The Review Regulation sets out the background of the expiry review, and explains the basis for maintaining the definitive anti-dumping duties in the investigation at issue, including the determinations of the Commission on the likelihood of the continuation or recurrence of dumping and injury, as well as on matters such as like product and domestic industry, procedural issues, and the resolution of arguments raised by the parties. China raises a number of claims with regard to various aspects of the Review Regulation and the conduct of the expiry review.

7.116 On 30 June 2008, the Commission received a complaint from the European Confederation of the Footwear Industry ("CEC") for the initiation of an expiry review on imports of certain footwear with uppers of leather originating in *inter alia* China.[319] Evidence submitted in connection with the application was deemed sufficient and an expiry review was initiated on 3 October 2008. The period of investigation for the purpose of the determination of likelihood of continuation or recurrence of dumping ("review investigation period") was 1 July 2007 to 30 June 2008. For the assessment of a likelihood of a continuation or recurrence of injury, the period considered included the period from 1 January 2006 through the end of the review investigation period. Reference was also made to the

[319] The Commission defined the "product concerned", that is, the product imported from China that was the subject of the investigation, in recital 54 of the Review Regulation, Exhibit CHN-2. We note that, although the European Union uses the term "product concerned" for what the AD Agreement refers to as the "product under consideration", there is no dispute that these terms refer to the same concept, and we have generally used the terminology of the AD Agreement in our report.

year 2005 and to the period of investigation used in the original investigation (i.e. 1 April 2004 to 31 March 2005).

7.117 The Commission used sampling in considering dumping. A total of 58 Chinese producers made themselves known by the relevant deadline, 15 days from initiation, and were considered as cooperating parties. The sample for purpose of the dumping analysis included seven Chinese producers, one of which, Golden Step, had been granted MET in the original investigation. The Commission based normal value on information concerning an analogue third country, Brazil. The data pertaining to three cooperating Brazilian producers of the like product was used in the determination of normal value. In the case of Golden Step, the Commission found that it had not made domestic sales during the period of investigation and therefore normal value for this producer could not be established on the basis of its domestic prices. Thus, the dumping margin for Golden Step was calculated on the basis of a constructed normal value. In respect of the amount for administrative, selling and general costs ("SG&A") and for profits, the Commission relied on data used in the original investigation. It also considered SG&A and profits from Chinese exporting producers that had obtained MET in other recent investigations and which had domestic sales in the ordinary course of trade, as well as SG&A and profit found in the analogue country. Export prices were calculated under normal rules provided for in Article 2(8) of the Basic AD Regulation, i.e. on the basis of the price actually paid or payable for the product when sold for export from the exporting country to the European Union. Dumping margins for the sampled producers were based on a comparison of a weighted-average normal value by product type with a weighted-average export price by product type. Except for Golden Step, one weighted-average dumping margin was calculated for all sampled producers and applied to the non-sampled Chinese producers. The dumping margin for Golden Step was based on a comparison of its export price with the constructed normal value described above.

7.118 With respect to the consideration of injury, the Commission found that the footwear production sector in the European Union comprised around 18,000 small and medium enterprises ("SMEs") mainly situated in seven member States with a concentration in three major producing member States. In addition to the complainants, a further five EU producers made themselves known to the Commission in response to the Notice of Initiation. Out of these, three did not supply the sample information, and two producers were found to be related to Chinese producers and to be importing significant quantities of the product under consideration, including from its related exporters in China, and excluded from the notion of the domestic industry. The Commission found that the producers that supported the complaint and cooperated with the Commission represented more than 25 per cent of total production of the like product in the European Union.[320]

7.119 Given the number of producers in the domestic industry, the Commission used sampling in investigating and assessing injury. The sample for the purpose of the injury analysis included eight EU producers operating in four member States. With respect to one sampled producer that progressively discontinued production in the European Union during the period considered, the Commission found that the weight of this producer was minimal in terms of overall production as well as in relation to the rest of the sample, and thus, even if this producer were excluded, there would have been no change in the overall picture in terms of standing nor a significant impact on the situation of the sampled companies as whole, including their representativeness. Therefore, this producer was neither excluded from the definition of the EU industry nor excluded from the sample. However, only data pertaining to its activity as an EU producer were used. For the purpose of the injury analysis, the Commission examined certain injury indicators at the macroeconomic level, based

[320] The overall production of the like product in the European Union was 366 million pairs during the period of investigation.

on data for the whole of EU production,[321] and others at the microeconomic level, based on data of the sampled EU producers.[322]

7.120 Based on its analysis of the information before it, the Commission determined that there was a likelihood of continuation of dumping and injury to the domestic industry. The Commission's analysis and conclusions are described in more detail as relevant elsewhere in this report.

(b) Definitive Regulation

7.121 Council Implementing Regulation (EC) No. 1472/2006 of 5 October 2006, i.e. the Definitive Regulation, imposed a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in *inter alia* the People's Republic of China. The Definitive Regulation sets out the background of the investigation, and explains the basis for the imposition of the anti-dumping duties in the investigation at issue, including the determinations of the Commission on dumping, injury, and causal link, as well as underlying determinations such as like product and domestic industry, and the resolution of arguments raised by the parties. China raises a number of claims with regard to various aspects of the Definitive Regulation and the conduct of the original investigation.

7.122 On 30 May 2005, the Commission received a complaint from the CEC for the initiation of an anti-dumping investigation on imports of certain footwear with uppers of leather originating in, *inter alia*, China.[323] Evidence submitted in connection with the application was deemed sufficient and an investigation was initiated on 7 July 2005. The period of investigation for purposes of the dumping determination was 1 April 2004 to 31 March 2005, and the examination of injury included the period from 1 January 2001 through the end of the period of investigation.

7.123 On 23 March 2006, the Commission published Commission Regulation (EC) No. 553/2006 of 23 March 2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam ("Provisional Regulation") detailing the preliminary findings in the investigation and inviting interested parties to make comments. Provisional anti-dumping duties on imports of certain footwear with uppers of leather originating in, *inter alia*, China were imposed.

7.124 The Commission used sampling in making its dumping determinations. An estimated 163 Chinese producers made themselves known by the relevant deadline, 15 days from initiation, and were considered as cooperating parties. The sample for dumping determinations initially included the four largest Chinese producers. However, in the course of the consultation process with the interested parties, the Chinese authorities insisted that more companies be added to the list in order to increase the representative level of the sample.[324] Consequently, the sample was extended to 13 Chinese producers, representing around 25 per cent of the Chinese exports to the Community.

7.125 All sampled producers applied for MET. Of these, one producer did not submit a questionnaire reply subsequent to having had its request for MET examined and therefore its dumping margin was established on the basis of facts available, and its request for MET was annulled. With respect to the remaining twelve Chinese producers, the Commission determined that they did not meet

[321] At the macroeconomic level, the injury indicators included output, production capacity, capacity utilization, sales volume, market share, employment, productivity, growth, magnitude of dumping margins and recovery from the effects of past dumping or subsidisation.

[322] At the microeconomic level, the injury indicators included stocks, sales prices, cash flow, profitability, return on investments, ability to raise capital, investments and wages.

[323] The Commission defined the "product concerned", that is, the product imported from China that was the subject of the investigation, in recitals 7-39 of the Definitive Regulation, Exhibit CHN-3. See footnote 319 above.

[324] Provisional Regulation, Exhibit CHN-4, recital 57.

the criteria set out in Article 2(7)(c) of the Basic AD Regulation and therefore their MET requests were denied. All sampled producers also requested IT, but the Commission concluded that they had failed to demonstrate that they met all the requirements for IT as set forth in Article 9(5) of the Basic AD Regulation. Four additional Chinese producers who were not included in the sample requested the Commission to calculate individual margins for them. However, the Commission concluded that, in view of the unprecedented size of the sample, no individual examination could be granted. According to the Commission, this would have been burdensome and could have prevented the timely completion of the investigation. Following the imposition of provisional measures, one of the twelve sampled producers, Golden Step, provided evidence of a substantial change that had taken place following the original examination of its MET request. The Commission considered the changed circumstances and decided to review its original decision and to grant MET to this producer.

7.126 The Commission based its normal value determinations on an analogue third country, Brazil. The data pertaining to three cooperating Brazilian producers of the subject product was used in the determination of normal value. In the case of Golden Step, normal value could not be established on the basis of its domestic prices since it was found that this producer had not made domestic sales during the period of investigation. Thus, the dumping margin for Golden Step was calculated on the basis of a constructed normal value and the amount for SG&A and for profits was calculated on the basis of SG&A and profits from Chinese producers of products other than footwear that recently obtained MET in other investigations and which had domestic sales in the ordinary course of trade.

7.127 Export prices were calculated under normal rules provided for in Article 2(8) of the Basic AD Regulation, i.e. on the basis of the price actually paid or payable for the product when sold for export from the exporting country to the European Union. Dumping margins for the sampled producers were based on a comparison of a weighted-average normal value by product type with a weighted-average export price by product type. Except for Golden Step, one weighted-average dumping margin was calculated for all sampled producers and applied to all non-sampled Chinese producers. The dumping margin was determined on the basis of the weighted average dumping margin of the sampled producers whose information regarding export prices was considered reliable. Export price data from four of the sampled Chinese producers was deemed unreliable, as they submitted unreliable transaction listings (e.g. they included products other than the product under consideration or did not match with source documentation). The dumping margin for Golden Step was based on a comparison of its export price with the constructed normal value described above.

7.128 With respect to the determination of injury, the Commission determined that the producers that supported the complaint and cooperated with the Commission (i.e. 814 producers representing 42 per cent of total production of the subject product in the then-European Communities)[325] constituted the domestic industry. Given the number of cooperating producers, the Commission used sampling in investigating and assessing injury. A sample of ten EU producers was selected accordingly. For the purpose of the injury analysis, the Commission examined the injury indicators at the macroeconomic level (based on data for the whole EU production)[326] and at the microeconomic level (based on data of the sampled EU producers).[327]

7.129 Based on its analysis of the information before it, the Commission determined that dumped imports from China caused material injury to the domestic industry. The Commission's analysis and conclusions are described in more detail as relevant elsewhere in this report.

[325] The like product was estimated to be produced by more than 8,000 producers.

[326] At the macroeconomic level, the injury indicators included production, production capacity, capacity utilization, sales volume, market share, employment, productivity, growth, magnitude of dumping margins and recovery from the effects of past dumping of subsidisation.

[327] At the microeconomic level, the injury indicators included stocks, sales prices, cash flow, profitability, return on investments, ability to raise capital, investments and wages.

2. Claims III.17 and III.18 – Alleged violations of Articles 6.10, 6.10.2, 9.2 and 9.3 of the AD Agreement – Application of a country-wide duty on sampled Chinese exporting producers, and Article 9(5) of the Basic AD Regulation as applied

7.130 In this section of our report, we address China's claims that the European Union acted inconsistently with Articles 6.10, 6.10.2, 9.2, and 9.3 of the AD Agreement in the original investigation by not calculating individual dumping margins for, and not imposing individual rates of duty on, Chinese exporters.

(a) Arguments of the parties

(i) China

7.131 China claims that, by not calculating individual dumping margins for, and not imposing individual rates of duty on, Chinese exporters in the original investigation, the European Union violated Articles 6.10, 6.10.2, 9.2, and 9.3 of the AD Agreement, for the same reasons that China asserted that Article 9(5) of the Basic AD Regulation was inconsistent "as such" with the AD Agreement.[328]

7.132 China asserts that although 140 Chinese exporting producers applied for IT, only one of them was granted individual treatment. All other Chinese producers, including those whose requests for IT were denied, were subject to a country-wide duty, which China alleges was in some cases higher than an individually calculated dumping margin would have been. China argues that despite Article 6.10 of the AD Agreement setting the rule that individual margins of dumping shall be established to each known exporter or producer, known Chinese exporters that sought to have individual dumping margins were denied this right. China acknowledges that Chinese exporters were denied IT on the basis of failure to meet the European Union's IT criteria.[329]

7.133 In addition, China notes that the Commission used sampling in making its dumping determination, and thus was subject to Article 6.10.2 of the AD Agreement. Four companies requested individual examination pursuant to Article 17 of the Basic AD Regulation, but the European Union denied those requests. Thus, China asserts that the European Union failed to provide individual examinations as required by Article 6.10.2. China asserts that it was not the case that "the number of exporters and producers [was] so large that individual examinations would be unduly burdensome", and contends that the European Union's explanation, referring to the number of MET requests received and the size of the sample, does not justify the conclusion that it would be unduly burdensome to examine the four requests for individual examination. China contends that most of the 140 MET requests received were not even looked at. Furthermore, China asserts that the "supposed exhaustion of administrative capabilities with respect to *one* aspect of the investigation should not then entitle the European Union to claim that it had no capacity to examine *any* individual examination requests – or an extremely small fraction of MET requests – which constitute completely distinct aspects of the investigation."[330] In response to the European Union's argument that China did not provide any evidence that the Commission had the capacity to individually examine those four companies, China asserts that investigating authorities have a certain amount of discretion in allocating resources, as long as they ensure that sufficient resources are "available to complete each aspect of the investigation" as required by the AD Agreement. China asserts that it "provided a *prima facie* case that the European Union could examine four additional producers in this case", and therefore contends that the burden of proof shifted to the European Union to demonstrate otherwise.

[328] China, first written submission, paras. 1039-1040, 1051 and 1052.
[329] China, first written submission, paras. 1039 and 1041-1042.
[330] China, first written submission, paras. 1044-1047 and 1049.

China argues that given the nature of the information required, China cannot be expected to provide such evidence.[331]

7.134 With respect to its "as applied" claims under Articles 9.2 and 9.3 of the AD Agreement, China incorporates its arguments with respect to its "as such" claims. China contends that "appropriate amounts" in Article 9.2 could only refer to amounts determined on the basis of individual examination, and that since only one company was granted individual treatment, the European Union violated Article 9.2 by not collecting anti-dumping duties in the appropriate amounts from all other companies, which were instead subject to the country-wide duty rate. Furthermore, China contends that the European Union violated Article 9.3 by applying an anti-dumping duty based on the country-wide rate, and thus collecting duties in amount exceeding the individual dumping margins.[332]

(ii) European Union

7.135 With respect to China's claims relating to the denial of individual dumping margins and duties as a result of the application of Article 9(5) of the Basic AD Regulation in the original investigation, the European Union considers that it has shown that Article 9(5) is "as such" consistent with the covered agreements, and asserts that the Panel should also reject China's "as applied" claim in this respect.[333]

7.136 The European Union recalls that the MET/IT applications of all Chinese companies requesting such treatment were denied on the basis that they did not satisfy the criteria set out in Articles 2(7) and 9(5) of the Basic AD Regulation.[334] As China's claim is based on the assumption that the application of Article 9(5) of the Basic AD Regulation is inconsistent with the AD Agreement in all cases, the European Union recalls its arguments with respect to China's "as such" claims, and asserts that the Panel should also reject China's claim in the specific context of the original investigation at issue.[335]

7.137 The European Union asserts that it fails to understand China's claims under Articles 9.2 and 9.3 of the AD Agreement.[336] The European Union notes that the anti-dumping duty imposed in this case was based on the injury margin found for China, and not on the dumping margin. Thus, the European Union contends that since the country-wide dumping margin was not the basis for the imposition of anti-dumping duties, China's claims are irrelevant.[337]

7.138 With respect to China's arguments concerning the failure to provide individual examination to the four Chinese producers requesting it under Article 17(3) of the Basic AD Regulation, the European Union notes that it explained the reasons why individual examination was not possible. In this regard, the European Union contends that the "unprecedented" size of the sample, which was larger than originally proposed as a result of discussions with the Chinese authorities, imposed a heavy burden on the European Union to complete the investigation in a timely manner, and in these circumstances, individual examination of the four Chinese producers in question was not possible. The European Union maintains that China has not provided any evidence that the Commission had the capacity to individually examine these four companies without affecting the completion of the

[331] China, second written submission, paras. 1278 and 1516 (correct cross-reference is to section 4.1.2.6 and not 4.2.1.6 of China's second written submission).
[332] China, first written submission, paras. 1051-1052. See paragraphs 7.67-7.75 above.
[333] European Union, opening oral statement at the second meeting with the Panel, para. 443.
[334] European Union, first written submission, para. 846.
[335] European Union, first written submission, para. 851.
[336] European Union, first written submission, para. 852.
[337] European Union, first written submission, para. 852. The European Union argues that, in any event, the country-wide dumping margin was properly established. *Id.*

investigation in a timely manner.[338] The European Union contends that, provided the obligations of the AD Agreement are respected, investigating authorities are free to allocate resources and efforts as they see convenient, particular where the AD Agreement itself allows for the possibility of not doing something that would be burdensome and prevent the completion of the investigation in a timely fashion, as Article 6.10.2 does. Moreover, the European Union contends that it is not clear what facts support China's view that the Commission had allocated certain resources to reviewing MET/IT forms, and that it could have reallocated so as to provide the requested individual examination to the four Chinese producers in question.[339]

(b) Evaluation by the Panel

7.139 As explained in our findings above regarding China's "as such" claims, we have concluded that Article 9(5) of the Basic AD Regulation is inconsistent as such with Articles 6.10 and 9.2 of the AD Agreement.[340] China also claims that the European Union's application of the Basic AD Regulation in the original investigation violated Articles 6.10, 6.10.2, 9.2 and 9.3 of the AD Agreement.

7.140 We first note that China makes two claims, III.17 and III.18, the first of which alleges violations of Articles 6.10, 6.10.2, 9.2 and 9.3 of the AD Agreement in the application of a country-wide duty on sampled Chinese exporting producers, and the second of which alleges violations of Article 6.10, 6.10.2 and 9.2 of the AD Agreement in the application of additional conditions, that is, the Basic AD Regulation Article 9(5) conditions, to deny individual dumping margins to cooperating Chinese exporters. However, China argues both claims together, without distinction. Moreover, the European Union makes no argument with respect to China's assertion concerning the application of Article 9(5) of the Basic AD Regulation in the original investigation except to assert that since the measure is not inconsistent as such, it was not inconsistent with the AD Agreement as applied in this case. This lack of precision has made our task in evaluating these claims more difficult. Nonetheless, to the extent China's claim is simply that Article 9(5) of the Basic AD Regulation as applied in the original footwear investigation was inconsistent with the cited provisions of the AD Agreement, we recall that we have found this provision of the Basic AD Regulation to be inconsistent with Articles 6.10 and 9.2 of the AD Agreement as such. Consequently, it is difficult for us to imagine how its application in this, or any, investigation could be found to be consistent with those provisions. We therefore conclude that the application of Article 9(5) of the Basic AD Regulation in the original footwear investigation is inconsistent with Articles 6.10 and 9.2 of the AD Agreement. We recall that we applied judicial economy with respect to China's claim that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.3 of the AD Agreement as such, and we consider it appropriate to do so in the as applied context as well, and therefore make no finding on China's claim under Article 9.3.[341]

7.141 We now turn to the remaining aspect of these claims, under Article 6.10.2 of the AD Agreement, which provides:

> "In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in

[338] European Union, first written submission, paras. 572-574, and 853.

[339] European Union, first written submission, paras. 576-577. The European Union notes that China did not make additional arguments with respect to this aspect of its claim in its second written submission. European Union, second written submission, fn. 19.

[340] See paragraphs 7.87-7.92 above.

[341] We note that the panel in *EC – Fasteners (China)* reached the same conclusions for essentially the same reasons. Panel Report, *EC – Fasteners (China)*, para. 7.149. Unlike in that case, China has not made an "as applied" claim under Article 9.4 of the AD Agreement in this dispute.

> time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged."

7.142 It is not entirely clear to us whether China is asserting that the application of Article 9(5) of the Basic AD Regulation in the original footwear investigation is inconsistent with Article 6.10.2 of the AD Agreement, or whether it is asserting that the European Union violated that provision directly. To the extent China is making the former claim, we have already concluded, as discussed above, that Article 9(5) of the Basic AD Regulation is inconsistent as such with Articles 6.10 and 9.2 of the AD Agreement. We fail to see how a finding of violation of Article 6.10.2 of the AD Agreement in the application of Article 9(5) of the Basic AD Regulation would contribute to the resolution of this dispute or aid in implementation. We therefore consider it appropriate to refrain from making any findings with respect to a claim that the application of Article 9(5) of the Basic AD Regulation in the original footwear investigation is inconsistent with Article 6.10.2 of the AD Agreement, to the extent China is making such a claim.

7.143 To the extent China is asserting that the European Union violated Article 6.10.2 directly by not examining the four Chinese producers who requested individual examination under Article 17(3) of the Basic AD Regulation, we now turn to that claim. With respect to the relevant facts, we recall that some 140 Chinese exporting producers requested MET and IT. It is undisputed that the Commission did not examine all of these requests.[342] Rather, the Commission first selected a sample of Chinese exporting producers for the purposes of its examination of dumping, and only reviewed the MET/IT requests of the thirteen sampled Chinese producers.[343] The Definitive Regulation states that "[t]here is no reason why the sampling method could not equally be applied to the situation where the high number of companies involved includes a high number of companies requesting MET/IT" and that "[i]n view of the unprecedented number of MET requests received it was not possible to assess each [MET/IT] claim individually."[344] Initially, all requests were rejected, but ultimately, the Commission concluded that one Chinese company, Golden Step, met the conditions necessary to receive MET, and an individual dumping margin was determined for Golden Step.[345] With the exception of Golden Step, the Commission did not calculate individual dumping margins for Chinese exporting producers, but rather calculated a single country-wide dumping margin. However, the European Union ultimately imposed a lesser duty, rather than a duty equivalent to the dumping margin.[346]

7.144 In addition to the MET/IT requests, four Chinese exporting producers requested individual examination pursuant to Article 17(3) of the Basic AD Regulation, which is the EU legislative provision corresponding to Article 6.10.2 of the AD Agreement. The Provisional Regulation states that "no individual examination of exporting producers in the PRC … could be granted because this

[342] The European Union does not indicate specifically the number of companies submitting applications for MET/IT, but does state that 163 companies "provided the requested information within the given deadline", and that 154 of those had exports to the European Union during the relevant period. European Union, first written submission, para. 540. See also Provisional Regulation, Exhibit CHN-4, recitals 66-90, and Definitive Regulation, Exhibit CHN-3, recitals 60-69. The European Union's failure to address all the MET requests is the subject of separate claims by China which are addressed in paragraphs 7.167-7.205 of our report.

[343] Definitive Regulation, Exhibit CHN-3, recitals 70-71. One sampled Chinese exporting producer did not reply to the MET questionnaire, and thus only 12 MET claims, those of the remaining sampled Chinese exporting producers, were actually analysed by the Commission. Provisional Regulation, Exhibit CHN-4, recital 67.

[344] Definitive Regulation, Exhibit CHN-3, recitals 61 and 64.

[345] Definitive Regulation, Exhibit CHN-3, recital 72.

[346] Definitive Regulation, Exhibit CHN-3, recital 311.

would have been unduly burdensome and would have prevented completion of the investigation in good time."[347]

7.145 China asserts that the number of MET requests is not relevant with respect to the burden of examining the four requests for individual examination, and that the exhaustion of its administrative capabilities with respect to one aspect of the investigation did not entitle the European Union to claim that it had no capacity to examine any individual examination requests. China asserts that the European Union should have considered the administrative feasibility of reviewing the individual examination requests, and had it done so would almost surely have reviewed all of them in light of the small number received.[348]

7.146 We are somewhat mystified by China's arguments in this regard. The Provisional and Definitive Regulations are clear that the Commission did, in fact, consider the four individual examination requests received, and concluded that individual examination could not be granted because to do so would have been unduly burdensome and would have prevented completion of the investigation in good time. These are precisely the criteria set forth in Article 6.10.2 which an investigating authority may cite in order to justify declining to grant individual examination requests. To the extent China is arguing that it would not, in fact, have been unduly burdensome, and that the Commission could, and should, have allocated its available resources so as to enable it to undertake the individual examinations requested, we reject China's argument. Even assuming China is correct that the Commission had sufficient resources, and/or could have allocated its available resources differently, we consider that it would be entirely inappropriate for us to interfere in this manner in an investigating authority's conduct of anti-dumping investigations.

7.147 Based on the foregoing, we conclude that the application of Article 9(5) of the Basic AD Regulation in the original footwear investigation was inconsistent with the European Union's obligations under Articles 6.10 and 9.2 of the AD Agreement. We apply judicial economy with respect to China's claim under Article 9.3 of the AD Agreement and therefore make no finding. Finally, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 6.10.2 of the AD Agreement.

3. Claim II.11 – Alleged violation of Article 11.3 of the AD Agreement

7.148 In this section of our report, we address China's claim that the European Union's determinations of likelihood of continuation or recurrence of dumping and injury in the expiry review were inconsistent with Article 11.3 of the AD Agreement, and the European Union's assertion that China's claim of violation of Article 11.3 was not properly presented to the Panel.

(a) Arguments of the parties

(i) China

7.149 China argues that the European Union's finding of likelihood of continuation of dumping and injury is based on a finding of dumping and injury during the review investigation period, and that this finding was inconsistent with Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the AD Agreement. China argues that, as a consequence, the European Union's finding of likelihood of continuation of dumping and injury is inconsistent with Article 11.3. China asserts that Article 11.3

[347] Provisional Regulation, Exhibit CHN-4, recital 64. The Definitive Regulation states that "submissions of non-sampled exporting producers were not examined as, in accordance with Article 17(3) of the basic Regulation, this would have been unduly burdensome and would have prevented completion of the investigation in good time." Definitive Regulation, Exhibit CHN-3, recital 65.

[348] China, first written submission, paras. 1046-1048.

requires "reasoned and adequate conclusions" based on a "rigorous examination", and supported by "positive evidence" and "sufficient factual basis".[349] China maintains that the legal basis of its claim is Article 11.3, and that the Panel should reject the European Union's characterization of this claim as purely consequential.[350]

(ii) European Union

7.150 The European Union contends that China's claim under Article 11.3 of the AD Agreement is "purely" a consequential claim, resting entirely on the asserted inconsistencies with other provisions of the AD Agreement.[351] The European Union argues that China only invokes a consequential violation of Article 11.3 after its claims of independent violation of Articles 2 and 3 of the AD Agreement with respect to the expiry review, and that the only evidence and argument presented by China in support of its claim under Article 11.3 is a reference back to its arguments with respect to its claims under Articles 2 and 3 of the AD Agreement.[352] The European Union reiterates that the Review Regulation is a regulation adopted pursuant to Article 11.2 of the AD Agreement, and as such is subject to the disciplines, primarily, of Article 11.3, and not Article 3.[353]

7.151 The European Union argues that by presenting its claim in such a manner, China "turns Article 11.3 on its head". In the European Union's view, this manner of presenting China's claims reduces Article 11.3 to a nullity, since, in the context of injury, it replaces the substantive disciplines of Article 11.3 with the disciplines of Article 3 of the AD Agreement. The European Union contends that "China effectively forces the Panel to disregard Article 11.3 of the Anti-Dumping Agreement in the consideration of all the injury-related determinations in the [Review] Regulation," and considers this "erroneous way" of raising claims to be "completely unsatisfactory". The European Union concludes that the Panel should reject China's claim of a consequential breach of Article 11.3.[354]

7.152 For the European Union, Article 11.3 is the starting point of the legal analysis of expiry reviews, and not a mere consequence of such analysis under other provisions of the AD Agreement.[355] Thus, European Union rejects the view that a violation of Article 11.3 of the AD Agreement may be found as an automatic consequence of a violation of Article 3 of the AD Agreement.[356] The European Union contends that China's view is that, in order to comply with Article 11.3, a Member must comply with Article 3, and/or Article 2. However, in the European Union's view, China's claim is based on an erroneous legal presumption that a violation of Article 11.3 of the AD Agreement is an automatic consequence of a violation of Article 3 of the AD Agreement.[357] For the European Union, China's position creates confusion by making little distinction between the legal basis of its challenge to the Review Regulation and to the Definitive Regulation.[358]

[349] China, first written submission, paras. 811-813.
[350] China, second written submission, para. 1207.
[351] European Union, first written submission, para. 495.
[352] European Union, first written submission, paras. 240-244, and 495-496.
[353] European Union, first written submission, para. 240.
[354] European Union, first written submission, paras. 242, 244 and 497-499.
[355] European Union, first written submission, para. 244.
[356] European Union, first written submission, paras. 495-496; answer to Panel question 52, para. 153; second written submission, para. 91; answer to Panel question 110, paras. 27, and 29-30. The European Union takes the same view with respect to Article 2 of the AD Agreement, arguing that a violation of Article 11.3 cannot be found merely as an automatic consequence of a violation of Article 2.
[357] European Union, answer to Panel question 52, paras. 163-164.
[358] European Union, opening oral statement at the first meeting with the Panel, para. 16.

(b) Evaluation by the Panel

7.153 We recall that the measure at issue in this claim is the Review Regulation, which was the result of an expiry review conducted by the European Union under its domestic legislation implementing Article 11 of the AD Agreement. There is no dispute between the parties that Article 11.3 of the AD Agreement is specifically concerned with such reviews. Given that China's claim pertains to alleged violations in the European Union's analysis and determination in the expiry review, as notified in the Review Regulation, we consider it appropriate to start our analysis by considering the most directly relevant provision of the AD Agreement, Article 11.3, which provides:

> "Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review."
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> [22] When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.154 In its first written submission, China's argument in support of its claim of violation of Article 11.3 is set out in its entirety in the following three paragraphs, following a quotation of the text of the provision:

> "China submits that sections 5.2, 5.3 and 5.4 of this submission demonstrate the violations of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the *Anti-Dumping Agreement* by the European Union. Based on these violations, China considers that as a consequence, the extension of the measures in this case is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.
>
> The AB in *US-Corrosion-Resistant Steel Sunset Review* held that the use of the terms "determine" and "review" in the text of Article 11.3 of the *Anti-Dumping Agreement* requires a "*reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination*" by an investigating authority. Moreover, an expiry review determination under Article 11.3 must be made on the basis of a "rigorous examination" leading to "reasoned and adequate conclusions," and be supported by "positive evidence" and a "sufficient factual basis." Furthermore, in that case the AB explained that, "*should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4*." The AB added that, "*[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement*." In such circumstances, "*the likelihood [-of-dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3*."

> As elaborated in the context of Claims II.1-II.5 and II.13, the European Union's finding of likelihood of continuation of dumping and injury in the absence of the measure within the meaning of Article 11.3 is based on a finding of dumping and injury during the RIP. The latter assessment as demonstrated by China is based on a violation of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the *Anti-Dumping Agreement*. Therefore, it follows that the extension of the measure in this case violates Article 11.3."[359]

7.155 We consider that China's claim of violation of Article 11.3 "as a consequence" of the asserted violations of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) does suggest that the substantive requirements of Article 11.3 are not at issue, and it is clear that China has made no independent arguments in support of its claim of violation of Article 11.3.[360] Nonetheless, we do not agree with the European Union that the formulation of China's Article 11.3 claim in this manner requires us to reject it.

7.156 It is clear that the expiry review, and the analysis and determination of likelihood of continuation or recurrence of dumping and injury, are at the core of China's claim. Moreover, China specifically refers to Appellate Body decisions which establish that a determination under Article 11.3 must be made on the basis of a "rigorous examination" leading to "reasoned and adequate conclusions," and be supported by "positive evidence" and a "sufficient factual basis." While China's claim under Article 11.3 is premised on a particular view of the relationship between Articles 3 and 11.3 of the AD Agreement, we do not consider that to justify concluding at the outset that its Article 11.3 claim should be rejected as not having been properly presented. Rather, we consider it more appropriate to undertake a substantive consideration of China's claim. Therefore, despite the manner in which China has presented its claim of violation of Article 11.3 of the AD Agreement, as a consequence of alleged violations of other provisions of the AD Agreement, we consider that China has presented a claim of violation of Article 11.3, and we will address that claim below.

7.157 Before doing so, we note that Article 11.3 does not prescribe any specific methodology for an investigating authority to use or any particular factors that investigating authorities should consider in making a determination of likelihood of continuation or recurrence of dumping and injury in an expiry review.[361] Indeed, China does not argue otherwise. It is also clear that there is no obligation to calculate or rely on dumping margins in making a determination of likelihood of continuation or recurrence of dumping.[362] And, there is similarly no obligation to make a determination of injury in making a determination of likelihood of continuation or recurrence of injury.[363] Thus, it is clear to us that Articles 2 and 3 of the AD Agreement are not directly applicable to a determination under Article 11.3, and thus to a panel's consideration of an alleged violation of Article 11.3. Moreover, our view in this regard is not changed by the fact that an investigating authority chooses to make a determination of dumping or injury in the context of a particular expiry review. Thus, we will review the European Union's determinations in the expiry review at issue here in order to make a finding as

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[359] China, first written submission, paras. 811-813 (footnotes omitted, emphasis in original).

[360] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[361] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, paras. 124 and 149; and Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*"), WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, 3523, para. 105.

[362] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[363] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107.

to whether China has demonstrated that they are inconsistent with Article 11.3 of the AD Agreement, and not in order to make findings as to whether those determinations are inconsistent with Articles 2 and/or 3 *per se*.

7.158 However, this does not mean that the substantive provisions of Articles 2 and 3 of the AD Agreement are not relevant to our consideration of whether there has been a violation of Article 11.3. We recall that a determination under Article 11.3 must be based on positive evidence, have a sufficient factual basis, involve a rigorous examination, and be supported by reasoned and adequate conclusions. In our view, the substantive provisions of Articles 2 and 3 may well be relevant to an analysis under Article 11.3, in order for an investigating authority to be able to make "reasoned conclusions" regarding of likelihood of continuation or recurrence of dumping and injury. We will address this question further in the context of our consideration of China's claims concerning the dumping and injury aspects of the expiry review.[364]

4. Claims II.1, II.13, III.1, III.2, III.3, III.4, III.15 and III.20 – Dumping

7.159 In this section of our report, we address China's claims concerning the dumping aspects of both the Review Regulation and the Definitive Regulation.

(a) Consideration of alleged violations of Article 2 of the AD Agreement in the context of the Review Regulation

7.160 Before turning to China's specific dumping-related claims, we describe our approach to consideration of China's claims of violations of Article 2 of the AD Agreement with respect to the Review Regulation and Article 11.3 in the context of the dumping aspects of the expiry review.

(i) Arguments of the parties

a. China

7.161 China asserts that the European Union relied upon dumping margins calculated for the review investigation period in its determination of likelihood of continuation or recurrence of dumping, and alleges that those margins were calculated in a manner inconsistent with Article 2 of the AD Agreement. China asserts that dumping margins relied upon in an expiry review must be consistent with the provisions of Article 2 of the AD Agreement, relying in this regard on previous panel and Appellate Body rulings. China claims that the European Union violated Article 11.3 of the AD Agreement, since its determination of likelihood of continuation or recurrence of dumping is based on a calculation of dumping margins inconsistent with Article 2 of the AD Agreement. Therefore, China argues that the Review Regulation in this respect does not contain "reasoned and adequate conclusions" based on "positive evidence".[365]

b. European Union

7.162 The European Union does not dispute China's assertion that dumping margins were calculated for purposes of the expiry review, nor does it disagree with China's view that a determination of likelihood of continuation or recurrence of dumping which is based on a dumping margin calculated inconsistently with Article 2 of the AD Agreement may be found to be inconsistent with

[364] See paragraphs 7.163-7.166, 7.266, 7.287, 7.329-7.340, 7.391, 7.432 and 7.517 below.
[365] China, second written submission, paras. 1212-1213.

Article 11.3.[366] However, the European Union does dispute China's allegations that the calculation of the dumping margins in the expiry review was in violation of Article 2 of the AD Agreement.[367]

(ii) Evaluation by the Panel

7.163 As noted above, Article 11.3 of the AD Agreement "does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review," and in particular, does not require an investigating authority to calculate or rely on dumping margins in making a determination of likelihood of continuation or recurrence of dumping.[368] Nevertheless, investigating authorities do not have unrestricted discretion in the determination of a likelihood of continuation or recurrence of dumping. With respect to the Article 11.3 determination of likelihood of continuation or recurrence of dumping, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* observed:

> "The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible. …
>
> Thus, even though the rules applicable to sunset reviews may not be identical in all respects to those applicable to original investigations, it is clear that the drafters of the *Anti-Dumping Agreement* intended a sunset review to include both full opportunity for all interested parties to defend their interests, and the right to receive notice of the process and reasons for the determination."[369]

In that case, the Appellate Body was considering an administrative review under U.S. law in which the investigating authority had relied on previously calculated dumping margins in concluding that there was a likelihood of continuation or recurrence of dumping. The Appellate Body made clear its view that there is:

> "no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. **However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4.** We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4,

[366] European Union, answer to Panel question 52, paras. 157-159.
[367] European Union, first written submission, paras. 223 and 238.
[368] Appellate Body Report, *US – Continued Zeroing*, fn. 418; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 149.
[369] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111-112. See also Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 180.

> this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*."[370]

The Appellate Body went on to state:

> "[i]f a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the **consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination** in the CRS sunset review. ... If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 ... then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3." [371]

7.164 Subsequently, in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Appellate Body explained that:

> "[T]he Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* does not stand for the proposition that a WTO-inconsistent methodology used for the calculation of a dumping margin will, in and of itself, taint a sunset review determination under Article 11.3. The only way the use of such a methodology would render a sunset review determination inconsistent with Article 11.3 is if the investigating authority *relied upon* that margin of dumping to support its likelihood-of-dumping or likelihood of injury determination."[372]

Thus, it is clear that if an investigating authority, in an expiry review, relies upon a dumping margin calculated in a WTO-inconsistent manner in determining that dumping is likely to continue or recur, that determination will be inconsistent with Article 11.3.[373]

7.165 There is no dispute in this case that the Commission calculated dumping margins in the expiry review, and relied on those margins in making its determination of likelihood of continuation or recurrence of dumping. Should we find that the Commission acted inconsistently with Article 2 in calculating dumping margins in the expiry review, and relied on such margins in making its determination of likelihood of continuation or recurrence of dumping, we will conclude that China has demonstrated a violation of Article 11.3 of the AD in that respect. However, should we find that the Commission acted inconsistently with Article 2 in calculating dumping margins in the original investigation, we will find a violation of the provision of Article 2 in question.

7.166 Therefore, we now turn to consideration of China's claims under Article 2 of the AD Agreement with respect to the dumping aspects of the expiry review and the original investigation.

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[370] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127 (emphasis added).

[371] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 130 (emphasis added). See also Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities* ("*US – Zeroing (EC) (Article 21.5 – EC)*"), WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, para. 390.

[372] Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico ("US – Anti-Dumping Measures on Oil Country Tubular Goods")*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127, para. 181 (emphasis in original).

[373] While the reports on which this view is based concerned dumping margins calculated inconsistently with Article 2.4 of the AD Agreement, we see nothing in the reasoning underlying this view that would limit it to only inconsistencies with that provision, and neither party suggests that it should be so limited.

(b) Claims III.1 and III.20 – Alleged violations of Articles 2.4, 6.10.2, and 17.6(i) of the AD Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, and paragraphs 151(e)-(f) of China's Working Party Report – Failure to examine MET applications in the original investigation

(i) Arguments of the parties

a. China

7.167 China claims that the European Union violated Articles 2.4, 6.10.2, and 17.6(i) of the AD Agreement, Paragraph 15(a)(ii) of China's Accession Protocol and Paragraphs 151(e) and (f) of China's Accession Working Party Report by failing to examine the applications for market economy treatment ("MET") of non-sampled cooperating Chinese exporting producers in the original investigation.[374] China states that its claims of violation under each of these provisions are independent of one another.[375]

7.168 China asserts that, at the time of the original investigation, the Commission's practice with respect to MET applications was to individually examine each application, and provide an explanation to each applicant regarding the decision to grant or deny MET status, even in cases with a large number of applicants where sampling was used in making the dumping determination.[376] In the original investigation at issue here, however, China asserts that, despite having solicited MET applications from all Chinese exporting producers, and having timely received over 140 such applications, the Commission only examined the MET applications of companies selected for the sample of Chinese exporting producers, and never examined the MET applications submitted by non-sampled cooperating Chinese exporting producers.[377] China notes that only the results with respect to the MET applications of the sampled Chinese exporters were published in the Provisional Regulation, and asserts that non-sampled companies objected to not receiving any disclosure regarding the results of their MET applications.[378]

7.169 China notes that pursuant to Paragraph 15(a)(ii) of China's Accession Protocol, an importing WTO Member may only use a methodology that is not based on a strict comparison with Chinese prices or costs if producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product.[379] China asserts that Paragraph 15(a)(ii), requires individual examination of all MET applications that have been submitted before resorting to an alternative methodology that is not based on a strict comparison with domestic prices or costs in China, and that by failing to comply with this requirement, the European Union violated Paragraph 15(a)(ii).[380]

[374] China, first written submission, paras. 839 and 851.

[375] China, answer to Panel question 87, para. 510.

[376] China, first written submission, para. 840. China cites a case before the European Court of First Instance (case T-255/01), and three previous anti-dumping investigations by the Commission (Council Regulation Nos. 1487/2005, 1212/2005, and 1095/2005) to demonstrate EU practice in this regard. China describes the so-called "desk check analysis" as including an individual evaluation of the merits of each application, but with no on-the-spot verification, disclosure of the acceptance or rejection of the application, and an opportunity to comment. China, first written submission, para. 840.

[377] China, first written submission, paras. 839, 841 and 844.

[378] China, first written submission, paras. 846-847, and 849, citing Definitive Regulation, Exhibit CHN-3, recital 61-69.

[379] China, first written submission, paras. 854-855.

[380] China, first written submission, para. 857; answer to Panel question 89, para. 526; second written submission, para. 1243.

7.170 In addition, China asserts that Paragraphs 151(e) and (f) of China's Accession Working Party Report require importing WTO Members to "provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case" and to "provide a sufficiently detailed reasoning of its preliminary and final determinations in a particular case."[381] China asserts that the European Union violated these obligations by not disclosing the examination of MET applications of non-sampled cooperation Chinese exporting producers.[382] China contends that the use of the word "comply" in Paragraph 151 shows that this Paragraph is binding on WTO Members.[383] China maintains that while Paragraph 342 of China's Accession Working Party Report lists only those paragraphs of that Report containing commitments given by China, this does not mean that other paragraphs of that Report do not establish binding obligations on other WTO Members.[384] In China's view, this is confirmed by the fact that Paragraph 14 of China's Accession Working Party Report refers to "discussions and commitments … contained in paragraphs 15-342 below and in the Draft Protocol of Accession ('Draft Protocol'), including the annexes."[385] Finally, China argues that China's Accession Working Party Report also contains other obligations on WTO Members, such as the application of product-specific safeguards in Paragraphs 246-250, which are not included in paragraph 342.[386] China notes that Paragraph 246 explicitly provides that "WTO Members would comply" with the provisions of China's Accession Protocol and "the following", which it contends refers to provisions of China's Accession Working Party Report, confirming that WTO Members accepted commitments under both China's Accession Protocol and China's Accession Working Party Report.[387]

7.171 China notes that Paragraph 151(e) of China's Accession Working Party Report and Article 6.2 of the AD Agreement contain similar language, in particular the reference to "a full opportunity for the defence of their interests". In response to a question posed by the Panel, China submits that the former should be seen as an application of the fundamental due process right contained in the latter in the determination under Paragraph 15(a)(ii) of China's Accession Protocol.[388] China further contends that in Paragraph 151(f) of China's Accession Working Party Report, WTO Members provided rights for China additional to those in Article 12.2.2 and 6.9 of the AD Agreement.[389]

7.172 China argues that, notwithstanding the number of MET applications and the fact that the European Union decided to use sampling for purposes of its dumping determination, sampling cannot be used in determining whether the producers under investigation operate under market economy conditions.[390] Moreover, China argues that even if sampling could be used, the sample used by the Commission was not selected for purposes of the MET determination, but for purposes of the dumping determination. According to China, the criteria used for selecting the sample for the determination of dumping do not guarantee that the sample selected is representative for purposes of

[381] China, first written submission, para. 858, citing Paragraph 151(e) and (f) of China's Accession Working Party Report.
[382] China, first written submission, paras. 859 and 861-862.
[383] China, second written submission, para. 1255.
[384] China, answer to Panel question 86, paras. 503-505; second written submission, para. 1254.
[385] China, answer to Panel question 86, para. 506. See also second written submission, paras. 1256-1257.
[386] China, answer to Panel question 86, para. 508.
[387] China, answer to Panel question 86, para. 509; second written submission, paras. 1258-1259.
[388] China, answer to Panel question 88, paras. 516-517; second written submission, paras. 1260-1261. See also first written submission, para. 860, noting the similarities between Paragraph 151(e) of China's Accession Working Party Report and Article 6.2 of the AD Agreement.
[389] China, answer to Panel question 88, para. 518.
[390] China, first written submission, para. 867. See also opening oral statement at the second meeting with the Panel, para. 25.

the MET determination.[391] China observes that no specific sampling procedure was foreseen by the Commission for purposes of the examination of MET applications.[392]

7.173 China also claims that the European Union violated the fair comparison requirement of Article 2.4 of the AD Agreement by requiring Chinese producers to complete their MET applications within a short period of time, and then not examining the information submitted.[393] Finally, referring to its arguments with respect to alleged violations of Article 6.10.2 of the AD Agreement in the European Union's failure to individually examine the four Chinese companies that requested such examination,[394] China claims that since the European Union did not examine, and thus did not grant, the requests for MET of those four companies, they were by default excluded from individual examination, required by Article 6.10.2, insofar as the European Union requires MET to be granted in order to qualify for individual treatment.[395]

b. European Union

7.174 The European Union argues that the examination of MET applications is not required with respect to exporting producers not included in the sample selected for the dumping determination and which do not qualify for individual examination.[396] The European Union submits that the selection of the sample for the dumping determination was consistent with Article 6.10 and 6.10.1 of the AD Agreement.[397] The European Union contends that the MET determination takes place in the context of the determination of dumping, and in cases where sampling is used and individual examination is not possible, the MET determination is appropriately undertaken based on examining the sampled companies.[398]

7.175 The European Union contends that Paragraph 15(a)(ii) of China's Accession Protocol does not address the issue of sampling, and does not interfere with the possibility of using sampling pursuant to Articles 6.10 and 9.4 of the AD Agreement.[399] Finally, despite China's assertion that its claims are independent of one another, the European Union considers that the Panel need not examine China's claims under the AD Agreement if the Panel finds that Paragraph 15(a)(ii) does not require investigating authorities to examine each of the MET applications individually.[400]

7.176 The European Union asserts that Paragraph 151 of the Working Party report does not establish any commitments on the part of WTO Members. The European Union notes that China's Accession Protocol is an integral part of the WTO Agreements, and that paragraph 342 of China's Accession Working Party Report incorporates China's commitments in China's Accession Working Party Report into China's Accession Protocol. However, the European Union points out, Paragraph 151 of China's Accession Working Party Report is not listed in Paragraph 342 of China's

[391] China, second written submission, paras. 1241-1242.
[392] China, first written submission, para. 872.
[393] China, first written submission, para. 875. See also second written submission, paras. 1273-1274.
[394] See paragraphs 7.131-7.134 above.
[395] China, first written submission, paras. 876-877.
[396] European Union, first written submission, para. 551; second written submission, para. 211.
[397] European Union, first written submission, para. 552. The European Union asserts that China does not contest that the use of sampling in the original investigation was warranted. *Id.* China asserts that while it made no claim in this regard, this does not mean that it agrees sampling was warranted. China, second written submission, para. 1228.
[398] European Union, first written submission, para. 554. The European Union notes in this regard that the Chinese authorities agreed to the sample selected.
[399] European Union, first written submission, para. 558.
[400] European Union, second written submission, para. 214.

Accession Working Party Report. Thus, the European Union maintains that Paragraph 151 cannot be interpreted to create obligations on any WTO Member.[401]

7.177 The European Union argues that Article 2.4 of the AD Agreement does not regulate sampling, or how normal value should be established in cases of imports from China. The European Union asserts that China has not presented a *prima facie* case with respect to this provision. Finally, the European Union understands China to make two arguments with respect to Article 6.10.2 of the AD Agreement. The first argument relates to the failure to individually examine the four companies that requested individual examination under Article 17(3) of the Basic AD Regulation. The European Union argues that both the Provisional Regulation and the Definitive Regulation explained the reasons why it was not possible to grant individual examination to these four companies. The second argument relates to the failure to examine questionnaires from and grant MET to non-sampled Chinese companies, and asserts that these companies were by default excluded from individual examination, required by Article 6.10.2. The European Union states that it fails to understand China's claim, but nevertheless argues that it is incorrect to consider that the lack of examination of the MET applications by default excluded those four companies from individual examination.[402]

(ii) Evaluation by the Panel

7.178 Before addressing China's claims, we consider it useful to set out our understanding of the relevant facts. Pursuant to Article 2(7)(b) of the Basic AD Regulation, the normal value used by the Commission in anti-dumping investigations concerning imports from China is determined on the same basis as for producers in market economies, if it is shown, on the basis of properly substantiated claims by one or more Chinese exporting producers, "that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product". The Basic AD Regulation sets out the criteria that must be satisfied for MET to be granted. The Notice of Initiation in the original investigation stated that Chinese exporting producers seeking to be granted MET should submit "duly substantiated claims" with respect to the MET criteria within 15 days of the date of publication of the Notice.[403] The Notice also indicated the likelihood that sampling might be used in the determination of dumping, and requested Chinese exporters/producers to make themselves known and provide certain information to the Commission within 15 days of the publication of the Notice.[404] Over 140 companies submitted applications for MET.[405] In the Provisional Regulation, the Commission set forth its examination with respect to the MET applications of the 12 Chinese exporters selected for the sample, and its conclusion that none of the companies satisfied the conditions for MET.[406] Certain interested parties argued to the Commission that the Commission was obliged to make individual determinations with respect to MET applications, regardless of whether the particular exporter was selected for the sample or not. The Commission rejected these arguments. The Commission concluded that the provision of the Basic AD Regulation on sampling encompassed the situation of companies claiming MET. The Commission noted that in any case of sampling, whether concerning market economy countries or others, exporters are by the nature of the sampling exercise denied individual assessment and the conclusions reached for the sample are extended to

[401] European Union, first written submission, para. 560; second written submission, para. 213.

[402] European Union, first written submission, paras. 567, 569, 570-572 and 579.

[403] Notice of initiation of an anti-dumping proceeding concerning imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam ("Notice of Initiation"), OJ C 166, 7 July 2005, Exhibit CHN-6, recitals 5.1(e) and 6(d).

[404] Notice of Initiation, Exhibit CHN-6, recitals 5.1(a)(i) and 6(b)(i).

[405] China, first written submission, para. 844. The European Union does not indicate specifically the number of companies submitting applications for MET, but does state that 163 companies "provided the requested information within the given deadline", and that 154 of those had exports to the European Union during the relevant period. These companies were considered for the sample. European Union, first written submission, para. 540.

[406] Provisional Regulation, Exhibit CHN-4, recitals 66-90.

them. The Commission considered that there was no reason why sampling could not equally be applied to the situation where a high number of companies requested MET. The Commission stated that the number of requests for MET in this case was so substantial that an individual examination of the requests, as had sometimes been done in other cases, was administratively impossible. The Commission stated that in those other cases, an individual examination of the MET requests was found to be still feasible, while this was not the case in this investigation. The Commission also stated that subsequent submissions from non-sampled exporting producers were not examined as this would have been unduly burdensome and would have prevented completion of the investigation in good time.[407]

7.179 China asserts independent violations of Articles 2.4, 6.10.2, and 17.6(i) of the AD Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, and Paragraphs 151(e) and (f) of China's Working Party Report against the European Union.[408] We will first address China's claim under China's Accession Working Party Report.

7.180 China claims that Paragraphs 151(e) and (f) of China's Accession Working Party Report establish that the European Union (and other WTO Members) have committed to "provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case" and to "provide a sufficiently detailed reasoning of its preliminary and final determinations in a particular case."[409] China asserts that the European Union failed to comply with these obligations in the original investigation by not disclosing the examination of MET applications of non-sampled cooperation Chinese exporting producers.[410] The European Union, on the other hand, contends that Paragraph 151 of China's Accession Working Party Report does not establish any legal obligations for WTO Members, and that China's claim is therefore without merit.[411]

7.181 We agree with the European Union. Section 1(2) of China's Accession Protocol provides, in relevant part, "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of China's Accession Working Party Report, shall be an integral part of the WTO Agreement." Section 1(2) of China's Accession Protocol, which is the only incorporation of commitments from China's Accession Working Party Report into the WTO Agreement, is clear on its face, and cannot be understood to incorporate commitments from paragraphs not listed in Paragraph 342. Paragraph 151 of China's Accession Working Party Report is not among the paragraphs listed in Paragraph 342 of China's Accession Working Party Report. It is thus clear Paragraph 151 of China's Accession Working Party Report is not a "commitment[] referred to in Paragraph 342", and consequently, is not part of the WTO Agreement.[412] Paragraph 151 of China's Accession Working Party Report therefore

[407] Definitive Regulation, Exhibit CHN-3, recitals 60-69.

[408] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[409] China, first written submission, para. 858, citing Paragraph 151(e) and (f) of China's Accession Working Party Report.

[410] China, first written submission, paras. 859 and 861-862.

[411] European Union, first written submission, para. 560.

[412] We note that the Panel in *China – Auto Parts* found that "[t]he Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol. In turn, paragraph 342 of China's Working Party Report incorporates China's commitments under its Working Party Report, including paragraph 93, into the Accession Protocol. Therefore, China's commitment in paragraph 93 of China's Accession Working Party Report is also an integral part of the WTO Agreement." Panel Reports, *China – Measures Affecting Imports of Automobile Parts* ("*China – Auto Parts*"), WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, as upheld (WT/DS339/R) and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, para. 7.740.

cannot be understood to impose a legally binding obligation on any WTO Member, and cannot be the basis of a claim in WTO dispute settlement.

7.182 China, however, argues that the word "comply" in Paragraph 151 demonstrates that it is a legally binding provision, and that since Paragraph 342 only lists the commitments "given by China", a commitment given by other WTO Members would naturally not be included in Paragraph 342. China finds support for its assertion that a commitment given by other WTO Members may be included in a paragraph of China's Accession Working Party Report, other than Paragraph 342, such as Paragraph 151, in the fact that Paragraph 14 of China's Accession Working Party Report refers to the discussions and commitments contained in Paragraphs 15 to 342.

7.183 We disagree. Even if Paragraph 14 were understood to mean that Paragraphs 15 to 342 all refer to "commitments", Paragraph 1(2) of China's Accession Protocol refers to Paragraph 342 specifically, and exclusively, in establishing which of the paragraphs of China's Accession Working Party Report contain commitments that are to be incorporated in the Protocol, and consequently become legally binding. Paragraph 14 of China's Accession Working Party Report, in itself, cannot make commitments expressed in China's Accession Working Party Report legally binding.

7.184 China also argues that commitments given by other Members concerning product-specific safeguards in Paragraphs 246-250 of China's Accession Working Party Report are legally binding, despite not being listed in Paragraph 342.

7.185 We recall that binding obligations on "transitional product-specific safeguard mechanism" are set out in Section 16 of China's Accession Protocol.[413] It is clear to us that the legally binding nature of WTO Members' commitments in this regard arise from their inclusion in China's Accession Protocol, which is an integral part of the WTO Agreement, and not from China's Accession Working Party Report. Thus, we fail to see how China's argument supports its position. There is nothing in China's Accession Protocol that sets out "commitments" equivalent to the matters addressed in Paragraph 151(e) and (f) of China's Accession Working Party Report.

7.186 China further submits that Paragraph 151(e) of China's Accession Working Party Report should be seen as an "application" of the fundamental due process right set out in Article 6.2 of the AD Agreement to the determination under Paragraph 15(a)(ii) of China's Accession Protocol. China notes that Article 6.2 of the AD Agreement and Paragraph 151(e) of China's Accession Working Party Report both refer to "a full opportunity for the defence of their interests".[414] China asserts that "the reference to Paragraph 151(e) of China's Accession Working Party Report impliedly also constitutes a reference to the principles upon which Article 6.2 is based"[415] and contends that although Paragraph 151(e) does not necessarily provide for an "additional right" beyond Article 6.2, it provides for "*the same right*, though located in another place."[416] China further argues that in Paragraph 151(f) of China's Accession Working Party Report, WTO Members granted rights to China in addition to those set out in Article 12.2.2 of the AD Agreement. In this regard, China argues that Article 12.2.2 of the AD Agreement is more limited than Paragraph 151(f), as it refers to "relevant" information,

[413] In *US – Tyres (China)*, a case involving a product-specific safeguard, the Panel concentrated its examination on Section 16 of China's Accession Protocol, although it referred to China's Accession Working Party Report as context for understanding China's Accession Protocol. See Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* ("*US – Tyres (China)*"), WT/DS399/R, circulated to WTO Members 13 December 2010 [appeal/adoption pending], para. 7.141.

[414] China, answer to Panel question 88, paras. 516-517; second written submission, paras. 1260-1261. See also first written submission, para. 860, noting the similarities between Paragraph 151(e) China's Accession Working Party Report and Article 6.2 of the AD Agreement.

[415] China, answer to Panel question 88, para. 517; second written submission, paras. 1260-1261.

[416] China, opening oral statement at the second meeting with the Panel, para. 28.

while Paragraph 151(f) refers to "detailed reasoning", and a public notice under Article 12.2.2 will not contain confidential information, which may not always constitute the "sufficient detailed reasoning" called for by Paragraph 151(f). China also asserts that the "sufficient detailed reasoning" with respect to the "preliminary and final determinations" called for by in Paragraph 151(f) establishes more extensive disclosure requirements than those established by Article 6.9 of the AD Agreement, which refers only to "essential facts under consideration" with respect to "the decision whether to apply definitive measures".[417] Finally, China argues that the particular facts of this case warranted a more detailed disclosure than the General Disclosure Document provided by the Commission, which did not contain information on why MET applications were not examined on their merits.[418] The European Union contends that China's arguments with respect to Articles 6.2, 6.9 and 12.2.2 of the AD Agreement miss the point, given that China has made no claims under those Articles with respect to the examination of the MET applications, relying instead on Paragraphs 151(e) and (f) of China's Accession Working Party Report.[419] Moreover, the European Union asserts that non-sampled cooperating Chinese exporting producers were provided a full opportunity to defend their interests, as they were informed of the Commission's reasoning in making its determinations.[420]

7.187 It is clear that China has not made any claims of violation of Articles 6.2, 6.9 and 12.2.2 of the AD Agreement with respect to the examination of the MET applications, and China does not contend otherwise. We have concluded that Paragraphs 151 (e) and (f) of China's Accession Working Party Report do not establish any legally binding commitments on WTO Members. Thus, there is no basis for China's assertion that WTO Members granted China rights under Paragraph 151 (e) and (f) either the same as, or broader than, those set out in Articles 6.2, 6.9, and 12.2.2 of the AD Agreement.[421]

7.188 With respect to Article 2.4 of the AD Agreement, China recalls that Article 2.4 requires that "a fair comparison shall be made between the export price and the normal value."[422] China asserts that the European Union violated this requirement "[b]y effectively requiring the producers under investigation to undertake a massive amount of work to complete the MET application form within an extremely short deadline and then not even considering the information submitted", thereby violating "the principle of good faith and fundamental fairness." The European Union agrees that Article 2.4 of the AD Agreement requires a "fair comparison", but asserts that nothing in Article 2.4 regulates sampling, or how normal value should be established in cases of imports from China.[423]

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[417] China, answer to Panel question 88, paras. 518 and 520-521; second written submission, paras. 1263-1266.

[418] China, second written submission, paras. 1263 and 1267, referring to Exhibit CHN-78.

[419] European Union, second written submission, para. 215; first written submission, para. 561. The European Union argues that such claims would be outside the Panel's terms of reference, since they were not included in China's panel request.

[420] European Union, first written submission, para. 562. The European Union notes that these producers received a copy of the General Disclosure Document, and were informed that any anti-dumping duties on their exports would be calculated in accordance with Article 9(6) of the Basic AD Regulation, the provision dealing with the determination of anti-dumping duties in cases where sampling is applied. *Id.*

[421] Indeed, we find it difficult to imagine that they would have done so without being far more explicit on the matter. In any event, we see no need to address any alleged differences in scope between the text of China's Accession Working Party Report and the AD Agreement in this regard.

[422] China, first written submission, paras. 854 and 875. See also second written submission, paras. 1273-1274.

[423] European Union, first written submission, para. 567. The European Union contends that China has failed to present a prima facie case of violation of Article 2.4. The European Union asserts in this regard that

> "China makes a bare assertion about the meaning of Article 2.4 ("fair comparison") and expects the Panel to develop the argument on its behalf or to shift the burden to the European Union to demonstrate that the relevant facts of the case do not infringe Article 2.4."

European Union, first written submission, para. 567.

7.189 We agree with the European Union that Article 2.4 does not establish any requirements with respect to either sampling, or the establishment of normal value.[424] The first sentence of Article 2.4 contains a general obligation to make a "fair comparison" between export price and normal value.[425] Despite the fact that this obligation is expressed in terms of a general and abstract standard,[426] China has failed to demonstrate how Article 2.4 regulates MET applications or the use of sampling in examining MET applications. Thus, we consider that Article 2.4 does not constitute a legal basis for China's claims.

7.190 China argues that Paragraph 15(a)(ii) of its Protocol of Accession requires individual examination of all MET applications that have been submitted before resorting to an alternative methodology that is not based on a strict comparison with domestic prices or costs in China.[427] China notes that pursuant to Paragraph 15(a)(ii) of its Protocol of Accession, an importing WTO Member may only use a methodology that is not based on a strict comparison with Chinese prices or costs if "producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product". China recalls that the dumping margin for non-sampled cooperating Chinese exporting producers, who submitted MET applications, was set at the level of the weighted average dumping margins established for sampled cooperating Chinese companies, and that normal value for these companies was established on the basis of prices in the analogue country. Thus, China contends that normal value for the non-sampled Chinese cooperating exporters was necessarily also based on prices in the analogue country, despite that they had each requested MET. China asserts that, in order to apply a methodology such as the analogue country method, which "is not based on a strict comparison with domestic prices or costs in China", the importing WTO Member

> "must first determine whether the producers that have submitted questionnaire responses can or cannot clearly show that they operate under market economy conditions. That is because in case they can clearly show that they operate under market economy conditions, the importing Member is not entitled to apply the analogue country method per [Paragraph 15(a)(ii)]. This implies that all submitted MET questionnaire responses must be assessed on their merits."[428]

7.191 The European Union argues that Paragraph 15(a)(ii) of China's Accession Protocol does not address the issue of sampling. Nor does it interfere with the possibility of using sampling pursuant to Articles 6.10 and 9.4 of the AD Agreement. The European Union notes that all but one sampled Chinese company did not satisfy the MET criteria, and thus contends that the Commission properly established the normal value for these companies based on an analogue country, pursuant to Paragraph 15(a).[429] In addition, the European Union asserts that according to Paragraph 15(d), WTO Members may decide that market economy conditions prevail in a particular industry or sector, or in China as a whole.[430] The European Union argues that, pursuant to Paragraph 15(a)(ii),

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[424] We recall in this regard our findings with respect to analogue country, where we concluded, *inter alia*, that Article 2.4 did not relate to the establishment of normal value, but only came into play after the determination of normal value and export price, in the comparison of the two. See paragraphs 7.262-7.265 below.

[425] Appellate Body Report, *EC – Bed Linen*, para. 59.

[426] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417, para. 146.

[427] China, first written submission, para. 857; answer to Panel question 89, para. 526; second written submission, para. 1243.

[428] China, first written submission, paras. 854-857, citing Definitive Regulation, Exhibit CHN-3, recital 146.

[429] European Union, first written submission, para. 558.

[430] European Union, answer to Panel question 89, para. 257.

> "producers requesting MET must show that market economy conditions prevail in the industry (as opposed to individual companies) producing the like product with regard to manufacture, production and sale of that product."[431]

The European Union goes on to state that

> "as a unilateral concession vis-à-vis China, the European Union examines whether an individual producer can be considered as a market economy producer (and thus grant MET) even if market economy conditions cannot be shown to prevail in the industry or sector producing the like product."[432]

7.192 China contends that the term "industry" in Paragraph 15(a)(ii) does not imply that the use of alternative methodologies is only allowed if it cannot be established that the "industry", rather than individual producers within an industry, operate under market economy conditions. China considers that "the use of NME methodologies is precluded also with regard to single operators within the industry under investigation that can clearly show that they operate on market economy conditions." China argues that the reference to "industry" merely indicates that the analysis is limited to the sector of the like product, and that investigating authorities may not draw inferences on the basis of other sectors. In support of its arguments, China refers to Paragraph 15(d) of China's Accession Protocol, which provides that if it is established under the national law of an importing WTO Member that market economy conditions prevail in a particular industry or sector, the provisions of Paragraph 15(a) shall no longer apply to that industry or sector. According to China, the fact that a WTO Member may exclude an entire sector or industry from the application of Paragraph 15(a)(ii) does not mean that for sectors or industries that have not been excluded pursuant to Paragraph 15(d), an importing WTO member could use an alternative methodology with respect to individual producers in an investigation that can show that they operate under market economy conditions.[433]

7.193 Paragraph 15(a) of China's Accession Protocol provides, in pertinent part:

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

[431] European Union, second written submission, para. 215; answer to Panel question 89, para. 256, citing Articles 2(7)(b) and 2(7)(c) of the Basic AD Regulation.
[432] European Union, second written submission, para. 215; answer to Panel question 89, para. 256, citing Articles 2(7)(b) and 2(7)(c) of the Basic AD Regulation.
[433] China, answer to Panel question 89, paras. 523-525.

There is nothing in the text of Paragraph 15(a)(ii) that refers to either the method or the criteria that should be used by investigating authorities to determine whether "market economy conditions prevail in the industry".

7.194 In our view, the text of Paragraph 15(a)(ii) is quite clear as to what must be shown, and by whom. Individual producers must "clearly show" that market conditions prevail in the **industry** producing the like product, in order to avoid the possibility that the importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China. On the other hand, if producers under investigation **cannot** clearly show that "market economy conditions prevail in the industry producing the like product", the importing Member is allowed to use a methodology that is not based on a strict comparison with Chinese prices or cost in its determination of price comparability. In our view, nothing in this provision suggests that an importing Member must consider whether individual producers can show that market economy conditions prevail with respect to each of the individual producers or any of them. We do not agree that Paragraph 15(a)(ii) establishes that the importing Member is precluded from using a methodology that is not based on a strict comparison with Chinese prices or cost in its determination of price comparability with respect to an individual Chinese producer if that producer can show that it operates under market economy conditions, unless it has been "clearly show[n]" that market economy conditions prevail in the industry of which that producer is a part.[434] Furthermore, since the showing of whether market economy conditions prevail must be made with respect to the industry producing the like product in China, we see no reason why the determination in that regard may not be made by the importing Member on the basis of a sample of the industry in question, as is the case with other determinations in anti-dumping investigations, including the determination of dumping.

7.195 China, however, argues that "[s]ampling cannot apply to the determination of whether the producers under investigation operate under market economy conditions [since] [t]he MET determination is not an aggregate one, based on a collective assessment of information, but it is based on the information provided by individual producers."[435] China asserts that neither Paragraph 15(a)(ii) of China's Accession Protocol, nor any other provision, authorizes the use of sampling in the examination of MET applications.[436] China contends in this regard that Article 6.10 of the AD Agreement, which generally requires the calculation of individual dumping margins, allows the use of sampling, and permits the investigating authority not to calculate individual dumping margins for non-sampled producers in such cases. However, China submits that other rights of exporting producers in such cases, including, China asserts, the right to have a determination of price comparability on the basis of Chinese prices or costs, are not affected by sampling.[437] China contends that Article 6.10 is not concerned with the methodology that is to be used for the determination of the margin of dumping, which is regulated elsewhere in the AD Agreement, and in the case of China, also in Paragraph 15(a) of China's Accession Protocol.[438] Moreover, China argues, in this investigation,

[434] We recall that, like other provisions of the WTO Agreement, China's Accession Protocol sets out the minimum rights and obligations of Members toward each other. Nothing prevents a Member from according greater rights to another Member, as the European Union asserts it does vis-à-vis China in this context as a unilateral concession.

[435] China, first written submission, para. 867. See also opening oral statement at the second meeting with the Panel, para. 25.

[436] China, answer to Panel question 89, para. 530; second written submission, para. 1241.

[437] China, answer to Panel question 89, para. 531; second written submission, paras. 1232 and 1241; closing oral statement at the second meeting with the Panel, para. 103, referring to Article 6.10.2.

[438] China, second written submission, paras. 1230-1231. China also argues that in other investigations, when the Commission used sampling, the Commission's practice was to give non-sampled cooperating producers which received MET as a result of a "desk check" a duty rate based on the weighted average duty of sampled companies that received MET. China, first written submission, para. 874; opening oral statement at the second meeting with the Panel, para. 24. In addition, China argues that, in a previous case, the European Union had stated that the provisions on sampling could not be used for MET determination. China, first written

the Commission incorrectly applied the sampling methodology, as "the sample was not selected for the purpose of the MET determination, but for the purpose of the calculation of the dumping margins. In other words, the European Union did not sample the MET determination."[439] China contends that the criteria used for the selection of the sample used in the determination of dumping do not guarantee that the sample selected will be representative for purposes of determining whether "market economy conditions prevail in the industry producing the like product."[440]

7.196 The European Union contends that the MET determination takes place in the context of the determination of dumping, and in cases where sampling is used for the determination of dumping, and individual examination is not possible, the MET determination needs to take place based on examining the sampled companies. The European Union considers this to be an equivalent situation to the determination of dumping in an investigation concerning imports from market economy countries in which sampling is used, and which would include the establishment of normal values and export prices. The European Union considers that, since the use of sampling implies that the investigating authority limits its examination as to the existence of dumping to a group of exporters, the examination of MET applications provided by non-sampled cooperating exporting producers is not required, just as the examination of the individual situation of non-sampled cooperating exporters would not be required in cases of imports from market economy countries provided that the condition under Article 6.10.2 is met.[441] The European Union maintains that even if a sampled company was granted MET, the Commission was not required to extrapolate that result to other MET applications, since requests for individual treatment were not granted in accordance with Article 6.10.2, and thus the Commission was not required to examine some MET applications as a result of its finding within the sample.[442]

7.197 There is no dispute that Paragraph 15(a)(ii) of China's Accession Protocol does not specifically address the question of sampling for purposes of determining whether "market economy conditions prevail" in the industry at issue. We do not agree with China's assumption that simply because Paragraph 15(a)(ii) does not explicitly authorize the use of sampling in making that determination means that sampling is prohibited, and if used, constitutes a violation of this Paragraph.[443] We recall in this regard the views of the panel in *EC – Salmon (Norway)*, which considered a similar argument with respect to the use of sampling in the context of injury determinations under the AD Agreement:

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submission, para. 867, referring to Council Regulation No. 1487/2005. We do not consider that the actions of the Commission in another anti-dumping investigation are relevant to our analysis in this case, particularly given that China's claim is with respect to the Commission's actions in this case, and not its practice or EU law as such.

[439] China, first written submission, para. 868.

[440] China, second written submission, para. 1242. China argues that Article 6.10 of the AD Agreement allows for the selection of a sample composed of "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated". China submits that although this criterion is justified in the context of the determination of dumping, because it ensures that the result of the dumping calculations of the sample be considered representative of the entire volume of imports, this criterion should not be used for MET determination, due to its "entirely different purpose". China argues that "[t]he selection of the biggest exporters does not ensure a representativeness of the entire industry, as companies with low or medium levels of export sales will necessarily be excluded from such an examination." China, second written submission, paras. 1242 and 1247.

[441] European Union, first written submission, paras. 554-555; second written submission, para. 218; opening oral statement at the second meeting with the Panel, para. 382.

[442] European Union, second written submission, para. 217.

[443] To the extent China has presented this argument, we do not consider it relevant to examine whether the so-called "desk-check analysis" is mandatory under EU law. See paragraph 7.168 above.

> "the mere absence of a specific provision allowing for sampling is not a sufficient basis for finding sampling to be prohibited in injury determinations. In our view, the mere absence of a provision permitting a particular investigative or analytical method in an anti-dumping investigation cannot mean that it is, for that reason alone, prohibited. The AD Agreement does not specify all the different methodologies of investigation and analysis that might be useful or appropriate in particular circumstances, and cannot be expected to do so. If applied as a general interpretive principle, Norway's position would render the AD Agreement potentially null in numerous situations where it simply does not specifically address a question that may arise in an investigation."[444]

In our view, the same reasoning holds true with respect to the lack of a specific provision in China's Accession Protocol permitting the use of sampling in determining whether market economy conditions prevail in the exporting industry at issue in a particular investigation, and we reach the same conclusion here as did the panel in *EC – Salmon (Norway)*.

7.198 China also takes issue with the use of a sample selected for the calculation of dumping margins, arguing that the criteria used to select that sample do not guarantee that the sample selected is representative for purposes of making the MET determination. The sample of Chinese exporting producers was selected on the basis of the volume of exports, pursuant to the provision of Article 6.10 allowing the investigating authority limit its examination to "the largest percentage of the volume of exports from the country in question which can reasonably be investigated."[445] China asserts that while the criterion of largest volume of export sales is justified in the context of the determination of dumping, as it will ensure that the result of the dumping calculations of the sample can be considered representative for the entire volume of imports from the countries concerned, it is not justified in the context of the MET determination, which China asserts has the different purpose of determining whether market economy conditions prevail in the exporting industry. China notes that a sample of the biggest exporters does not ensure representativeness of that industry, as it excludes companies with low or medium levels of export sales.[446]

7.199 China asserts that the MET determination is "based on the information provided by individual producers", and argues that, as a consequence, it is not an aggregate determination based on a collective assessment of information, implying that this demonstrates that sampling is not permitted. However, in our view, an "aggregate" determination is, in fact, based on information provided by individual producers, and we thus fail to see the significance of the distinction China has drawn. We recall that anti-dumping duties may be imposed on non-sampled exporters, consistently with Articles 6.10 and 9.4 of the AD Agreement, as a consequence of a finding of dumping based on information provided by a limited number of examined producers. We see no reason why, in a case involving a NME, anti-dumping duties may not be imposed on non-sampled exporters based on a finding of dumping involving an MET analysis based on information provided by a limited number of examined producers.

7.200 Moreover, we recall that we have noted elsewhere in our report that the use of the "largest volume" option under Article 6.10 in making a determination of dumping does not, in fact, guarantee that the companies selected for examination will be "representative" of the exporting industry as a whole.[447] Thus, the premise of China's argument, that this option is justified for the determination of

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[444] Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway ("EC – Salmon (Norway)")*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3, para. 7.126.

[445] We recall that we have rejected China's claims with respect to the Commission's actions in this regard. See paragraphs 7.211 and 7.226 below.

[446] China, second written submission, para. 1242.

[447] See paragraph 7.217 below.

dumping, but not for the MET determination, is false. Even assuming China were correct, and that companies with low or medium levels of export sales were excluded from the sample, China has made no argument indicating why the inclusion of such companies would make the sample more representative with respect to whether market economy conditions prevail for the industry in question. There is no question that the sample used by the Commission for the MET determination concerned the "industry producing the like product" in this case.

7.201 Thus, we conclude that China has failed to demonstrate that sampling is prohibited for purposes of making the MET determination, and has failed to demonstrate that the criteria on which the sample in this case was selected were unjustified.

7.202 We understand China to be making two arguments with respect to Article 6.10.2 of the AD Agreement with respect to the MET applications. The first argument relates to the Commission's failure to examine the four Chinese companies that requested individual examination pursuant to Article 17(3) of the Basic AD Regulation. China makes no independent arguments in this regard, merely referring to its arguments with respect to its claims that the European Union violated Article 6.10.2 by not individually examining the four companies that requested such examination. We recall that we concluded that China had failed to demonstrate a violation of Article 6.10.2, and do not repeat our analysis here, but reach the same conclusion.[448]

7.203 China's second argument is that since the European Union did not examine, and thus did not grant the requests for MET made by those four companies,

> "the European Union violated Article 6.10.2 insofar as it requires MET to be granted in order to qualify for individual examination. Phrased differently, China considers that because the European Union wrongly disregarded the MET questionnaires and did not grant MET with respect to the companies requesting individual examination, those companies were by default excluded from individual examination as required by Article 6.10.2."[449]

The European Union, despite indicating that it fails to understand China's claim, argues that it is incorrect to consider that the lack of examination of the MET applications by default excluded those four companies from individual examination.[450]

7.204 Despite acknowledging the European Union's lack of understanding, China did not provide any further explanation of its claim and argument.[451] We, too, are at a loss to understand China's claim. In our view, China has not explained how the failure to examine MET applications from and grant MET to non-sampled Chinese companies excluded such companies by default from individual examination as required by Article 6.10.2. We therefore dismiss this aspect of China's claim.

7.205 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Articles 2.4, 6.10.2, and 17.6(i) of the AD Agreement,

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[448] See paragraphs 7.141 and 7.146 above. Nevertheless, we recall that both the Provisional and Definitive Regulation clearly explained the reasons why individual examination of the four requests was declined, in accordance with the criteria established in Article 6.10.2 of the AD Agreement.

[449] China, first written submission, para. 877.

[450] European Union, first written submission, para. 579.

[451] China's only statement concerning this claim after its first written submission was the following:

> "Finally, the European Union has stated that it failed to understand China's claim that because the European Union wrongly disregarded the MET questionnaires and did not grant MET with respect to the companies requesting individual examination, those companies were by default excluded from individual examination as required by Article 6.10.2."

China, second written submission, para. 1287. No further explanation was provided.

Paragraph 15(a)(ii) of China's Accession Protocol, and Paragraphs 151(e) and (f) of China's Accession Working Party Report in the original investigation by failing to examine the non-sampled cooperating Chinese exporting producers' MET applications.

(c) Claim III.15 - Alleged violation of Article 6.10 of the AD Agreement in the selection of the sample of Chinese exporting producers in the original investigation

(i) Arguments of the parties

a. China

7.206 China claims that the Commission selected the sample of Chinese producers for purposes of the dumping determination in the original investigation inconsistently with Article 6.10 of the AD Agreement. Specifically, China asserts that the European Union (1) selected the producers to be sampled before the exclusion of certain Special Technology Athletic Footwear ("STAF") from the product under consideration, and (2) selected the sample in part based on the domestic sales volumes of the Chinese producers. As a consequence, China asserts, the European Union failed to examine the largest percentage of the volume of exports from China which could reasonably be investigated.[452] China considers that the inclusion of a product not within the scope of the product under consideration, that is, STAF priced below €7.50, in the volume of exports considered in selecting the sample invalidated the sample as it affected representativeness.[453] According to China, a change in the scope of the product under consideration during the course of the investigation means that the investigating authority should adapt the sample accordingly. China notes that the Commission selected the sample of Chinese producers before the decision to exclude certain STAF from the investigation was made. The producers selected for the sample accounted for 25 per cent of the volume of exports of cooperating Chinese exporting producers. China asserts that, although the Commission stated otherwise, the exclusion of certain STAF from the scope of the product under consideration necessarily reduced the representativeness of the sample.[454] According to China, where the panel in *EC – Salmon (Norway)* addressed the question whether non-producing exporters might be excluded from being considered for inclusion in the sample, in this case, the question is whether producers of products not under investigation may or may not be considered in the pool and thus be included in the sample. More generally, the issue is whether the phrase "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated" may include products not under investigation.[455] China argues that by including exports of STAF in the largest volume of exports of non-STAF from China which the European Union could reasonably investigate, the European Union failed to base the sample on "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." Therefore, China asserts that the European Union violated Article 6.10 to the extent that the exclusion of STAF resulted in a lower percentage of the volume of exports being investigated than could otherwise have reasonably been achieved.[456]

7.207 Concerning the second aspect of its claim, China notes that the Commission took into consideration, in selecting the sample of Chinese producers, the volume of domestic sales of the

[452] China, first written submission, para. 1017.
[453] China, first written submission, paras. 1021-1024.
[454] China, first written submission, paras. 1020-1021. China cites, as an example in support of its view, the fact that, following the decision to exclude certain STAF, the Commission informed one company that had been selected for the sample that its data would not be used, since all of its exports were of the excluded product. According to China, this demonstrates that the sample was no longer representative. China, first written submission, para. 1023. China underlines that its claim is not against the exclusion of this company from the sample. China, second written submission, para. 1495.
[455] China, second written submission, para. 1497.
[456] China, second written submission, para. 1500.

cooperating Chinese producers from which the sample was selected, in order to have available information on prices and costs of production and sales, should some or all of the Chinese producers be granted MET.[457] According to China, there is nothing in Article 6.10 that would allow the use of any other criterion than the largest volume of exports in the selection of the sample.[458] China argues that, in selecting the sample for the dumping determination, the European Union was not entitled to consider whether sampled producers would be able to provide information usable for the purpose of calculating the margin of dumping, as this is not addressed by Article 6.10.[459] Consequently, China asserts, by taking account of the volume of domestic sales, a variable with no basis in Article 6.10, the European Union acted inconsistently with that provision.[460]

7.208 China asserts its understanding that the European Union's selection of the sample of Chinese exporting producers was not based on the largest percentage of the volume of exports that could reasonably be investigated, despite the European Union's statement to the contrary. China asserts that Article 6.10 is purely procedural in nature, and does not concern substantive issues relating to the determination of individual margins.[461] Moreover, contrary to the European Union's view that what is "reasonable" for purposes of Article 6.10 may reflect the preference for use of domestic sales prices in the determination of normal value, China asserts that "reasonable" for purposes of Article 6.10 is what is practicable for the investigating authority, in terms of the "number" of exporters to be examined. In addition, China asserts that the drafters of the AD Agreement were aware that a company included in a sample composed on the basis of the volume of exports might not have a sufficiently high level of domestic sales to allow the use of its domestic prices for the calculation of normal value. Nonetheless, the drafters did not include a minimum amount of domestic sales in the criteria for the selection of the sample in Article 6.10. Moreover, since only domestic sales in the ordinary course of trade would be relevant in determining normal value under Articles 2.1 and 2.2, China considers that the European Union's sampling method does not achieve the purpose of ensuring use of domestic sales prices in calculating normal value, assuming that could be considered as an aspect of what is "reasonable" in the sense of Article 6.10. China notes that, in the case of a NME, a high level of domestic sales is not determinative of whether they will be taken into account, as companies must first be granted MET status. In addition, China argues that in a case where exporters are not sampled, an investigating authority cannot control which of the methods provided in Article 2 will be used in determining normal value. China asserts that the fact that the Chinese authorities were consulted and agreed to the list of sampled companies does not establish compliance with Article 6.10, since that did not encompass agreement with the methodology for the selection of those companies.[462]

b. European Union

7.209 The European Union argues that the issue being considered by the panel in *EC – Salmon (Norway)* was different from the issue before this Panel. In that case, the panel addressed the exclusion of certain exporters or producers from the pool of those concerned with the product under investigation. The European Union notes that, in the course of the investigation at issue here, the Commission redefined the product under investigation, and as a consequence, concluded that certain

[457] China, first written submission, paras. 1028-1030.
[458] China, first written submission, para. 1037.
[459] China, first written submission, para. 1031, citing Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* ("*Argentina – Poultry Anti-Dumping Duties*"), WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727.
[460] China, first written submission, para. 1038.
[461] China, second written submission, paras. 1501-1502, citing Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.215. In China's view, substantive issues such as the availability of relevant data for the determination of dumping are addressed by other provisions of the AD Agreement, such as Article 2.
[462] China, second written submission, paras. 1504-1510. China notes in this regard that Article 6.10.1 of the AD Agreement establishes a preference for selection of a sample in consultation with and with the consent of the exporters, producers or importers concerned, but not the authorities of the exporting country.

exporters were no longer eligible for consideration since they neither exported nor produced the product as defined. For the European Union, this action was in fact an appropriate implementation of the requirements of Article 6.10. The European Union asserts that whether or not the sample, as it stood following the redefinition of the product under consideration, complied with Article 6.10, depended on the firms whose exports were included in the sample and on those other producers/exporters who continued to export the product concerned. The European Union asserts that it was appropriate to not take account of the exports of the one company whose exports were principally of products not within the product under consideration as redefined. The European Union notes that it fully addressed the issue of representativeness following the exclusion of certain STAF from the product under consideration in the Definitive Regulation, and concluded that the sample was representative.[463]

7.210 With respect to the second aspect of China's claim the European Union takes the position that a WTO Member which applies the "largest percentage" option in Article 6.10 may take account of the level of domestic sales of exporters when selecting the sample.[464] The European Union asserts that the situation in *Argentina – Poultry Anti-Dumping Duties*, relied upon by China, was quite different, concerning the obligation in the first sentence of Article 6.10, and the question whether a Member could decline to calculate a dumping margins for each known exporter or producer merely for lack of documentation. The European Union asserts that in fact, its method of selecting the sample in this case ensured strict adherence to WTO rules. According to the European Union, the "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated" must take into account other relevant rules on determining dumping, including the preference for use of domestic sales prices. The European Union asserts that it sought to maintain the pre-eminent status of domestic sales prices in selecting the sample of Chinese producers, given that at the time, no decision had yet been made with respect to market economy treatment of any Chinese producer.[465] If an MET exporter's domestic sales were low, its domestic prices might have to be disregarded under Article 2.2 of the AD Agreement, and an alternative methodology would have to be used in determining normal value. The European Union notes that obviously, whether sales were made in the ordinary course of trade cannot be considered when a sample of exporters is considered, but the volume of domestic sales can be, and that it was entitled to assume that companies are entitled to MET for purposes of selecting the sample.[466] The European Union also notes that, as provided for in Article 6.10.1, it selected the sample after consulting with representatives of the Chinese exporters to reach a mutually satisfactory solution regarding the composition of the sample, and that these representatives were informed of and agreed to the sample as selected, and subsequent modifications.[467]

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[463] European Union, first written submission, paras. 828-832, referring to Definitive Regulation, Exhibit CHN-3, recitals 43-44.

[464] European Union, first written submission, para. 833.

[465] European Union, first written submission, paras. 835-837.

[466] European Union, opening oral statement at the second meeting with the Panel, para. 438.

[467] European Union, first written submission, paras. 838-840, opening oral statement at the second meeting with the Panel, paras. 439-440. Specifically, the China Chamber of Commerce for I/E of Light Industrial Products & Arts-Crafts (CCCLA) and the Chinese Ministry of Commerce were consulted, and the originally proposed sample was amended as a result. European Union, first written submission, para. 840. Moreover, the European Union asserts, and China does not dispute, that both Chinese entities were aware of the bases on which the sample was selected and agreed with the selection of the sample. See Email from Mission of PR China to DG Trade, 12 August 2005, Exhibit EU-13 (Confidential), and *Note Verbale* from DG Trade to Mission PR China, 12 August 2005, Exhibit EU-14 (Confidential). The European Union "finds it unacceptable that China should now purport to disown the agreement that it reached about the composition of the sample and accuse the EU of infringing its obligations under the ADA," and suggests that the Panel reject China's claim on the basis of a theory of estoppel, citing Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("*EC – Asbestos*"), WT/DS135/R and Add.1, adopted 5 April 2001, as

(ii) Evaluation by the Panel

7.211 Before addressing China's claim, we note the following facts, which we understand to be undisputed. The Commission indicated, in the Notice of Initiation of the original investigation, that it might base its examination of dumping on a sample of Chinese exporters, and requested that Chinese exporters/producers make themselves known and submit certain information in order to enable the Commission to decide whether to sample, and if so, to select a sample.[468] The Provisional Regulation states that 163 Chinese companies submitted the requested information in a timely fashion, and 154 reported exports to the then-European Communities during the relevant time period. The Commission originally proposed a sample of the four largest Chinese producers. However, in the course of consulting with representatives of the interested parties, including the Chinese authorities and the Chinese producers' association, the Chinese authorities insisted that more companies be added in order to increase the representative level of the sample. As a consequence, the sample was expanded to include 13 Chinese exporting producers, representing more than 20 per cent of Chinese exports to the then-European Communities. The Chinese authorities agreed to this sample.[469] The Provisional Regulation also states that, in accordance with Article 17(1) of the Basic AD Regulation, two criteria were taken into account in the selection of the sample, the size of the exporting producer with regard to export sales to the then-European Communities, and the size of the exporting producer with regard to domestic sales. The Commission noted in the Provisional Regulation that it was considered essential to include in the sample companies with domestic sales in order to have as representative a sample as possible, and in particular to have information available in the event that some or all exporters would be granted MET. Thus, only the "major exporting companies which also represented a major part of the domestic sales" were selected. Finally, the Provisional Regulation states that "the exclusion of the STAF products did not significantly influence the representativeness of the sample".[470]

7.212 The Definitive Regulation notes the arguments of some parties that the sample as selected was not representative, given the exclusion of STAF and children's shoes from the scope of the investigation.[471] The Commission, in the Definitive Regulation, recalls the statement in the Provisional Regulation that the exclusion of STAF did not significantly influence the representativeness of the sample. The Definitive Regulation states that the companies in the sample accounted for more than 12 per cent of exports of the cooperating exporting Chinese producers, and concludes that the sample was representative, noting that the relevant EU regulation established no quantitative threshold as to what constitutes a level of "representative volume", other than that the volume should be limited to what can "reasonably be investigated within the time available".[472] In the Definitive Regulation, the Commission also addresses arguments that the selection of the sample was inconsistent with the AD Agreement "since certain major exporters were chosen at the expense of the companies with smaller or non-existent EC sales, but relatively large domestic sales." The Commission rejected these arguments, concluding that the AD Agreement allowed the use of domestic sales as a relevant criterion in selecting the sample, and recalling that the Chinese authorities had consented to the sample selected.[473]

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modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, 3305, para. 8.60, in this regard. European Union, opening oral statement at the second meeting with the Panel, paras. 440-442.

[468] Notice of Initiation, Exhibit CHN-6, recital 5.1(a).

[469] Provisional Regulation, Exhibit CHN-4, recitals 55 and 57.

[470] Provisional Regulation, Exhibit CHN-4, recitals 60-61.

[471] Definitive Regulation, Exhibit CHN-3, recital 42.

[472] Definitive Regulation, Exhibit CHN-3, recitals 44 and 56.

[473] Definitive Regulation, Exhibit CHN-3, recitals 46 and 47.

7.213 Article 6.10 of the AD Agreement provides, in pertinent part:

> "6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.
>
> > 6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned."

7.214 China asserts that, by selecting the sample before the exclusion of certain STAF from the scope of the investigation, and using the domestic sales volume of Chinese producers as a criterion in the selection of the sample, the European Union failed to examine the largest percentage of the volume of exports from China which can reasonably be investigated. With respect to the first aspect of its claim China argues that if the scope of the product under consideration changes during the course of an investigation, and this affects the volume of exports or the largest percentage of exports which can reasonably be investigated, the investigating authority should adapt the sample accordingly. We do not necessarily disagree that such a course of action is advisable, but it is not clear to us that it is required.

7.215 We see nothing in Article 6.10 that would require an investigating authority to reconsider the sample selected at the outset of an investigation as a result of a change in the scope of the product under consideration in the course of that investigation. While such a course of action is certainly not precluded, as a practical matter, it will not always be possible to do so, depending on the particular circumstances. To interpret Article 6.10 to require investigating authorities to, in all cases, adapt the sample selected for purposes of the dumping examination might well have the effect of delaying the investigation so as to prevent the investigating authority from completing its investigation in a timely fashion. We recall that Article 6.14 of the AD Agreement provides:

> "[t]he procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement."

Article 6.10 is one of the "procedures set out above", and we decline to interpret it as requiring, in all cases, that investigating authorities revise the sample selected for the dumping determination in the face of a change in the scope of the product under consideration. Article 6.14 recognizes the tension between the goals of accurate information, due process and transparency in the investigative process, furthered by the procedures provided for in Article 6, and the obligation to complete the investigation within the time allowed by Article 5.10 – one year, and in special circumstances, no more than 18 months after initiation. Finally, in this regard, we note that to the extent a failure to alter the sample as a result of a change in the scope of the product under consideration may result in some inaccuracy in the calculation of the dumping margin, the AD Agreement itself provides remedies for errors in the amount of anti-dumping duties imposed and collected. Article 6.10.2 allows producers to request an individual examination even if they were not included in the sample, and Article 9.4 provides for the imposition of an individual duty for exporters/producers who provided the necessary information as

provided for in Article 6.10.2.[474] Articles 9.3.1 and 9.3.2 provide procedures for ensuring that the actual amount of dumping duty collected does not exceed the relevant margin of dumping.

7.216 Moreover, while China focuses on the "representativeness" of the sample selected after the change in the scope of the investigation, we see nothing in Article 6.10 that requires an investigating authority to consider whether the sample selected for the dumping determination pursuant to the second option in that provision is "representative" of the exporters according to any measure, including the percentage of exports of the product under consideration for which they account. We recall that, while the parties refer to the second option in Article 6.10 as a "sampling" provision, the text of Article 6.10 authorizes the investigating authorities to "limit their examination" in one of two ways: (1) "to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection", or (2) "to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." While a statistically valid sample might be presumed to be representative of the universe of companies sampled, there is no indication that an investigating authority choosing to limit its examination in the second manner, that is, to the "largest percentage of the volume … which can reasonably be investigated" must, having satisfied that criterion, in addition ensure that the exporters/producers accounting for that volume are representative of the industry in the exporting country, or that the percentage of the volume represented by the producers selected for the sample reaches some quantitative threshold. There is certainly no suggestion in Article 6.10 that any particular threshold percentage will demonstrate that the volume of exports accounted for by the selected producers is "representative" of anything.[475]

7.217 Indeed, application of the "largest volume" option might well result in an examination of exporters/producers which, while consistent with Article 6.10, would neither be a statistically valid sample, nor necessarily "representative" of the producers and exporters in the country in question. For instance, in the case of an industry in the exporting country with hundreds of exporters, a few dozen of which are large companies, exporting significant volumes to the country conducting the investigation, while the remainder export only small volumes to that country, the investigating authority may well conclude that the "largest volume which can reasonably be investigated" is accounted for by the six largest exporters. From the perspective of the industry in the exporting country as a whole, such a sample may not "representative" of the exporters, but in our view it may well be satisfactory under Article 6.10 despite this.[476]

7.218 China does not argue that either the volume of exports of the product under consideration attributable to the exporters selected in the sample originally, or the volume of exports of the revised product under consideration attributable to those exporters, was not "the largest percentage of the volume of the exports" from China which could reasonably be investigated. Rather, China focuses on

[474] This right is not absolute, as Article 6.10.2 of the AD Agreement allows the investigating authority to decline to calculate individual margins of dumping for exporters/producers so requesting, where to do so would be unduly burdensome and prevent the timely completion of the investigation. Thus, like Article 6.14 of the AD Agreement, this provision recognizes the tension between the goals of the procedural rules in Article 6, and the obligation to complete the investigation within the time allowed by Article 5.10 of the AD Agreement.

[475] This is by contrast to a statistically valid sample, which conceptually results in a sample that is representative of the entire population being sampled, but as a result, presumably requires good knowledge of and data regarding that entire population, in the case of Article 6.10 of the AD Agreement, the foreign exporters/producers being investigated, in order to ensure that the sample is "statistically valid".

[476] Moreover, we recall that Article 9.3 of the AD Agreement sets out provisions intended to ensure that individual importers are not required to pay dumping duties in excess of the margin of dumping, by providing for reimbursement or refund of any excess. Thus, even assuming that a dumping margin is calculated on the basis of information concerning a sample of foreign producers or exporters that is not "representative", the consequences of such a lack of representativeness for individual exporters not examined are, in our view, of little significance.

a change in the "representativeness" of the sample, that is, the fact that the exporters selected for the sample accounted for 25 per cent of exports to the then-European Communities by cooperating exporting producers at the time of the Provisional Regulation, but "a mere 12% at the definitive stage."[477] Given that the scope of the product under consideration was different at the definitive stage than at the provisional stage,[478] it is not surprising that the percentage of exports of the product under consideration accounted for by the exporters in the sample was also different. We recall, however, that Article 6.10 does not require that any particular percentage of exports be included in the sample, but rather that the sample include "the largest percentage of the volume of the exports", which we understand to be the absolute volume of exports. China has presented no evidence, or even any argument, that would demonstrate that the Commission erred in concluding that the investigation of thirteen Chinese companies, accounting for 12 per cent of the exports of cooperating Chinese producers, represented the "largest percentage of the volume of the exports from the country in question which can reasonably be investigated." Merely that this percentage was less than the percentage of a differently defined volume of total exports does not suffice in this regard.

7.219 China quotes the following statement by the panel in *EC – Salmon (Norway)*:

> "the starting point for the application of the limited examination techniques set out in the second sentence of Article 6.10 is the pool of interested parties making up all of the "known exporter[s] or producer[s] concerned…[which] implies that the identification of the pool of "known exporter[s] or producer[s] concerned" will be central to the selection of interested parties that is envisaged in the second sentence of Article 6.10. It follows that an assessment of whether a selection of interested parties has been made consistently with the second sentence of Article 6.10 may involve checking whether the starting pool of interested parties from which that selection was made is permissible. If there has been an error in the identification of the starting pool of "known exporter[s] or producer[s] concerned", this would, in our view, invalidate the selection of interested parties carried out in terms of the second sentence of Article 6.10, at least to the extent that it resulted in a lower percentage of the volume of exports being investigated than could otherwise have reasonably been achieved."[479]

China relies on this statement to argue, as we understand it, that the selection of a sample is similarly invalidated if the "pool" of the volume of exports from the exporting country, or the largest percentage of exports which can reasonably be investigated, includes products that are not within the scope of the product under consideration. We consider that China's reliance on this decision is inapposite. First, we note that "largest percentage of exports from the country in question which can reasonably be investigated" is not a starting point for the application of the limited examination techniques in Article 6.10. Rather, it is the criterion set out in Article 6.10 for whether the selection of exporters/producers for limited examination under the second option is appropriate. Moreover, China's argument ignores that the panel in *EC – Salmon (Norway)* concluded that the investigating authority in that case did not act inconsistently with the second sentence of Article 6.10 by excluding, *ab initio*, all non-producing exporters from even being considered for selection.[480] Finally, in this

[477] China, first written submission, para. 1021.

[478] We recall that all STAF was excluded from the product under consideration at the provisional stage, Provisional Regulation, Exhibit CHN-4, recital 19, while only STAF of a value not less than €7.50 was excluded at the definitive stage. Definitive Regulation, Exhibit CHN-3, recital 19.

[479] Panel Report, *EC – Salmon (Norway)*, paras. 7.162-7.163.

[480] The question being considered by the panel was whether the exclusion of exporters of the product under consideration, farmed salmon, who did not themselves produce that product, from even being considered for inclusion in the sample was permissible in a limited examination under the second option in Article 6.10 of the AD Agreement. Panel Report, *EC – Salmon (Norway)*, para. 7.164.

case, the product under consideration was revised **after** the selection of the companies for limited examination. Thus, to the extent the "pool" of the volume of exports might be relevant, at the time of the selection, that pool corresponded with the scope of the product under consideration. We have concluded that an investigating authority is not required to revise the selection as a result of a change in the scope of the investigation, and as a consequence, we see no relevance in the fact that the revision resulted in the fact that the exports of the companies selected for limited examination under Article 6.10 included products that were not subject to the investigation.

7.220 China does not assert that any producers were excluded from the initial "pool" from which the selection was made, or that producers selected for limited examination did not produce or export the product under consideration after the revision, or that the Commission selected Chinese producers with a smaller volume of exports of that product, to the exclusion of others with a larger volume of exports. Moreover, we recall that the sample was selected in consultation with, and agreed to by, representatives of the Chinese producers. While this is not determinative, we do consider that the fact that the Commission made its selection after consultations with the representatives of the Chinese producers and the Chinese authorities, taking into account their views, and, ultimately, with their agreement, is relevant. Thus, we do not consider that the European Union acted inconsistently with Article 6.10 with regard to the selection of companies for limited examination despite the subsequent exclusion of certain STAF from the scope of the investigation.

7.221 We turn next to the second aspect of China's claim, the assertion that the European Union acted inconsistently with Article 6.10 by taking into consideration the domestic sales volume as well as the volume of exports of Chinese producers in its selection. In this regard, China asserts that nothing in the text of Article 6.10 provides that the largest percentage of the volume of exports from the country in question should also represent the largest percentage of the volume of domestic sales.[481] Thus, China asserts that this criterion, which it is undisputed was taken into consideration, and which is not found in Article 6.10, was introduced into the selection of the companies for limited examination inconsistently with Article 6.10.

7.222 We do not agree that the specific requirement of Article 6.10 second sentence to select for limited examination producers/exporters accounting for the largest percentage of the volume of the exports from the country in question which can reasonably be investigated precludes the consideration of other criteria not specified in Article 6.10, so long as doing so does not result in a selection inconsistent with the criterion that is specified. China has not demonstrated that, by taking the additional criterion of domestic sales volume into account, the European Union failed to select producers accounting for the largest percentage of the volume of exports that could reasonably be investigated.

7.223 We note that China does not dispute that the Commission took into account the domestic sales volume of Chinese producers for the reasons stated by the European Union; to ensure that, in the event Chinese producers were granted MET treatment, the Commission would be able to use information from the selected companies for the determination of normal value consistently with Article 2 of the AD Agreement. However, China considers that this does not justify using the Article 6.10 selection process, as the receipt of information which is usable for the purpose of the calculation of the margin of dumping pursuant to Article 2.1 is an issue addressed by Article 2.2, and not Article 6.10.[482] In support of its position, China relies on the report of the panel in *Argentina – Poultry Anti-Dumping Duties*.

7.224 That panel was considering the assertion by Argentina that a condition for the determination of an individual margin of dumping for each exporter under Article 6.10 of the AD Agreement is that

[481] China, first written submission, para. 1027.
[482] China, first written submission, para. 1034.

the exporter supply the information needed to enable the investigating authority to do so. The panel concluded there was no such obligation in the text of Article 6.10. The panel stated its view that

> "Article 6.10 is purely procedural in nature, in the sense that it imposes a procedural obligation on the investigating agency to determine individual margins of dumping for each known exporter or producer concerned of the product under investigation. Article 6.10 is *not* concerned with substantive issues concerning the determination of individual margins, such as the availability of the relevant data. Such issues are addressed by provisions such as Articles 2 and 6.8 of the *AD Agreement*. …
>
> The fact that an investigating authority does not receive any information from an exporter, or only receives partial information, or information that is not usable or is unreliable, should not prevent the calculation of an individual margin of dumping for that exporter, since the substantive provisions in the *AD Agreement* referred to [above] expressly allow investigating authorities to complete the data with regard to a particular exporter in order to determine a dumping margin in case the information provided is unreliable or necessary information is simply not provided."[483]

We see nothing in the views of the panel in *Argentina – Poultry Anti-Dumping Duties* that supports China's view that the consideration of an additional criterion renders the selection of companies for limited examination inconsistent with Article 6.10.[484] The panel in *Argentina – Poultry Anti-Dumping Duties* was not concerned with the selection of producers for limited examination pursuant to the second option of Article 6.10, but with the question whether a lack of information from a company subject to the investigation, whether or not part of a limited examination, justifies declining to determine an individual margin for that company. The conclusion of the panel that it does not has no bearing on the question that is before us in this dispute.

7.225 We can see the practical reasons for an investigating authority to seek to ensure that the companies selected for limited examination will be able to cooperate effectively, by providing information necessary for the determinations that the investigating authority will, or in this case, might, make during the course of the investigation. So long as the investigating authority does not, in taking such matters into account in the selection of companies for limited examination, end up with a selection that does not comport with the stated criterion in Article 6.10, we see nothing in that provision which would preclude the investigating authority from doing so. We therefore reject China's arguments in this regard. Finally, we recall that the criteria used by the European Union were known to the Chinese authorities and the representatives of the Chinese exporters, who agreed to the sample as selected by the European Union after consultations and taking into account their views. We consider this, while not determinative, to be relevant to our conclusion.

7.226 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 6.10 of the AD Agreement in selecting the sample for the dumping determination in the original investigation.

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[483] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.215-7.216.

[484] Nor do we see anything in those views which renders invalid the European Union's expressed reason for considering the additional criterion of domestic sales volume in this case. However, since China's claim does not rest on the validity *vel non* of the reasons for taking into consideration a criterion not set out in Article 6.10, we find it unnecessary to make conclusions in this regard.

(d) Claims II.1, II.3, III.3, and III.20 – Alleged violations of Articles 2.1, 2.4 and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994 – Analogue country

7.227 In this section of our report, we address China's claims challenging the procedures used by the European Union in selecting an analogue country for purposes of determining normal value, as well as the selection of Brazil as the analogue country, in both the original investigation and the expiry review.

(i) Arguments of the parties

a. China

7.228 With respect to the expiry review, China claims that the analogue country selection procedure of the European Union, as well as the selection of Brazil, was inconsistent with Articles 2.1, 2.4 and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994.[485] With respect to the analogue country selection procedure, China further claims that the European Union acted inconsistently with Article 17.6(i) of the AD Agreement.[486] With respect to the original investigation, China refers to the legal arguments it makes in this context concerning the analogue country selection in the expiry review,[487] and specifically claims that the European Union's analogue country selection process was inconsistent with Articles 2.4 and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994.[488]

7.229 China asserts that the analogue country selection process falls within the scope of the "fair comparison" requirement of Article 2.4 of the AD Agreement, and the "comparable price" referred to in Article 2.1 of the AD Agreement. China submits that the "fair comparison" requirement in Article 2.4 is an independent and overarching obligation, which stands alone from the more specific obligations in the following sentences, relating to the examples of due allowances.[489] China contends that the Appellate Body has acknowledged the independent nature of the "fair comparison" obligation when it stated that the "scope of this obligation is not exhausted by the general subject matter expressly addressed by paragraph 4", but rather "informs all of Article 2".[490] China contends that Article 2 addresses the entire determination of dumping, including the establishment of normal value. In this respect, China considers that the Article 2.2 provisions governing construction of normal value when domestic prices cannot be used, and the analogue country selection process in cases involving non-market economies, are both mechanisms to find a proxy normal value, and that the "fair comparison" requirement of Article 2.4 necessarily applies to both.[491] In addition, China argues that

[485] See generally, China, first written submission, paras. 382 and 402. China submits that the arguments it advances with respect to the relationship between Article 2.1 and the analogue country selection process equally applies to its claim under Article VI:1 of the GATT 1994. China, second written submission, fn. 146.

[486] China, first written submission, para. 382.

[487] China, second written submission, para. 1315.

[488] China notes that while it did not cite Article 2.1 of the AD Agreement in connection with this claim, it did cite Article VI:1 of the GATT 1994. Thus, given the identical "comparable price" language in the two provisions, China does not consider that the difference between the claims should have any practical effect on the outcome of its claim. China, second written submission, para. 1316.

[489] China, answer to Panel question 29; second written submission, para. 262.

[490] China, second written submission, para. 262, quoting Appellate Body Reports, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* ("*US – Softwood Lumber V (Article 21.5 – Canada)*"), WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, 5087, para. 133, and *EC – Bed Linen*, para. 59.

[491] China, answers to Panel questions 29 and 33; second written submission, paras. 261-269, citing Appellate Body Reports, *EC – Bed Linen*, para. 59; *US – Zeroing*, para. 146 [sic]; and *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 133.

the "comparison" between normal value and export price referred to in the chapeau of Paragraph 15 of China's Accession Protocol is the same "comparison" that Article 2.4, first sentence requires to be fair. For China, this means that where a Member uses an alternate method to derive normal value, in making that comparison, then the result, and the process by which that result is derived, must be fair as well.[492] Finally, China contends that the "fair comparison" requirement applies to both the procedural aspects of selecting an analogue country, and the substance of the selection made. For China, a "comparison" cannot be "fair" if the substantive criteria used to derive the normal value are fair, but the procedure favours the interests of the domestic producers.[493]

7.230 China also argues that the analogue country selection process falls within the scope of Article 2.1. China asserts that the analogue country selected must provide a "comparable price" that can constitute normal value. China recognizes that Article 2.1 does not contain any due-process language, but asserts that it is violated if the process by which the "comparable price" referred to in Article 2.1 is determined does not ensure that the price is "comparable". China asserts that the facts in this case demonstrate bias in favour of the domestic producers throughout the selection of the analogue country, in violation of the general "good faith" principle of international law that informs the provisions of the AD Agreement.[494]

7.231 China also contends that, while Article 2.1 is "definitional", it may nevertheless form the basis of a claim. China disagrees with the European Union's reliance on the statement of the Appellate Body in *US – Zeroing (Japan)* that "Article 2.1 read in isolation does not impose independent obligations", and seeks to distinguish the Appellate Body's statement as an explanation of why it exercised judicial economy with respect to an alleged violation of Article 2.1 in that case.[495] China asserts, relying on the decisions of the panel and the Appellate Body in *US – Hot-Rolled Steel*, that while Article 2.1 cannot independently impose an obligation, a violation of that Article can be found if, read in conjunction with other provisions, a violation of Article 2.1 can be established.[496] Thus, China argues, 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 covered agreements. In this case, China argues, its "comparable price" claim under Article 2.1 looks to various other provisions which evidence the existence of an obligation to secure a comparable price.[497]

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[492] China, answer to Panel question 29.

[493] This, China notes, is essentially what it is alleging. China, second written submission, paras. 286-288.

[494] China, second written submission, paras. 313-314.

[495] Furthermore, China is of the view that had Japan only cited Article 2.1 of the AD Agreement, the Appellate Body would have found a violation of that provision in light of the context of the AD Agreement, particularly Article 2.4.2. China, second written submission, paras. 295-297, citing Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews ("US – Zeroing (Japan)")*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3, para. 140.

[496] China, second written submission, paras. 298-300, citing Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769, para. 7.112. China further notes that the Appellate Body did not modify the panel's conclusion that Article 2.1 may form the basis of a claim. *Id.*, para. 304.

[497] China points, in particular, to (i) Paragraph 15 of China's Accession Protocol; (ii) the second *Ad* Note to Article VI:1 of the GATT 1994; (iii) Paragraph 151 of China's Accession Working Party Report; and (iv) Articles 2.2 and 2.5 of the AD Agreement. China, second written submission, paras. 306-308; closing oral statement at the second meeting with the Panel, para. 9.

7.232 China argues that Articles 2.1 and 2.4 inform the boundaries of an investigating authority's discretion in selecting an analogue country.[498] China asserts that, although China's Accession Protocol is silent as to criteria to be used in selecting an analogue country, the process of selecting an analogue country is not immune from review.[499] China contends that whatever discretion investigating authorities may have in adopting a procedure in connection with the determination of dumping, this discretion cannot trump the "obligation" to ensure a fair comparison based on export prices and "comparable" normal value.[500]

7.233 China considers that the selection of an analogue country is to be guided by the fair comparison requirement in Article 2.4, as well as the prescription that the normal value be comparable to the export prices and should be based on a fair competition in the domestic market of the analogue country.[501] China submits that an appropriate method aimed at securing a comparable price which could permit a fair comparison must at least attempt to find a proxy for the normal value that would have prevailed but for the distortion resulting from the fact that the country under investigation is not a market economy. China alleges that the 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 attempt to approximate the value which would have prevailed in the absence of the need to find the proxy.[502]

7.234 China asserts that this view is consistent with the object and purpose of the AD Agreement and, in particular, the context provided by Article 2. In this respect, China argues that Article VI:2 of the GATT 1994 provides that the purpose of imposing anti-dumping duties is to "offset or prevent dumping" and that in order to achieve that goal the AD Agreement requires a fair and accurate measurement of international price discrimination between the domestic market of the exporting country and the domestic market of the importing Member, i.e. dumping. China maintains that the purpose of Articles 2.1 and 2.4 is to ensure that investigating authorities seek a value which approximates what normal value would have been if there had been sales of the like product in the ordinary course of trade in the exporting country. For China, it is only by attempting to find such values that a determination of dumping within the meaning of Article 2.1 can be achieved. China considers that Paragraph 15(a) of China's Accession Protocol, like Articles 2.1 and 2.4, establishes that the purpose behind any alternate method for determining normal value must seek to approximate the result that would be reached if there were no need to resort to an alternate method. In China's view, the notion of "comparable price" requires that a normal value based on analogue country producers' data must be "comparable" to the export prices of the exporting producers.[503]

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[498] In China's view, a "fair comparison" between normal value and export price cannot be possible without securing a "comparable price". China, second written submission, paras. 326-327.

[499] China argues that silence on the part of the drafters with respect to the analogue country selection process indicates nothing more than that the drafters could not agree on specific disciplines in this regard and decided to leave the definition of the relationship between relevant obligations (such as fair comparison) and the discipline imposed by them on selection process to the DSB, if necessary. In any event, China contends that the drafters of the Protocol actually made their intentions clear as to what an appropriate analogue country selection process would entail in Paragraph 151 of China's Accession Working Party Report. China, second written submission, paras. 334-335.

[500] In China's view, silence as to the contours of one provision cannot be taken to modify or permit derogation from another, explicitly defined obligation. China, second written submission, paras. 326, and 329-343.

[501] China, first written submission, para. 390.

[502] See, generally, China, second written submission, paras. 351-357; answer to Panel questions 31 and 36; opening oral statement at the second meeting with the Panel, paras. 13 and 16-18.

[503] China, answer to Panel question 31. China also refers to (i) the second *Ad* Note to Article VI:1 of the GATT 1994; (ii) Article 2.1 of the AD Agreement; (iii) Article 2.2 of the AD Agreement; (iv) Paragraph 15(a) of China's Accession Protocol; (v) Paragraph 151 of China's Accession Working Party

7.235 With respect to the selection of the analogue country in the expiry review, China contends that the criteria relied upon by the European Union, and the way in which they were analysed, were not aimed at securing a comparable price which could have permitted a fair comparison, and thus the selection process as a whole was inconsistent with Articles 2.1 and 2.4. China asserts that the criteria used, (i) prevailing market conditions, (ii) sales of the like product, and (iii) a statistically significant volume of domestic sales, did not include any factor which would tend to account for labour costs in China or the situation of China as a lower-income country with a low per-capita income.[504] In China's view, while the three criteria are necessary, they cannot be considered sufficient, as none of them demonstrate a relationship between the potential analogue and the target country.[505] China also alleges that the importance which the European Union attached to the domestic sales volume criterion was manifestly unreasonable. China asserts that Indonesia was similar to China in terms of economic development, produced a broader range of footwear types, and the Commission itself recognized that the Indonesian producers' sales volume constituted a statistically significant sample. China argues that the selection of Brazil as the analogue country, because its sales volume was greater than that of Indonesia, demonstrates that the selection process did not secure a comparable price and secure a fair comparison.[506] China submits that the European Union analysed competition in a meaningless manner, as it failed to take into account the protected nature of the Brazilian market, in particular tariff barriers.[507] China also refers to the fact that the Brazilian producers whose data was used did not produce children's shoes, and alleges that by disregarding this fact, the European Union did not act

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Report; and (vi) EU practice, in support of its view that the analogue country selection process must seek to approximate the normal value that would have existed if the producers in the exporting non-market economy had operated under market economy conditions. China also argues that the reasoning of the panel in *US – Anti-dumping and Countervailing Duties (China)* concerning out-of-country benchmarks under Article 14(d) of the SCM Agreement supports its view by analogy. China, answer to Panel question 31; second written submission, paras. 358-366, citing Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ("*US – Anti-dumping and Countervailing Duties (China)*"), WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, para. 10.187.

[504] China argues that while in this case it was of extreme significance to take into consideration China's comparative advantages, namely low labour costs and economies of scale, as well as the fact that footwear is a labour intensive product, accounting for around 40 per cent of the price of the product, the European Union disregarded these aspects. China, first written submission, paras. 394, and 396-397; second written submission, para. 377.

[505] See, generally, China, second written submission, paras. 379-405.

[506] China argues that the European Union wrongly considered the provisions of footnote 2 to Article 2.2 of the AD Agreement in selecting Brazil. Footnote 2 provides:

> "Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison."

According to China, the 5 per cent level "was meant to be a rough guideline", and that while reliance on it might result in an accurate reflection of normal value in the analogue country, it is not sufficient for finding a proxy for the normal value that would have existed but for the distorted prices in the actual target of the investigation. China, second written submission, paras. 406-420; closing oral statement at the second meeting with the Panel, paras. 14-15.

[507] China argues that the existence of "fair" competition in the analogue country is essential for ensuring comparable prices and fair comparison, and asserts that competition in the Brazilian footwear market was not fair. China disagrees with the European Union that factors such as the number of the producers, exports, and the consumption of footwear in Brazil established that there was fair competition in the market. China, second written submission, paras. 454 and 458-459. China also argues that the European Union disregarded the effect of Brazil's system of non-automatic import licensing for footwear, and the fact that Brazil had imposed an anti-dumping duty of $13.85/pair on Chinese footwear imports. China, first written submission, para. 392.

objectively in selecting Brazil as the analogue country.[508] China contends that these errors demonstrate that the European Union failed to secure a comparable price which could permit a fair comparison. Finally, China argues that in selecting an analogue country, investigating authorities are under an obligation to comply with Article 17.6(i) of the AD Agreement. China asserts that the European Union failed to ensure that the analogue country selection procedure was based on a proper establishment of facts as well as an unbiased and objective evaluation of those facts. In particular, China contends that the European Union (i) assured the cooperation of the Brazilian producers by establishing different timeframes for sending the questionnaires to the Brazilian, Indian and Indonesian producers and by sending the questionnaires to the Indian and Indonesian producers during a holiday period; (ii) facilitated the cooperation of the Brazilian producers by giving them more time and greater flexibility to respond to the analogue country questionnaire; and (iii) failed to investigate the allegation regarding collusion between the Italian Footwear Association (ANCI) and the Brazilian footwear association (Abicalçados).[509]

7.236 With respect to the original investigation, China refers to its legal arguments in the context of its claims concerning the analogue country selection in the expiry review, and notes the similarity of the analogue country selection in both proceedings.[510] In particular, China recalls its arguments that (i) the European Union places an unreasonable weight on domestic sales volume in selecting an analogue country[511]; and (ii) the criteria relied upon, taken as a whole, are manifestly unreasonable and cannot accord with the obligations to secure a fair price and make a fair comparison, as the European Union does not take into account any criterion which aims at finding a proxy normal value for that which would have existed but for the distortion in the Chinese market.[512] With respect to its claim under Article 17.6(i) of the AD Agreement, China argues that the European Union (i) made more attempts to secure support from Brazilian and Indian producers than it made for Thai producers; (ii) granted more time to respond to the questionnaire to several Brazilian producers than it granted certain Thai and Indonesian producers; and (iii) did not objectively evaluate all the information made available by interested parties, including information regarding the factors affecting competition in Brazil.[513] In China's view, this was not only inconsistent with Article 17.6(i), it precluded a fair comparison between normal value and the Chinese export prices as required by Article 2.4, and as a consequence, the European Union's determination of dumping is inconsistent with Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994.[514]

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[508] China, first written submission, paras. 400-402; second written submission, para. 461. China disagrees with the European Union that a "fair comparison" can be achieved by making adjustments. In China's view, due allowances are not on their own sufficient to comply with the "fair comparison" obligation. In this case, China contends that a comparison of a normal value based on the price of an adult shoe adjusted by 33 per cent to compare it to the export price of a children's shoe demonstrated the lack of fair comparison. China, second written submission, para. 463; answer to Panel question 31(c).

[509] See, generally, China, first written submission, paras. 379 and 381-382; second written submission, paras. 370, 438, 443-445, and 448-449; closing oral statement at the second meeting with the Panel, paras. 16-23.

[510] With respect to the original investigation, China asserts claims under Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994, but not Article 2.1 of the AD Agreement. However, China contends that, given the identical "comparable price" language in Article 2.1 and Article VI:I of the GATT 1994, the difference between the claims should not have any practical effect on the outcome. China, second written submission, paras. 1315-1316.

[511] In particular, China alleges that while the Definitive Regulation states that "the representativeness of the domestic sales is not the sole reason for having chosen Brazil" and that "other factors such as the competition on the Brazilian market, the difference in the costs of production structures including the access to raw materials and the know-how of the Brazilian producers were analyzed", no real evaluation of these other factors took place. China, first written submission, para. 937.

[512] China, second written submission, para. 1318.

[513] China, first written submission, para. 930; second written submission, paras. 1328-1329.

[514] China, first written submission, para. 931.

b. European Union

7.237 The European Union rejects China's argument that Articles 17.6(i), 2.4, and 2.1 of the AD Agreement establish rules governing the analogue country selection. The European Union asserts that the only source of rules governing the choice of analogue country is Paragraph 15 of China's Accession Protocol[515], and that although these rules are implicit, their substance can be deduced from the context.[516]

7.238 The European Union contends that Article 2.4 of the AD Agreement does not apply to the selection of the analogue country. According to the European Union, the purpose of the analogue country selection is clear: to find a normal value that can be compared to the export price in an investigation involving a non-market economy. The standard way of determining a normal value is set out in Articles 2.1 and 2.2 of the AD Agreement, but in the case of China, Paragraph 15(a) of its Protocol of Accession makes clear that instead of using Chinese prices or costs to determine a normal value, an "alternative methodology" may be used. Once a normal value has been determined, the fair comparison obligation of Article 2.4 becomes operative, but not before, as the European Union contends that the very wording of Article 2.4 assumes that a normal value already exists.[517]

7.239 The European Union asserts that the notion of a "comparable" normal value does not involve the fairness criterion of Article 2.4. The European Union refers in this regard to Article 2.2, which provides that

> "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." (footnotes omitted)

The European Union notes that Article 2.2 refers to a "proper" rather than a "fair" comparison, contending that in this context, the two terms are not interchangeable, and the choice of terms is significant. The European Union also observes that nothing in Article 2.2 suggests that the use of alternative methods of determining normal value on the basis of "third country price" or "constructed price" must lead to a "fair", or even a "proper", comparison, although they must lead to a "comparable price", since that is the purpose of identifying a normal value. Finally, the European Union argues that the scope of Article 2.4 is limited, as demonstrated by the fact that all of the detailed rules its sets out for making a fair comparison assume that a comparable normal value already exists.[518]

7.240 The European Union contends that the authorities China invokes in support of its view do not demonstrate that the "fair comparison" obligation applies to the choice of the normal value. The

[515] In this respect, the European Union notes that China's panel request does not include Paragraph 15 of China's Accession Protocol in connection with its claims regarding the analogue country selection procedure. European Union, opening oral statement at the second meeting with the Panel, para. 56.

[516] European Union, opening oral statement at the second meeting with the Panel, paras. 53-56 and 73. The European Union rejects China's reliance on Paragraph 151 of China's Accession Working Party Report, arguing that it does not have the status of a legally binding text. European Union, first written submission, paras. 165-166; second written submission, paras. 64-65; opening oral statement at the second meeting with the Panel, para. 72.

[517] European Union, first written submission, paras. 169-171, 176 and 191; second written submission, para. 82; answer to Panel question 36, citing Panel Report, *Egypt – Steel Rebar*, para. 7.335.

[518] European Union, first written submission, paras. 173-175; answer to Panel question 37.

European Union notes that the Appellate Body reports referred to by China do not address the choice of normal value, but only the comparison of normal value and export price. Nor did the Appellate Body in any of these cases elaborate on the implications of the fair comparison obligation informing all of Article 2 other than in regard to the comparison of the normal value and export price. Furthermore, the European Union argues that the Appellate Body has made clear that the identification of the comparable price is entirely in terms of Article 2.1, and that once the comparable price has been identified, Article 2.4 guides the investigating authorities in ensuring that there is a fair comparison.[519]

7.241 The European Union argues that Article 2.1 is definitional and therefore cannot be the basis of a claim, disagreeing with China's reliance on the panel and Appellate Body report in *US – Hot-Rolled Steel* in this respect.[520] The European Union argues that in that case, the complainant had no way of challenging the conduct of the United States other than by invoking Article 2.1, since the phrase "in the ordinary course of trade" is not elaborated on elsewhere in the AD Agreement. China's claim, however, focuses on the term "comparable price", which is addressed by other provisions, notably Article 2.2. The European Union argues that since Article 2.1 sets out the basic elements of dumping, the effect of China's position would be that virtually any aspect of a Member's dumping determination could be brought before a panel simply by invoking Article 2.1. The European Union considers that this was not the intention of the drafters of the Agreement, and that Article 2.1 could not constitute a "legal basis", in terms of Article 6.2 of the DSU, for such a challenge.[521]

7.242 The European Union rejects China's view that the purpose of selecting an analogue country is to "find a value which would *approximate* what normal value *would have been* if there were, respectively, sales of the like product in the ordinary course of trade in the domestic market, or domestic sales made at the same level of trade as export sales."[522] The European Union does not consider the "goal of replicating conditions in a non–market economy country as though it were not a non-market economic [sic] country as one that can meaningfully be pursued".[523] Moreover, the European Union contends that China's argument in this regard is supported only by simple assertions.[524] The European Union argues that the use of analogue country information is an exceptional procedure that is adopted because conditions in the country being investigated are found to be incapable of providing data that can be used to determine normal values. Therefore, the

[519] European Union, second written submission, paras. 58-60, 61-62 and 82, citing Appellate Body Reports, *EC – Bed Linen*, para. 59; *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 133; and *US – Zeroing (EC)*, para. 146; *US – Hot-Rolled Steel*, paras. 148 and 164-169; answer to Panel question 38.

[520] European Union, opening oral statement at the second meeting with the Panel, para. 65, citing Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

[521] European Union, opening oral statement at the second meeting with the Panel, paras. 67, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 158.

[522] European Union, second written submission, para. 68, quoting China, answer to Panel question 31, para. 215.

[523] European Union, second written submission, para. 80.

[524] The European Union argues that (i) China concludes that Article VI of the GATT 1994 (and Article 2.1 of the AD Agreement) require that the analogue country permit determination of a normal value that is comparable to the export price, and then asserts that only its own standard is capable of achieving that result; (ii) China annexes the term "appropriate" in Article 2.2 of the AD Agreement to the choice of the analogue country and then asserts that Article 2.2 supports its notion of producing the situation of sales in a hypothetical market-economy domestic market; and (iii) Paragraph 151 of China's Accession Working Party Report is not binding, and in any event, the criteria actually used by the Commission in selecting the analogue country constitute "an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation". The European Union also notes that the panel in *US - Anti-Dumping and Countervailing Duties (China)* did not address how Paragraph 15(b) of China's Accession Protocol would have had to be applied had it been invoked, and the task of establishing a proxy benchmark under Article 14(d) of the SCM Agreement is significantly different from the task of choosing an analogue country. European Union, second written submission, paras. 74-79; opening oral statement at the second meeting with the Panel, paras. 85-86.

European Union considers that the notion of "what the normal value would have been if" cannot be applied.[525]

7.243 The European Union maintains that the choice of an analogue country is not governed by Article 2.4 of the AD Agreement, but must result in identifying a comparable normal value. In this regard, the European Union argues that China fixes on the term "appropriate", which appears in the second *Ad* Note to Article VI:1 of the GATT 1994, EU legislation, and Paragraph 151 of China's Accession Working Party Report, as the basis for criteria governing the choice of analogue country. The European Union considers the notion of choosing an "appropriate" analogue country unobjectionable, but asserts that a Member need not choose the "most appropriate" country in this regard.[526] In support of this view, the European Union points to Article 2.2, which establishes rules for alternate methods of determining normal value where domestic prices are not suitable for this purpose, with no preference for either of the two options, and a reference to the "appropriate" not "most appropriate" third country. The European Union also points to the working party reports on the accessions of Poland, Romania, and Hungary, which envisaged determining a normal value using a method that was "appropriate and not unreasonable", not choosing the "most appropriate" country.[527] Finally, the European Union notes that both the text of the second *Ad* Note to Article VI:1 of the GATT 1994, and its negotiating history, reveal the reluctance of the GATT Contracting Parties to articulate criteria applicable to the selection of normal value, and to the choice of an analogue country which is a step towards that selection.[528] Thus, for the European Union, any such criteria are necessarily implicit in character.[529]

7.244 With respect to the selection of an analogue country in the original investigation, the European Union rejects China's contention that, in making the choice of the analogue country, the Commission should have considered certain factors, notably the level of development. The European Union submits that in so far as the Commission did consider factors, its consideration was proper and met any legal obligation that exists, and as regards other factors proposed by China, it was under no obligation to consider them.[530] The European Union asserts that competitiveness and representativeness were the most significant factors taken into account for the selection of the analogue country, although the Commission also addressed other factors that were raised by interested parties.[531] Furthermore, the European Union argues that its emphasis on the existence of a sufficient volume of domestic sales in the analogue country was consistent with the AD Agreement which, as reflected in the hierarchy of choices set out in Articles 2.1 and 2.2, indicates that domestic sales prices

[525] European Union, second written submission, para. 71.

[526] European Union, first written submission, paras. 193-198. Indeed, Article 2(7)(a) of the Basic AD Regulation refers to "appropriate", but China does not explain how this provides guidance in the interpretation of WTO obligations. European Union, first written submission, para. 195.

[527] European Union, first written submission, paras. 191-202.

[528] European Union, answer to Panel question 36. In this respect, the European Union notes that the Contracting Parties' refused to modify the second *Ad* Note to Article VI:1 of the GATT 1994 as proposed by Czechoslovakia. This, in the European Union's view, further demonstrates that the intention of this provision is to give Members broad discretion as how to determine the normal value for non-market economy countries. *Id.* European Union, first written submission, para. 209.

[529] European Union, answers to Panel questions 34 and 36; opening oral statement at the second meeting with the Panel, para. 56; first written submission, paras. 197-203.

[530] See, *e.g.* European Union, opening oral statement at the second meeting with the Panel, paras. 60 and 122. With respect to China's contention regarding the level of economic development, the European Union further argues that (i) costs in a non-market economy are distorted and therefore cannot be relied upon; (ii) there is no legal basis for such a criterion to apply to the choice of the analogue country; (iii) China's reliance on Paragraph 151 of China's Accession Working Party Report to support this criterion is flawed since this provision is not legally binding nor is it within the terms of reference of the Panel. European Union, first written submission, paras. 217-218; opening oral statement at the second meeting with the Panel, paras. 79-80.

[531] European Union, opening oral statement at the second meeting with the Panel, para. 90.

are the primary source for determining normal value.[532] The European Union disagrees with China's argument that the Commission erred in choosing Brazil over Indonesia based on greater representativeness of sales. The European Union contends that the Commission's determination in this regard was based on the 5 per cent rule contained in Article 2.2 and that the purpose of this rule is to ensure that domestic sales constitute a significant portion of the exporter's business.[533] The European Union also argues that the criterion of competitiveness was amply satisfied by Brazil.[534] In the European Union's view, the existence of nearly 8,000 producers of footwear in Brazil was a significant factor indicating a competitive market. The European Union notes that other factors, such as Brazil's level of footwear imports, were also considered by the Commission in reaching its conclusion. As for China's allegations regarding the lack of production of children's shoes in Brazil, the European Union argues this did not prevent the choice of Brazil as the analogue country, as an appropriate adjustment was made at the stage of comparison of normal value and export price. The European Union notes that China's criticism appears to be directed at the way in which the adjustment was made, and maintains that this is not a relevant issue in the context of the analogue country selection.[535]

7.245 The European Union reiterates its view that China's claim under Article 17.6(i) of the AD Agreement is outside the Panel's terms of reference. In any event, the European Union asserts that China's arguments in support of this claim are confused and ineffectual.[536] The European Union submits that China's accusation of bias is without foundation.[537] The European Union maintains that, as stated in the Review Regulation, the sending of questionnaires to the Indian and Indonesian producers "could only be completed at the end of December 2008, after the relevant addresses of producers were obtained". Furthermore, the European Union argues that, apart from its unproven contentions regarding the "holiday season", China has not advanced any argument or evidence supporting its contention that the dispatching of questionnaires on different dates constituted bias.[538] The European Union asserts that there was no discrimination in favour of Brazil in granting extensions of the deadlines, since companies could ask for extensions, extensions were granted, and replies were accepted until mid-February.[539] Finally, the European Union asserts that China's allegation of collusion between the Italian and Brazilian producers is unsubstantiated.[540]

7.246 With respect to the selection of an analogue country in the expiry review, the European Union argues that the Commission correctly considered the factors of competition, labour costs, and the representativeness of sales in concluding that Brazil was an appropriate analogue country. It asserts that its preference for making a comparison with a normal value based on domestic sales prices is

[532] European Union, first written submission, para. 220; answer to Panel question 37.

[533] European Union, opening oral statement at the second meeting with the Panel, paras. 92-94. Furthermore, the European Union notes that while it does not treat the 5 per cent rule as rigid minimum, no argument was presented to the Commission as to why it should lower the threshold in this case. *Id.*, para. 96.

[534] European Union, first written submission, paras. 214-216, referring to Review Regulation, Exhibit CHN-2, recitals 80-82 and 89-90; opening oral statement at the second meeting with the Panel, para. 122.

[535] European Union, opening oral statement at the second meeting with the Panel, paras. 124, and 128-130.

[536] European Union, first written submission, paras. 178-179.

[537] European Union, first written submission, para. 190.

[538] European Union, first written submission, paras. 182-183; opening oral statement at the second meeting with the Panel, paras. 99-103. The European Union asserts that the Indian and Indonesian producers actually had more time to respond than did Brazilian producers. European Union, first written submission, para. 188; opening oral statement at the second meeting with the Panel, paras. 107-108.

[539] European Union, opening oral statement at the second meeting with the Panel, paras. 105-106.

[540] The European Union notes that the Commission did not find, nor was it provided with, evidence of the collusion alleged by China. Similarly, the European Union argues that China's hypotheses as to how the Brazilian data might have been distorted by collusion are based on theories and not on facts. European Union, opening oral statement at the second meeting with the Panel, paras. 110-117.

consistent with Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement, both of which establish that prices are always the first choice in establishing a normal value. Furthermore, the European Union contends that given the large number of different types of shoes involved in the investigation, the level of the domestic sales was particularly relevant.[541] It adds that given the significantly larger volume of sales by Brazilian producers willing to cooperate, the likelihood of finding comparable models was higher than in the case of Thai, Indonesian and Indian companies.[542] The European Union asserts since the Brazilian market was found to be a competitive market, it was unnecessary to investigate competition in other countries. In this regard, the European Union recalls its position that there is no obligation to choose the "best" country. Moreover, the European Union notes that, as stated in the Definitive Regulation, the labour costs of the sampled exporting producers in China did not warrant an adjustment in the comparison.[543] Finally, the European Union submits that China has failed to substantiate its allegations that the Commission's procedures to select an analogue country were biased.[544]

(ii) Arguments of third parties

a. Brazil

7.247 Brazil asserts that there are no specific WTO rules governing the choice of the analogue country for the purpose of calculating the normal value in anti-dumping investigations. Brazil notes that the second *Ad* Note to Article VI:1 of the GATT 1994 and Article 2.7 of the AD Agreement recognize the inherent difficulties in calculating dumping margins in cases where products are exported from NMEs. While Article 2.7 allows WTO Members to depart from the rules laid down in Article 2 of the AD Agreement in determining normal value, neither the GATT 1994 nor the AD Agreement indicate which method should be used, and the terms "analogue country" or "surrogate country" do not appear in the AD Agreement, China's Accession Protocol or the GATT 1994. Nor is there any provision which would indicate how WTO Members should calculate NME normal value, or implying that Members must select the most appropriate or otherwise "similar" country as the analogue/surrogate country. In Brazil's view, the sole guidance provided by the GATT 1994 and the AD Agreement is that the normal value used should render a fair comparison with the export price possible. Thus, insofar as the investigating authority selects an analogue country which allows it to obtain a comparable, and thus appropriate, normal value, it should not be found to be in breach of WTO rules. Brazil considers that the investigating authority in selecting an appropriate analogue country enjoys certain discretion in creating alternative methodologies for establishing normal value for NME countries and also in establishing criteria that exporters from NME countries must meet in order to be subject to the exceptional regime of market economy. Finally, Brazil considers that Article 2.4 of the AD Agreement does not apply at the stage of selecting an analogue country and therefore the fair comparison rule cannot be interpreted so as to apply to the choice of the analogue country as such.[545]

b. Colombia

7.248 Colombia considers that the use of alternative methodologies for establishing the normal value of producers from non-market economy countries is justified by the second *Ad* Note to Article VI:1 of the GATT 1994 and Article 2.7 of the AD Agreement. Colombia acknowledges that

[541] European Union, first written submission, paras. 614-616.
[542] European Union, first written submission, para. 622.
[543] European Union, first written submission, para. 619.
[544] European Union, first written submission, paras. 604-611; opening oral statement at the second meeting with the Panel, paras. 392-396.
[545] Brazil, third party written submission, paras. 31, 34-35, 38-40, and 41; answers to Panel questions 7 and 8.

market conditions of non-market economy countries do not permit a proper comparison between the normal value and the export price of products from those countries and therefore considers that a comparison methodology for that purpose should take into account elements such as those described in Article 2 of the AD Agreement. Finally, Colombia is of the view that the "fair comparison" requirement of Article 2.4 does not apply to the selection of an analogue country in the context of a non-market economy country investigation.[546]

c. Japan

7.249 Japan notes that throughout the comparison of normal value and export price, Article 2.4 of the AD Agreement establishes a fundamental obligation limiting the discretion of the investigating authority in conducting a fair comparison. This obligation, in Japan's view, requires investigating authorities to conduct the investigation properly and assess the facts in an unbiased and objective manner, observing the principles of good faith and fundamental fairness. Japan considers that the selection of an analogue country in the context of a NME country investigation is a part of the process of establishing the normal value in the investigation and, as a result, to the extent that the general obligations of good faith and fundamental fairness are applicable throughout the comparison process for calculating the dumping margin, it would not be reasonable to conclude that the authorities are exempted from securing substantive and procedural fairness in the context of the selection of the analogue country. To this extent, Japan is of the view that the "fair comparison" requirement in Article 2.4 is also applicable to other aspects of a determination of dumping through the comparison process.[547]

d. Turkey

7.250 Turkey notes that both the second *Ad* Note to Article VI:1 of the GATT 1994 and Paragraph 15(a) of China's Accession Protocol allow Members to use a methodology that is not based on a strict comparison with domestic prices or costs in China if the investigated producers cannot clearly show that they are operating in market economy conditions. Turkey considers that selecting an analogue country is the most reasonable method for determining the normal value when the investigated companies are not operating under market economy conditions and that such selection should be guided by an "appropriate country" standard. In addition, Turkey is of the view that the fair comparison requirement in Article 2.4 does not govern the analogue country selection process. In this regard, Turkey notes that the fair comparison principle does not govern the calculation of normal value or export price but only the stage of comparison of these two prices.[548]

e. United States

7.251 The United States considers that the obligation under Article 2.4 to ensure a fair comparison between normal value and export price does not apply to the selection of an analogue country. Instead, the focus of Article 2.4 is on how the authorities are to select specific transactions for comparison and make the appropriate adjustments for differences that affect price comparability once the normal value has been determined. The United States is of the view that just as nothing in the text of Articles 2.1, 2.2 or 2.4 indicates that the first sentence of Article 2.4 is relevant to the choice between home market, third country market or cost of production, nothing in Paragraph 15(a)(ii) of

[546] Colombia, answers to the Panel questions 7 and 9.

[547] Japan, answer to Panel question 9, citing Appellate Body Reports, *EC – Bed Linen*, para. 59 and *US – Hot-Rolled Steel*, para. 101; Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.178; *United States – Measures Relating to Zeroing and Sunset Reviews*, ("*US – Zeroing (Japan)*"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, 97, para. 4.107.

[548] Turkey, third party written submission, paras. 16-28; oral statement, paras. 2-11; answers to Panel questions 2 and 9.

China's Accession Protocol or Article 2.4 suggests that the first sentence of Article 2.4 is relevant to the selection of the analogue country. In addition, the United States argues that the language of Article 2.4, which relates solely to the comparison, should not be taken out of context and applied to other issues related to the calculation of dumping margins. Finally, the Unites States considers that to the extent a comparison has been made in accordance with the rules of Article 2.4, the comparison is "fair".[549]

f. Viet Nam

7.252 Viet Nam considers that Brazil has a higher level of socio-economic developments compared to China and its footwear industry is one of the world's most protected ones. In addition, Viet Nam notes while Article X:3 of the GATT 1994 states that measures of general application are to be administered in an impartial, objective and uniform manner, it seems that the selection of Brazil as the analogue country was not objective or impartial. Thus, in Viet Nam's view, the analogue-country selection is, arguably, inconsistent with Article X:3 of the GATT 1994.[550]

(iii) Evaluation by the Panel

7.253 Before addressing China's claims, we recall certain relevant facts of the original investigation and the expiry review.

7.254 The European Union considered China to be a non-market economy for purposes of both proceedings.[551] Pursuant to Article 2(7) of the Basic AD Regulation, in the original investigation, the Commission established normal value on the basis of the price or constructed value in an analogue country. In the Notice of Initiation of the original investigation, the Commission indicated its intention to use Brazil as an appropriate analogue country and invited interested parties to comment. Comments were received suggesting Thailand, India, or Indonesia as more suitable than Brazil in this regard. The Commission considered each of these proposed alternatives, and concluded that Brazil was an appropriate analogue country at the time of the Provisional Regulation. Subsequently, some interested parties argued that it was not appropriate to have chosen Brazil as the analogue country. The Commission rejected these arguments and concluded that Brazil was an appropriate analogue country for the purpose of establishing the normal value in the Definitive Regulation.[552]

7.255 In the expiry review, pursuant to Article 2(7)(b) of the Basic AD Regulation, the Commission again established normal value "on the basis of the price or constructed value in an appropriate market economy third country." In the Notice of Initiation of the expiry review, the Commission indicated its intention to use Brazil as analogue country, as it had in the original investigation, and invited comments.[553] Comments were received suggesting that Thailand, India or Indonesia would be more suitable than Brazil. The Commission considered each of these proposed alternatives, and concluded that Brazil was an appropriate analogue country in the Review Regulation.[554]

[549] United States, oral statement, paras. 15-19; answers to Panel questions 7, 8 and 9.
[550] Viet Nam, third party written submission, paras. 16-19.
[551] With the exception of one company, Golden Step, which the Commission concluded was entitled to market economy treatment. Definitive Regulation, Exhibit CHN-3, recital 72, Review Regulation, Exhibit CHN-2, recitals 111-115.
[552] Definitive Regulation, Exhibit CHN-3, recitals 105-122.
[553] Review Regulation, Exhibit CHN-2, recitals 68-69.
[554] Review Regulation, Exhibit CHN-2, recitals 71-108. The Commission also checked what the result would have been had it selected Indonesia, which it considered the only tenable alternative to Brazil, and confirmed that the choice of analogue country between the two tenable alternatives in this case was not determinative of the result of the dumping calculations. *Id.*, recitals 106-107.

7.256 China's claims assert that the analogue country selection procedure used by the European Union and the selection of Brazil as the analogue country in both the original investigation and the expiry review violated Articles 2.1, 2.4, and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994.[555]

7.257 Thus, the first question before us is whether China's premise, that Articles 2.1 and 2.4 apply to the analogue country selection procedure and establish limits on the procedures and criteria for, and the outcome of, the selection of an analogue country, is correct. If not, then China's claim is without a legal basis in the AD Agreement, or the GATT 1994,[556] and we need not consider its contentions regarding the facts of either the expiry review or the original investigation.

7.258 We note first that the term "analogue country" does not appear in the AD Agreement, Article VI of the GATT 1994, in China's Accession Working Party Report, or in China's Accession Protocol.[557] Nor is there any reference in any of these concerning the procedure or criteria for the selection of an analogue country. Indeed, China does not argue otherwise. China asserts that the "fair comparison" obligation in Article 2.4 and the term "comparable price" in Article 2.1 inform the boundaries of investigating authorities' discretion in the selection of an analogue country. In China's view, the process of selecting an analogue country must aim at securing a comparable price which could permit a fair comparison, and the country selected must be capable of yielding such a price.[558] Thus, China's claims ask us to first conclude that Articles 2.1 and 2.4 of the AD Agreement establish requirements for a methodology for determining normal value in certain anti-dumping investigations which is not even alluded to in any relevant legal instrument, and second that the European Union violated those requirements.

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[555] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

Moreover, while China's claim with respect to the original investigation does not allege a violation of Article 2.1 of the AD Agreement, its arguments in support of that claim refer back to its arguments with respect to the expiry review, where a claim under Article 2.1 is asserted. As the analysis underlying China's claims is essentially the same, we will address these claims together, despite the lack of an Article 2.1 claim with respect to the original determination.

[556] To the extent China makes arguments under Article VI:1 of the GATT 1994, these are the same as its arguments under Article 2.1 of the AD Agreement, as they concern the term "comparable price". Therefore, our consideration of China's arguments regarding Article 2.1 also addresses its arguments under Article VI:1 of the GATT 1994 in the context of these claims.

[557] Paragraph 15(a)(ii) of China's Accession Protocol does provide that an importing WTO Member "may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producer under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product." Paragraph 15(c) further provides that "[t]he importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices", and Paragraph 15(d) sets out temporal limits on the provisions of subparagraph (a). The "analogue country" methodology is generally understood to be an "alternative methodology" within the meaning of Paragraph 15(a)(ii). China explains that the European Union uses prices or costs prevailing in a market economy country, i.e. an analogue country, as the basis for determining the normal value used to calculate the dumping margins for exporting producers that do not receive market economy treatment. China, first written submission, paras. 366 and 369.

[558] Specifically, we recall that China asserts that an appropriate method aimed at securing a comparable price which could permit a fair comparison must at least attempt to find a proxy for the normal value that would have prevailed but for the distortion resulting from the fact that the country under investigation is not a market economy. In practical terms, China would have an investigating authority attempt to determine what domestic prices would obtain for a product in a non-market economy if it were a market economy. Like the European Union, we consider this to be a goal that cannot meaningfully be pursued, and certainly not one which can be derived from the "fair comparison" language of Article 2.4.

7.259 Article 2.1 of the AD Agreement provides:

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

On its face, it is clear that Article 2.1 is a definitional provision that sets forth the general definition of "dumping" for the purposes of the AD Agreement. The Appellate Body's report in *US – Zeroing (Japan)* states:

> "Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the Anti-Dumping Agreement and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the Anti-Dumping Agreement, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations."[559]

7.260 Thus, it would seem that Article 2.1 does not, in itself, impose independent obligations and therefore cannot be the basis of a stand-alone claim. The European Union argues that Article 2.1 is a purely definitional provision that cannot be used as a basis of a claim. China, however, asserts, relying on the decision of the panel in *US – Hot-Rolled Steel*, that although Article 2.1 does not create independent obligations, it may nevertheless form the basis of a claim if it can be shown that the obligation is also "located" or "created" elsewhere in the AD Agreement.[560] Even assuming this were the case, we do not consider that China has demonstrated that the obligations it asserts are "located" or "created" elsewhere in the AD Agreement.[561] Thus, we see no basis in Article 2.1 of the AD Agreement for China's claims concerning analogue country.[562] We have, as discussed above, dismissed China's claims under Article 17.6(i).[563] Moreover, we agree with the European Union that, under China's approach, all dumping-related claims could be brought under Article 2.1 alone, supported by the assertion that the obligations asserted are "created" elsewhere.[564] Articles 2.2 and

[559] Appellate Body Report, *US – Zeroing (Japan)*, para. 140 (footnote omitted).

[560] China, second written submission, paras. 300 and 306-307; closing oral statement at the second meeting with the Panel, para. 9.

[561] We see nothing in the conclusions or reasoning of either the panel or the Appellate Body in *US – Hot-Rolled Steel* which supports China's position. The question at issue in that case was the United States' test for determining whether sales between affiliated parties were "sales in the ordinary course of trade" within the meaning of Article 2.1, which defines dumping as occurring where the export price of a product is less than "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The panel, and later the Appellate Body, noted that the AD Agreement did not define the term "ordinary course of trade" and that while Article 2.2.1 established rules for determining whether sales below cost may be treated as not in the ordinary course of trade, it did not address the question raised in the dispute. Panel Report, *US – Hot-Rolled Steel*, para. 7.108; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 139. The panel, and later the Appellate Body for somewhat different reasons, found that the test applied by the United States "does not relate to a permissible interpretation of the term "sales in the ordinary course of trade"". Panel Report, *US – Hot-Rolled Steel*, para. 7.112; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 158.

[562] As noted above, our consideration of China's arguments regarding Article 2.1 also addresses its arguments under Article VI:1 of the GATT 1994 in the context of these claims, see footnote 556 above, and therefore we also see no basis in Article VI:1 of the GATT 1994 for China's claims.

[563] See paragraphs 7.35-7.44 above.

[564] European Union, opening oral statement at the second meeting with the Panel, para. 67.

2.3 establish specific rules for alternative methods that may be used in establishing normal value and export price in certain circumstances; Article 2.4 establishes specific rules and methodologies for the comparison of normal value and export price; Article 2.5 establishes specific rules for the country in which normal value is to be established in cases of transhipment; Article 2.6 defines like products, and Article 2.7 establishes the continued significance of the second *Ad* Note to Article VI:1 of the GATT 1994. Under China's approach, however, these provisions would simply be subsumed in the definition of dumping set out in Article 2.1, and be effectively redundant. We do not accept that Article 2.1 can be understood in such a fashion.

7.261 The only other provision relied on by China in this regard is Article 2.4 of the AD Agreement. China contends that Article 2.4 applies to the analogue country selection procedure, and that the "fair comparison" obligation in the first sentence of Article 2.4 is an "independent" and "overarching" obligation which applies to all of Article 2, including all aspects of the establishment of normal value, in particular, in this case, the selection of an appropriate analogue country.[565]

7.262 Article 2.4 of the AD Agreement provides:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties." (footnote omitted)

The first sentence of Article 2.4, on its face, addresses the "comparison" between the export price and normal value and explicitly requires that such a comparison must be "fair". The remainder of the provision, including its subparagraphs, establishes specific rules for ensuring a fair comparison of export price and normal value.

7.263 Nothing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price. Indeed, in our view, it is clear that the requirement to make a fair comparison in Article 2.4 logically presupposes that normal value and export price, the elements to be compared, have already been established. We note in this regard the views of the panel in *Egypt – Steel Rebar*. Although the issue before that panel was the different question of whether Article 2.4 establishes a "generally applicable rule" as to burden of proof, the panel considered Article 2.4 in detail, and stated:

> "Article 2.4, on its face, refers to the comparison of export price and normal value, i.e. the calculation of the dumping margin, and in particular, requires that such a comparison shall be "fair". **A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and**

[565] China, second written submission, paras. 261-266; opening oral statement at the second meeting with the Panel, para. 8.

> **basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value**."[566]

Moreover, there is nothing in the provisions of the AD Agreement that specifically address the determination of normal value, most notably Article 2.2, that refers to the "fair comparison" called for by Article 2.4.[567]

7.264 China argues, however, that Article 2.4 establishes a general "fairness" obligation that applies to all of Article 2, including all aspects of the establishment of normal value. As noted above, however, the "fairness" requirement in Article 2.4 refers to the "comparison" between the normal value and the export price. In our view, to require consideration of whether a "fair comparison" will result in the process of determining normal value introduces a circularity into the analysis which is untenable. Indeed, in our view, the provisions of Article 2.4 are intended precisely to deal with problems that arise in the comparison as a result of, *inter alia*, how normal value was established. In such a circumstance, Article 2.4 requires investigating authorities to ensure a fair comparison between the normal value and the export price, and provides explicit guidance on how this is to be done: where there are "differences" affecting price comparability between export price and normal value, "[d]ue allowance shall be made" for those differences.[568] These allowances can only be made after the normal value and the export price have been established.

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[566] Panel Report, *Egypt – Steel Rebar*, para. 7.333 (footnote omitted, **bold emphasis** added). The panel went on to observe:

> "First, the emphasis in the first sentence is on the *fairness* of the *comparison*. The next sentence, which starts with the words "[t]his comparison", clearly refers back to the "fair comparison" that is the subject of the first sentence. The second sentence elaborates on considerations pertaining to the "comparison", namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence has to do with allowances for "differences which affect *price comparability*", and provides an illustrative list of possible such differences. The next two sentences have to do with ensuring "price comparability" in the particular case where a constructed export price has been used. The final sentence, where the reference to burden of proof at issue appears, also has to do with "ensur[ing] a fair comparison". In particular, the sentence provides that when collecting from the parties the particular information necessary to ensure a fair comparison, the authorities shall not impose an unreasonable burden of proof on the parties.
>
> The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where "the *comparison* under paragraph 4 requires a conversion of currencies" (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as "the provisions comparison is made (i.e. the calculation of dumping margins on a weighted-average to weighted average or other basis).
>
> In short, Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value."

Id., paras. 7.333-7.335 (italics in original).

[567] Article 2.2 establishes options for determining normal value where domestic sales prices are not a suitable basis, but establishes no hierarchy between them. There is nothing in Article 2.2 to suggest that consideration of the fair comparison requirement or Article 2.4 is relevant to the choice among these options. Similarly, Article 2.3 establishes options for determining export price in certain circumstances, but does not suggest that consideration of the fair comparison requirement or Article 2.4 is relevant to the choice among these options.

[568] In this regard, we note that Article 2.4 expressly requires that "due allowance" be made for "any other differences which are also demonstrated to affect price comparability" and therefore no difference

7.265 China relies on three Appellate Body reports in support of its view that Article 2.4 establishes a general requirement of "fairness" that applies to all of Article 2. However, the three cases cited by China in this regard involved the question of whether the investigating authority had made a "fair comparison" between normal value and export price.[569] In none of them was the establishment of the normal value addressed in connection with the "fair comparison". It is true the Appellate Body stated, in *EC – Bed Linen*, that the obligation to make a fair comparison between export price and normal value in Article 2.4 "is a general obligation" that "informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'". However, the Appellate Body was not, in that case, considering the determination of normal value, and we see nothing in its reasoning to suggest it intended this statement to have the breadth ascribed to it by China. We decline to ascribe to the Appellate Body the views proffered by China concerning the relevance of fair comparison to the determination of normal value. We recall that in *US – Hot-Rolled Steel*, the Appellate Body examined the determination of normal value under Article 2.1, and while noting that the use of downstream sales to determine normal value could affect price comparability, it concluded this could be taken account of by the allowance mechanism provided for in Article 2.4. The Appellate Body certainly did not conclude that the fair comparison requirement of Article 2.4 directly applied to the determination of the normal value from the outset.[570] We therefore conclude that China has failed to demonstrate that the fair comparison requirement of Article 2.4 of the AD Agreement, either alone, or together with Article 2.1 of the AD Agreement and/or Article VI:1 of the GATT 1994, establishes a general requirement of "fairness" which applies, *inter alia*, to the selection of an analogue country.[571]

7.266 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Articles 2.1, 2.4 and 17.6(1) of the AD Agreement, or with Article VI:1 of the GATT 1994 in the original investigation as a result of the analogue country selection procedure and the selection of Brazil as the analogue country. We also conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 11.3 of the

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affecting price comparability is precluded from being the object of an allowance. Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

[569] In *US – Zeroing (EC)* and *US – Softwood Lumber V (Article 21.5 – Canada)*, the issue was whether the United States' practice of zeroing was inconsistent with Article 2.4 of the AD Agreement. Appellate Body Reports, *US – Zeroing (EC)*, paras. 136-147; and *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 131-146. Similarly, in *EC – Bed Linen*, the issue was whether the European Communities' practice of zeroing was consistent with Article 2.4.2 of the AD Agreement. Appellate Body Report, *EC – Bed Linen*, paras. 46-66. In *US – Zeroing (EC)*, the Appellate Body agreed with the panel's findings that the "'fair comparison' language in the first sentence of Article 2.4 creates an independent obligation" and that "the scope of this obligation is not exhausted by the general subject matter expressly addressed by paragraph 4 (that is to say, the price comparability)." Appellate Body Report, *US – Zeroing (EC)*, para. 146. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body referred to the statements made in the cases noted above. *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 133.

[570] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 166-168.

[571] We note that the European Union in this case considers that the AD Agreement does require that the analogue country selected be "appropriate", but not necessarily the "most appropriate", and defends the selection of Brazil in both the original investigation and the expiry review as satisfying this standard. The Definitive and Review Regulations make clear that the Commission not only invited the comments of interested parties on the choice of analogue country, but considered the comments received and addressed them in its determinations. Nothing in China's arguments suggests otherwise. Rather, China disagrees with the weight accorded to certain facts by the Commission, and its conclusions. Given our conclusion that China has failed to demonstrate a legal basis for its claims, we do not consider it either necessary or appropriate to address the parties' arguments concerning the facts and the Commission's consideration of those facts.

AD Agreement in the expiry review as a result of the analogue country selection procedure and the selection of Brazil as the analogue country.[572]

(e) Claims II.1 and III.3 – Alleged violation of Articles 2.1 and 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 – PCN Methodology

(i) Arguments of the Parties

a. China

7.267 With respect to both the expiry review and the original investigation, China claims that the European Union acted inconsistently with Article 2.4 of the AD Agreement by using a broad Product Control Number ("PCN") system for the classification of different product types which in China's view led to the classification of extremely different footwear types under a single PCN category and thereby precluded a fair comparison between the export price and normal value, as well as domestic market prices, for the purpose of the dumping margin calculation as required by Article 2.4 of the AD Agreement. In the context of the expiry review, China also claims that the reclassification of certain footwear from one PCN category to another during the expiry review precluded a fair comparison between the export price and normal value, in violation of Article 2.4 of the AD Agreement. China claims that, as a consequence of both the broad PCN system and the reclassification of certain footwear, the European Union's determination of dumping in the expiry review was inconsistent with Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994.[573]

7.268 China notes, as examples, that a single PCN included a broad range of footwear styles and/or production processes or included different shoes with different production costs and factory prices.[574] China also asserts that the reclassification of sports, sports-like and trekking footwear into category "A: Urban" further increased the breadth of different types of footwear in a single category, as all sports, sports-like and trekking footwear were grouped with all divergent types of urban footwear. In China's view, this approach mixed completely different footwear types and automatically prevented a fair comparison.[575]

7.269 China argues that if the European Union decides to use a PCN system, it is under an obligation to adequately reflect all the characteristics of the product which may affect price comparability, and the failure to do so results in an unfair comparison unless it could be cured by appropriate adjustments calculated in a correct manner.[576] China alleges that in both the expiry review and the original investigation, due to the overly broad PCN system used by the Commission, exactly this situation arose, and allowances for differences affecting price comparability could not be demonstrated by the exporters. In particular, China asserts that Chinese producers could not possibly quantify these differences for the hundreds of different footwear types categorized within the same PCN in order to request specific adjustments, and that under these circumstances, the only possible solution for exporters was to request the introduction of specific categories within the existing PCN system.[577] With respect to the original investigation, China specifically asserts that the PCN system

[572] We recall in this regard our views concerning the consideration of alleged violations of Article 2 of the AD Agreement in the context of an expiry review, paragraphs 7.163-7.165 above.

[573] China, first written submission, paras. 409-419; second written submission, paras. 481 and 502.

[574] China, first written submission, para. 410.

[575] China, first written submission, paras. 415-417.

[576] China, first written submission, para. 947; answers to Panel questions 27 and 28.

[577] China, answers to Panel questions 27 and 28; second written submission, paras. 484-486. China argues that, most importantly, Chinese exporters did not know how footwear was classified by the Brazilian producers in the various PCNs until the general disclosure, and therefore they could not request any adjustments for the different footwear types classified within the same PCN by them and the Brazilian producers. In addition, China argues that the European Union's practice imposes an impossible burden of proof on exporters

(i) did not take into account the type or quality of the leather used in the production of the product under consideration and (ii) grouped extremely different footwear categories under a single PCN and did not take into consideration the differences between the production processes (*e.g.* number/types of stitching operations which result in significantly different production costs and sales prices). In addition, China alleges that the failure to identify footwear designed for sporting activities and STAF from the beginning of the original investigation severely affected the price comparisons made.[578]

7.270 China asserts that despite repeated submissions by interested parties objecting to the specifics of the PCN system, the European Union did not make any amendments to that system. In this regard, China disagrees with the Commission's view that the PCN system allowed for a comparison of up to 600 different categories or product types and that substantiated reasons for amending the PCN system were not presented. The fact that the PCN system allowed for a theoretical comparison of up to 600 footwear categories, China argues, is irrelevant, as the system did not ensure sufficient comparability of the different footwear types classified under the same PCN. Furthermore, China submits that the evidence demonstrates that interested parties did present substantiated and detailed comments opposing the use of the PCN system.[579]

7.271 With respect to the original investigation, China in addition claims that the European Union acted inconsistently with Article 2.4 of the AD Agreement by making an incorrect adjustment to the analogue country normal value for differences in the quality of leather used by Chinese and Brazilian producers. With respect to the leather adjustment, China also claims that the European Union violated Article VI:1 of the GATT 1994.[580] China submits that, pursuant to Article 2.4, it is not enough that allowances are made for factors affecting price comparability, but it is also necessary that the allowances are calculated in a correct manner in order to ensure a fair comparison. In this case, China argues, the leather adjustment precluded a fair comparison because the Commission, in making the adjustment, used the data of Chinese producers that it had not granted MET.[581] Specifically, China notes that while on the one hand, the Commission did not grant MET to eleven sampled Chinese producers, considering that they did not operate under market economy conditions, on the other hand, the Commission then used the data of these producers, which it otherwise disregarded, to make significantly high adjustments of 21.6 per cent to the normal value based on the Brazilian producers' costs or prices.[582]

b. European Union

7.272 With respect to the expiry review, the European Union submits that China has failed to establish that the PCN system used was in violation of Article 2.4 of the AD Agreement.[583] The European Union notes that China repeats the same arguments concerning aspects of the PCN system that were raised during the review and rejected by the Commission, which found that those arguments

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since adjustments are not accepted unless duly verified. China, opening oral statement at the second meeting with the Panel, para. 21.

[578] China argues that the type, quantity, and quality of the leather are elements that affect price comparability, but that neither the PCN system nor the adjustment made by the Commission with respect to quality of the leather reflected such differences. See, e.g. China, first written submission, paras. 949, and 951-953; answers to Panel questions 25 and 27; second written submission, paras. 1331 and 1333.

[579] China, first written submission, paras. 412-413; second written submission, paras. 487-488.

[580] China, first written submission, para. 961.

[581] See, generally, China, first written submission, paras. 955-961.

[582] China, first written submission, para. 958. China further argues that the European Union has a practice of not making adjustments for differences in production costs when the normal value is based on the prices or constructed values in the analogue country as the figures presented by Chinese exporters not benefiting from MET were considered to be unreliable. *Id.*, para. 959.

[583] European Union, first written submission, para. 238.

did not warrant any changes to the PCN system.[584] Furthermore, the European Union argues that the categories the Commission relied upon reflected important market and cost considerations. Moreover, the European Union asserts that while the classification of products into PCN categories achieves the major part of ensuring comparability for the price comparison, the results can be fine-tuned by making appropriate adjustments and allowances, which were not requested in the review at issue. Nor has China provided evidence to demonstrate that the differences that it points to would have made adjustments impossible.[585]

7.273 In the European Union's view, nothing in Article 2 addresses the use of PCNs and therefore Members are free to use a PCN system unless it actually prevents a fair comparison being made. The European Union therefore rejects China's contention that a PCN system must meet certain requirements in order to satisfy Article 2.4. Furthermore, the European Union argues that just as there is no obligation in the AD Agreement to use a PCN system, there is no obligation to use one that avoids every difficulty of comparison due to differences between the products within a given PCN category.[586] The European Union argues that China has not established that the PCN categories were such as to make requests for adjustments impossible. In addition, the European Union asserts that China's allegations regarding the European Union's supposed failure to make a correct comparison of footwear following the decision not to include STAF in the scope of the original investigation are unsubstantiated.[587]

7.274 With respect to the adjustment for leather quality in the original investigation, the European Union asserts that the adjustment was made on the basis of world market prices, and not on some internal, non-market economy aspect of the Chinese companies' operations.[588]

(ii) Arguments of third parties

a. United States

7.275 The Unites States considers that by making due allowance for differences that are demonstrated to affect price comparability, an investigating authority complies with the obligations under Article 2.4 of the AD Agreement. Moreover, the United States submits that the basis on which the products under investigation are grouped or categorized for purposes of comparison generally would not implicate the provisions under Article 2.4 *per se*, but if the different product categorizations were demonstrated to affect price comparability, then making "due allowance" for such differences would satisfy an authority's obligation to account for differences which affect price comparability.[589]

(iii) Evaluation by the Panel

7.276 China's claims concern the PCN methodology used by the European Union for the classification of different types of footwear in both the expiry review and the original investigation, and the reclassification of certain footwear in the expiry review. China argues that the broad PCN categories, and the reclassification of certain footwear from one PCN category to another in the expiry review, which China alleges further increased the divergence of footwear types within a single category, precluded a fair comparison between the export prices and analogue country prices for the

[584] European Union, first written submission, para. 229.
[585] European Union, first written submission, paras. 234-235; answer to Panel question 27; second written submission, paras. 49 and 53; opening oral statement at the second meeting with the Panel, paras. 138 and 141.
[586] European Union, first written submission, paras. 626-627; second written submission, paras. 46-49.
[587] European Union, first written submission, paras. 629 and 631.
[588] European Union, first written submission, para. 633.
[589] United States, answer to Panel question 10.

purpose of the dumping margin calculation, and was therefore inconsistent with Article 2.4 of the AD Agreement.[590]

7.277 Article 2.4 of the AD Agreement provides, in pertinent part:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." (footnote omitted)

Article 2.4 requires, as discussed above, that a "fair comparison" be made between the normal value and the export price. To this end, the comparison should be made at the same level of trade and with respect to sales made at as nearly as possible the same time. In addition, Article 2.4 mandates that "due allowance" shall be made for "any" difference between normal value and export price which is "demonstrated" to affect "price comparability".[591] However, Article 2.4 does not set out any methodological guidance as to how due allowance for differences affecting price comparability is to be made. This, in our view, implies that, subject to the obligation to ensure a "fair comparison", the investigating authority may make any necessary "due allowance" according to whatever methodology it considers suitable in this respect.[592]

7.278 Moreover, it is clear to us that while Article 2.4 places the obligation to ensure a fair comparison on the investigating authority[593], it places an obligation on interested parties to make substantiated requests for "due allowance", whether in the form of adjustments or otherwise, demonstrating that there is a difference affecting price comparability.[594] It follows therefore, that in order to make a *prima facie* case of violation of Article 2.4, a complaining party must demonstrate that due allowance should have been made with respect to (i) a difference (ii) that was demonstrated to affect price comparability between the normal value and the export price and (iii) that the investigating authority failed to make the adjustment.[595]

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[590] China argues that the PCN system in question also precluded a fair comparison between the export prices and the domestic market prices. However, we note that the "fair comparison" obligation in Article 2.4 of the AD Agreement only applies to the comparison between the "normal value" and the "export price" for purposes of dumping determination. A comparison between export prices and domestic prices is not relevant to the determination of dumping, which is the subject of China's claim at issue here. We therefore do not address this aspect of China's argument, as we consider it unrelated to the claim at hand.

[591] Indeed, Article 2.4 reflects merely an indicative list of differences that may affect price comparability, as there are no differences affecting price comparability which are precluded from being the object of an "allowance". Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

[592] Panel Report, *EC – Fasteners (China)*, para. 7.297.

[593] Appellate Body Report, *US – Hot-Rolled Steel*, para. 178.

[594] Panel Reports, *EC – Fasteners (China)*, para. 7.298; and *EC – Tube or Pipe Fittings*, para. 7.158. Indeed, this seems entirely logical and reasonable to us, as it is the interested parties who have, at least initially, knowledge of the product being investigated, including any particular differences that may affect price comparability, which they can bring to the investigating authority's attention, in order to enable it to ensure that a fair comparison is made. There is certainly no indication in Article 2.4 of the AD Agreement that it is the investigating authority's responsibility to determine whether there exist any differences which affect price comparability in a given anti-dumping investigation, particularly differences not specifically listed in Article 2.4 itself.

[595] Panel Report, *Korea – Certain Paper*, para. 7.138; and Panel Report, *EC – Fasteners (China)*, para. 7.298.

7.279 We understand that, in order to comply with the requirement of Article 2.4 to make due allowance for differences affecting price comparability, investigating authorities may divide products into groups or categories of goods sharing common characteristics within the like product, and make comparisons of normal value and export price for these comparable groups of goods, as part of their determination of dumping. Alternatively, investigating authorities may make adjustments for differences affecting price comparability with respect to each export and normal value price to be compared. Or investigating authorities may use a combination of these two approaches, or some entirely different methodology.[596] Any of these methods may satisfy the Article 2.4 requirement that "due allowance" be made for differences demonstrated to affect price comparability, in order to ensure a fair comparison. We see nothing in Article 2.4 that limits the range of methodological options for investigating authorities in comparing normal value and export price, subject always to the requirement that the comparison actually made must satisfy the fundamental requirement of Article 2.4 that it be a "fair comparison", in which "due allowance" is made for differences demonstrated to affect price comparability.

7.280 China does not contest the use of a PCN methodology by the Commission in either the expiry review or the original investigation *per se*. Rather, China argues that the PCN methodology used by the Commission was "extremely broad" and unspecific – a situation China alleges was further aggravated by the Commissions' reclassification of footwear in the expiry review. China asserts that the "extremely broad" classifications used did not capture all the differences affecting price comparability and therefore precluded a "fair comparison" between the export prices and analogue country prices. For China, an investigating authority using a PCN system is under the obligation to reflect all the characteristic of the product which may affect price comparability in the categories defined.[597]

7.281 We do not agree. We recall that Article 2.4 does not address how due allowance for differences affecting price comparability is to be made. Thus, in the absence of any guidance in this respect, we consider that Article 2.4 cannot be understood to establish specific obligations with regard to the methodologies that investigating authorities may use in order to ensure a fair comparison. We therefore see no legal basis for China's contention that the Commission was obliged to reflect in its PCN methodology all the characteristics of the product which may have affected price comparability.

7.282 Moreover, we recall our view that the fact that Article 2.4 requires investigating authorities to ensure a fair comparison does not mean that interested parties have no obligation in this process. Indeed, we consider that, consistently with Article 2.4, if an exporter believes that the methodology adopted by the investigating authority is inadequate to ensure a fair comparison, it is for the exporter to make substantiated requests for due allowance to be made in order to ensure such comparison. In this case, however, we see nothing in the evidence before us that would indicate to us that Chinese producers made substantiated requests for adjustments with respect to the factors which allegedly affected price comparability. Nor has China demonstrated otherwise.[598] Simply arguing, as interested parties did before the Commission, and China does here, that the PCN categories established by the Commission were "too broad" to allow a fair comparison is not sufficient, in our view, to discharge the exporters' obligations in this regard.

7.283 China argues that due to the "overly broad" PCN categories used by the Commission, it became impossible for Chinese exporters to claim adjustments for differences affecting price comparability. In particular, China asserts that given the hundreds of different footwear types classified under the same PCN, exporters could not possibly quantify the differences on account of the

[596] This same understanding is reflected in Panel Report, *EC – Fasteners (China)*, para. 7.297.
[597] See, *e.g.* China, answer to Panel question 28; second written submission, para. 484.
[598] China acknowledges that no requests for adjustments were claimed by interested parties during either the expiry review or the original investigation. See, e.g., China, answer to Panel question 27.

physical and technical characteristics which affected price comparability.[599] In our view, however, the mere fact that an investigating authority chooses to use a system based on categorizing the product under consideration into comparable groups, even if those groups are broadly defined, does not alter or somehow shift the burden with respect to demonstrating the need for due allowance from interested parties to investigating authorities.[600] Moreover, we note that the evidence before us demonstrates that adjustments were possible and were in fact made during the both the expiry review and the original investigation.[601] We are therefore not convinced by China's argument that because of the hundreds of different kinds of types/models of footwear within a PCN category, exporters could not quantify the differences which allegedly affected price comparability.

7.284 With respect to the original investigation, China makes an additional specific claim that the European Union acted inconsistently with Article 2.4 by making an incorrect adjustment for differences in quality of leather.

7.285 China argues that the European Union violated Article 2.4 because the adjustment of 21.6 per cent the Commission made to the analogue country normal value for differences in quality of leather was incorrect. China's main argument is that the Commission used cost data of Chinese producers that it had not granted MET in calculating the adjustment. The European Union asserts that the adjustment for leather quality was made on the basis of the world market prices, and not on the non-market economy aspects of the Chinese companies' operations. In particular, the European Union notes that the leather used by the Chinese sampled producers was found to be imported from market economy countries.

7.286 As we understand it, China's argument is premised on the factual assertion that the adjustment in question was made on the basis of distorted production costs data of the Chinese producers to which the Commission had denied MET. We can find no evidence to substantiate this assertion, however. The Definitive Regulation, in pertinent part, states:

> "[I]t was found appropriate to make a correction to the adjustments made on leather costs … It was found that the producers in the exporting countries, particularly those in China, were selling leather footwear of higher quality than Brazilian producers did on their domestic market. The difference in the quality of shoes was essentially due to a higher quality of the leather used. The quality difference was also mirrored in the purchase price of the leather used: the leather of the footwear exported from China

[599] See, e.g. China, second written submission, para. 486.

[600] We are not persuaded by China's argument that Chinese exporters could not request adjustments for differences affecting price comparability because they did not know the footwear classified by the Brazilian producers in the various PCNs until the disclosure. China, opening and closing oral statements at the second meeting with the Panel, paras. 21 and 28, respectively. Chinese exporters knew the scope of the PCN categories, yet never argued that adjustments might be needed within a category, which would not have required specific information as to PCN classifications of Brazilian footwear.

[601] In this regard, we note that the Commission did make adjustments in the expiry review for differences in (i) discounts granted to wholesalers on the Brazilian market; (ii) commissions paid to independent agents in Brazil; (iii) R&D and design in order to reflect the costs incurred by the Brazilian producers as opposed to Chinese/Vietnamese producers; (iv) for children's' shoes, and (v) for transport and insurance. Review Regulation, Exhibit CHN-2, recitals 120-124. In the original investigation, allowances for differences in transport costs, ocean freight and insurance costs, handling, loading and ancillary costs, packing costs, credit costs, warranty and guarantee costs and commissions, as well as for the quality of the leather and for R&D and design costs, were granted. Provisional Regulation, Exhibit CHN-4, recital 132. In the Definitive Regulation, the Commission addressed interested parties' comments with respect to these adjustments, revised the adjustment for leather quality, and rejected arguments that the PCN scheme did not allow for a fair comparison. In particular, parties had argued that the PCN scheme used was too broad and not based on product-specific physical characteristics. Definitive Regulation, Exhibit CHN-3, recitals 127-145.

> and Vietnam was more expensive than that used in Brazil to manufacture domestically-sold shoes. For this purpose, the value of leather inputs of analogue country producers were compared to the corresponding values of leather inputs used by Chinese and Vietnamese producers that were part of the sample. It was found that most of **the leather used by Chinese and Vietnamese producers had been imported from market economy countries. Therefore, an average including world market prices was used to determine the adjustment**. …
>
> Some parties argued that it was not appropriate to make adjustments on the leather quality where it was found that the cost of production in the export countries was distorted due to the fact that all but one of the exporters in those countries had not been granted MET.
>
> *This had to be rejected.* It is true that MET was rejected also because state influence was found that impacted on costs/prices. However, **as noted above, it was found that leather had been imported from market economy countries**."[602]

Thus, the Definitive Regulation clearly indicates that the Commission used the leather cost data of the sampled Chinese producers to which MET had been denied precisely because it found that this particular element of that data was not distorted, because the leather used by the Chinese producers had been imported from market economy countries, and therefore was a cost reflecting market economy conditions. We therefore see no factual basis for China's contention that the adjustment for leather quality was made on the basis of distorted production cost data of the Chinese producers to which the Commission had denied MET, and thus precluded a fair comparison.

7.287 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 2.4 of the AD Agreement because of the PCN methodology used and the adjustment for leather quality made by the Commission in the original investigation.[603] We also conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 11.3 of the AD Agreement by using the PCN methodology, or by reclassifying certain footwear, in the expiry review. [604]

(f) Claim III.2 – Alleged violation of Article 2.2.2 of the AD Agreement – Amounts for SG&A and profit

7.288 In this section of our report, we address China's claim that, in the original investigation, the European Union did not construct normal value for the one Chinese producer granted market economy treatment consistently with the requirements of Article 2.2.2 of the AD Agreement.[605]

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[602] Definitive Regulation, Exhibit CHN-3, recitals 127-129 (**bold** emphasis added).

[603] China also claims that the adjustment for leather quality made by the Commission was inconsistent with Article VI:1 of the GATT 1994. China, however, has presented no substantive arguments as to how or why the alleged use by the Commission of data from Chinese producers denied MET in calculating this adjustment constitutes a violation of that provision. China merely restates part of the text of Article VI:1 of the GATT 1994. China, first written submission, paras. 409-419; second written submission, paras. 481-502. We therefore consider this aspect of China's claim to have been insufficiently elaborated, and do not make findings in this regard.

[604] We recall in this regard our views concerning the consideration of alleged violations of Article 2 of the AD Agreement in the context of an expiry review, paragraphs 7.163-7.165 above.

[605] Although China states that the "European Union's practice in determining SG&A and profit for GS constitutes a violation of Article 2.2.2 of the Anti-Dumping Agreement", China, first written submission, para. 884, we note that China has made no claim concerning EU practice in this regard as such, and therefore

(i) Arguments of the Parties

a. China

7.289 China argues that the method applied by the European Union to calculate the amounts for administrative, selling and general ("SG&A") costs and for profits for Golden Step was inconsistent with Article 2.2.2 of the AD Agreement, in particular with Article 2.2.2(iii), because the method was not reasonable and the European Union failed to calculate the cap for profits as provided in that provision. China asserts that, if an investigating authority constructs normal value, Article 2.2 of the AD Agreement provides that it shall add a "reasonable amount" for SG&A and profits. Article 2.2.2 in turn establishes, in the chapeau, that the amounts for SG&A shall be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation", and that where the amounts cannot be determined on this basis, they may be determined on one of three alternative bases, including Article 2.2.2(iii) which is at issue here, and which provides:

> "any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

Based on the text of Article 2.2.2(iii), China asserts that there are two conditions on the use of "any other reasonable method" – first, the method used to calculate SG&A and profit must be reasonable, and second, the profit established pursuant to the reasonable method shall not exceed the cap.[606] China contends that the European Union in the original investigation did not respect either of the two conditions.[607]

7.290 With respect to the first condition, China notes the statement of the panel in *EC – Salmon (Norway)* that "a methodology for calculating SG&A that inflates SG&A costs above what they should have been cannot be "reasonable" within the meaning of Article 2.2.2(iii)".[608] China notes that the amounts determined by the Commission are much higher than the SG&A and profit reported by Golden Step itself, and the 6 per cent profit figure calculated for the then-EC footwear industry. China contends that the use of data from two companies in unrelated industrial sectors, which are not necessarily representative of the sector to which they belong, yields unreasonable results. Moreover, China notes the statement of the panel in *Thailand-H-Beams* that:

> "the intention of these provisions is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[609]

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our analysis and conclusions are limited to the specific facts of the original anti-dumping investigation and the Definitive Regulation, the measure before us in this regard.

[606] China, first written submission, paras. 894-897.

[607] China, first written submission, para. 903.

[608] China, first written submission, para. 898, quoting Panel Report, *EC – Salmon (Norway)*, para. 7.605.

[609] China, first written submission, paras. 904-905, quoting Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non Alloy Steel and H Beams from Poland*, ("*Thailand – H-Beams*"), WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, 2741, para. 7.112. China asserts that it would have been more reasonable to use the figures reported by other Chinese companies producing footwear, and that the denial of MET to these companies did not allow the European Union to disregard their data. In addition, China asserts that even assuming these data could be disregarded, at least two other Chinese companies were identified during the MET determination as having

China asserts that the Commission's methodology in the original investigation did not ensure that the constructed normal value comes as close as possible to the normal value that would have been obtained on the basis of the domestic prices of Golden Step, and was therefore unreasonable.[610]

7.291 With respect to the second condition, China asserts that it is clear that the European Union failed to calculate the benchmark for the cap established in Article 2.2.2(iii).[611] China asserts that WTO Members that use the method provided under subparagraph (iii) must necessarily calculate the cap set out in that subparagraph.[612] China contends that the plain wording of the text indicates that there is no exception to this requirement. In China's view, this includes a case in which the investigating authority cannot calculate the cap, assuming that such a situation were ever to arise. In any event, China asserts that this was not the case in the original investigation, as the Commission could have used data for exporting producers in the textile sector to calculate the cap, contending that the textile sector concerns "products of the same general category" as footwear.[613]

b. European Union

7.292 The European Union considers that, in the absence of other data, it had to apply Article 2.2.2(iii) in the calculation of Golden Step's normal value.[614] The European Union acknowledges that the method adopted had to be "reasonable", and was subject to the cap.[615] The European Union contends that the notion of "reasonableness" must be interpreted in the context in which it appears. The European Union notes the statement of the panel in *Thailand – H-Beams*, with respect to Articles 2.2.2(i) and (ii), that the intention of these provisions was

> "to obtain results that approximate as closely as possible to the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[616]

For the European Union, this rule is also relevant for interpreting the notion of reasonableness in sub-paragraph (iii). However, the European Union contends that this does not answer how much weight should be given to each of the criteria in this rule in situations where they cannot be respected equally. According to the European Union, in the original investigation at issue, the Commission decided that the advantage of matching the criteria of "ordinary course of trade" and "domestic market of the exporting country" outweighed the disadvantage of departing somewhat from the criterion of "like product". The European Union acknowledges that the products were not like, or even of the "same

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accounting records that were independently audited in line with international accounting standards, and having no significant distortions carried over from the former non-market economy system. Moreover, China asserts that similar sizes of companies, a factor considered by the Commission, has no relationship with SG&A or profit levels, and the Commission's consideration of only recent data, i.e. published within the preceding 12 months, was arbitrary. *Id.*, paras. 906-907.

[610] China disputes that the Commission had to act under Article 2.2.2(iii), contending that it could have used one of the other provisions of Article 2.2.2.

[611] China, first written submission, para. 908. China notes the statement of the panel in *Thailand – H Beams*, that "under subparagraph (iii) where no specific methodology or data source is required, and the use of "any other reasonable method" is permitted, the provision itself contains what is in effect a separate reasonability test, namely the cap on the profit amount based on the actual experience of other exporters or producers." China, first written submission, para. 899, quoting Panel Report, *Thailand – H Beams*, para. 7.125.

[612] China, first written submission, para. 900.

[613] China, answer to Panel question 81.

[614] European Union, first written submission, para. 586.

[615] European Union, first written submission, para. 587.

[616] European Union, first written submission, para. 588, quoting Panel Report, *Thailand – H-Beams*, para. 7.112. For the European Union, this means, in other words, that the result obtained by the alternative method used should be as close as possible to the result that would obtain if the rule in Article 2.2.2 chapeau were followed. European Union, first written submission, para. 588.

general category", but contends that the Commission found there were important similarities between the companies whose data were used and Golden Step, notably that the data involved Chinese companies who were granted market economy treatment, were recent, and came from companies that had representative domestic sales.[617]

7.293 The European Union contends that some criteria had to be used to limit the range of data to be considered, and asserts that China has not shown that those selected by the Commission, size and timing, were unreasonable. Moreover, the European Union notes that the Article 2.2.2(iii) obligation is not to find the "best" method, but a "reasonable" one, and notes that there may be more than one such method. The European Union contends that China has the burden of establishing that the European Union's method was unreasonable, which is not satisfied by demonstrating that China's proposed alternative was reasonable, or even that it was in some way better than that used by the European Union.[618] The European Union rejects China's suggestion that the Commission could have used the method set out in Article 2.2.2(ii), because all other exporters or producers of the product in China had failed to satisfy the MET requirements. In the European Union's view, the whole purpose of the MET criteria is to determine whether the companies' data can be used to determine normal values, and if it is found that they cannot be so used because the company is not operating like a company in a market economy then it must also follow that their data would be similarly disqualified for use in the way envisaged in Article 2.2.2(ii) for determining the normal value of another company.[619]

7.294 In the European Union's view, Article 2.2.2(iii), which creates the cap, assumes that there are "sales of products of the same general category in the domestic market of the country of origin", and gives no guidance as to what should happen if those conditions do not exist.[620] The European Union asserts that the logical conclusion is that if the necessary circumstances do not exist the cap cannot be applied, and the criterion constraining Members' action is that of "reasonableness".[621] The European Union contends that the "cap" could not be applied in the circumstances of this case because the data specified in that provision for calculating the cap did not exist, as there were no sales of products of the same general category by companies which had been granted MET. Moreover, the European Union considers that the same reasons that bar the use of data from non-MET companies in the context of Article 2.2.2(ii), also bar their use in calculating the cap in Article 2.2.2(iii).[622] However, in the European Union's view, the "reasonable method" requirement continues to act as a constraint.[623] Finally, the European Union contends that to treat the textiles at issue in the investigation referred to by China as being of the "same general category" as the footwear at issue in

[617] European Union, first written submission, paras. 588-590, citing Exhibit CHN-80.

[618] European Union, first written submission, paras. 594-595. The European Union rejects China's suggestion that the Commission could have used data from two of the companies whose MET applications were denied because they were "considered as having accounting records that were independently audited in line with international accounting standards, and they were considered as having no significant distortions carried over from the former non-market economy system". The European Union notes that Golden Step did not make such a suggestion, and contends that the suggestion is at odds with the whole philosophy on which the exclusion of data from non-MET firms is based. European Union, first written submission, paras. 592-593.

[619] European Union, opening oral statement at the second meeting with the Panel, para. 386.

[620] European Union, first written submission, para. 597. The European Union likened this to the situation under Article 9.4 of the AD Agreement, which does not provide any guidance when establishing the ceiling for non-sampled cooperating suppliers. *Id.*, footnote 447, citing Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 453. However, in response to a question from the Panel, the European Union clarified that "unlike the situation regarding Article 9.4, in Article 2.2.2(iii) there is no "absence of guidance" as to the relevant legal rule because the provision contains the requirement of reasonableness." European Union, answer to Panel question 104.

[621] European Union, first written submission, para. 598.

[622] European Union, opening oral statement at the second meeting with the Panel, para. 389.

[623] European Union, answer to Panel question 82.

the original investigation would have been contrary to the AD Agreement, and therefore the data of the textile companies could not be used to calculate the cap.[624]

(ii) Evaluation by the Panel

7.295 Before addressing China's claim, we note the following facts, which we understand to be undisputed. Golden Step was the only Chinese company granted market economy treatment in the original investigation, and was as a result entitled to a normal value calculated according to the rules applied for market economy countries. In calculating normal value for Golden Step, the Commission first determined that Golden Step made no domestic sales during the period of investigation, and thus its own prices could not be used as the basis for determining normal value. The Commission concluded that the prices of other sellers or producers in China could not be used because they had not been granted MET. Therefore, the Commission constructed normal value for Golden Step on the basis of Golden Step's own cost of manufacture, plus an amount for SG&A expenses and for profit. The Commission did not use the data of Golden Step for the amounts of SG&A and profit. The Commission stated in this regard:

> "Since the exporting producer with MET did not perform any domestic sales and since no other Chinese exporting producer had been awarded MET, SG&A and profit had to be determined on the basis of any other reasonable method pursuant to Article 2(6)(c) of the basic Regulation.
>
> Consequently, the Commission used SG&A and profit rates from Chinese exporting producers that recently obtained MET in other investigations and which had domestic sales in the ordinary course of trade as stipulated by Article 2(2) of the basic Regulation.
>
> The SG&A and profit average rates found in these investigations were compounded on the cost of manufacturing incurred by the exporting producer in question with regard to the exported models."[625]

The amounts so determined were disclosed to Golden Step.[626]

7.296 Golden Step submitted comments following the disclosure, including that the figures used to derive the SG&A and profit amounts and product sectors involved were not disclosed to it.[627]

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[624] European Union, answer to Panel question 83.

[625] Definitive Regulation, Exhibit CHN-3, recitals 102-104.

[626] China, first written submission, para. 888, quoting Final General Disclosure Document, Exhibit CHN-81 (Contains Confidential Information), Annex II:

> "Bearing in mind the above decision NV should be based on your own data of cost of manufacturing (COM) plus SGA and profit from a domestic source. This is because it is considered that your COM for domestic sales would be the same as for export but it is considered that your own SGA and profit data (which are for export sales) are not reliable for a calculation of NV which is for the domestic market.
>
> The domestic source used for calculation of SGA and profit was not available from other exporting companies within AD 499 because they have not been granted MET and are also therefore deemed unreliable. It was therefore decided most reasonable to use data from companies in recent AD cases which had been granted MET and which had representative domestic sales in the PRC. All examples found to meet these conditions in 2006 were taken into account and used to calculate an average. The names of the companies used is [sic] confidential …. A breakdown of this is shown in the NV sheet attached."

[627] Comments of Golden Step on General Disclosure Document, dated 18 July 2006, Exhibit CHN-82 (Contains Confidential Information).

Subsequently, the Commission disclosed that the figures used were averages for Chinese producers in the chemical and engineering sectors granted market economy treatment in two recent investigations, and their SG&A and profits rates were similar. The Commission stated that it considered the data used were "reasonable" and "comparable in respect of the types of SGA elements to the Golden Step export prices". In this latter respect, the Commission acknowledged that the chemical and engineering sectors were different, but noted that the companies were similar in size to Golden Step, and similarly did not have heavy sales costs or significant R&D departments.[628]

7.297 Article 2.2.2, which is at issue in this claim, provides:

> "For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

7.298 There is no dispute in this case as to what the Commission did in order to determine a normal value for Golden Step in the original investigation. There is also no dispute that the "actual data pertaining to production and sales in the ordinary course of trade of the like product" of Golden Step, the Chinese producer under investigation, could not be used as the basis for determining the amounts for SG&A and for profits. What is at issue is, first, whether the method used by the Commission to determine the amounts for SG&A and for profits was reasonable, within the meaning of Article 2.2.2(iii), and second, whether the European Union violated that provision by failing to determine the cap on profit set out in Article 2.2.2(iii), the "profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", therefore failing to ensure that the amount for profit it had established did not exceed that cap.

7.299 Turning to the second question first, it is undisputed that the Commission not only did not calculate the cap established in Article 2.2.2(iii), it made no attempt to do so. The European Union asserts that the necessary data for calculating the cap was not available in this case, and suggests that this entitled the Commission to ignore this requirement. In any event, the European Union contends that the requirement of a "reasonable method" nonetheless constrained the Commission's decision.

7.300 Even assuming it to be the case that relevant data on the basis of which the cap could be calculated was not available to the Commission in this case, we fail to see how this excuses the Commission from complying with the requirements of the AD Agreement. More to the point, however, in the case before us, it is undisputed that the Commission made no attempt to calculate the

[628] Letter from the Commission to Golden Step, dated 22 August 2006, Exhibit CHN-80.

cap called for in Article 2.2.2(iii).[629] While we understand the European Union's argument as to why it would be inappropriate to use the data of other Chinese producers of footwear who had not been granted MET as a basis for calculating the cap, there is no indication, or even any argument, that the Commission itself considered the calculation of the cap at the time it made its determination. Moreover, there is no indication that the Commission ever looked into whether there were producers who sold "products of the same general category" whose data might have been used in this regard. We consider this failure particularly troublesome in view of the fact that the Commission considered it reasonable to use the data of producers of products in the chemical and engineering sectors as the basis for determining the amounts for SG&A and profits, but apparently never even considered whether it might be reasonable to use the data of these companies to calculate the cap.[630] Given that it is undisputed as a matter of fact that the Commission did not determine "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", it is apparent that the Commission could not, and did not, ensure that the amount for profit it established for Golden Step did not exceed this level.

7.301 Thus, we conclude that China has demonstrated that, in the original investigation, the European Union acted inconsistently with Article 2.2.2(iii) of the AD Agreement in determining the amounts for SG&A and profit for Golden Step. In light of this conclusion, we consider it unnecessary for us to also address and make findings with respect to the first aspect of China's claim, whether the method used by the European Union in determining the amounts for SG&A and profit for Golden Step was "reasonable".[631]

(g) Claim III.4 – Alleged violation of Article 2.6, together with Articles 3.1 and 4.1, of the AD Agreement – Exclusion of Special Technology Athletic Footwear (STAF) of not less than €7.50 per pair from the product under consideration and/or like product

(i) Arguments of the parties

a. China

7.302 China claims that the European Union violated Article 2.6 of the AD Agreement, read together with Articles 3.1 and 4.1, in the original investigation by excluding Special Technology Athletic Footwear (STAF) of not less than €7.50 per pair from the scope of the product under consideration, and from the like product, while not excluding STAF priced below that level. In China's view, conceptually and technically, there is no difference between STAF below and above that price level, and the justifications for excluding STAF above that price level apply equally to STAF below that price level.[632] China notes that the definition of the product under consideration in an anti-dumping investigation determines the scope of the allegedly dumped product to which injury

[629] We note in this regard that the Commission rejected consideration of the data of other Chinese producers of footwear who had not been granted MET as the basis for determining the amounts for SG&A and profits for Golden Step. There is no indication that the Commission ever considered using those data as the basis for calculating the cap. We do not mean to suggest that the Commission was required to do so, or that this would necessarily have been a satisfactory basis for calculating the cap for purposes of Article 2.2.2(iii) of the AD Agreement. We note this because it underscores the fact that the evidence before us indicates that the Commission gave no consideration whatsoever to calculation of the cap.

[630] We note that we do not mean to suggest that the Commission was required to do so, or that this would necessarily have been a satisfactory basis for calculating the cap for purposes of Article 2.2.2(iii) of the AD Agreement. Rather, again, this fact underscores that the Commission gave no consideration whatsoever to calculation of the cap.

[631] While we might conclude otherwise were it possible that our views in this regard could be relevant in the context of implementation, we note that the measure in question has expired. Thus, no questions of implementation can arise in which this question could be relevant.

[632] China, first written submission, para. 966.

may be attributed, and on which anti-dumping measures may be imposed, as well as the "benchmark" for determining the like product, as defined by Article 2.6 of the AD Agreement.[633] China recognizes that previous panels have concluded that there is no specific definition of the term "product under consideration" in the AD Agreement. However, it considers that this case is different, because, China asserts that, by applying the criteria for the determination of the "like product" to the determination of the product under consideration, the Commission concluded that STAF is a different like product from other footwear subject to the investigation.[634] China asserts that, in determining whether to exclude certain STAF from the product under consideration in this case, the European Union found that all products included in the product under consideration are alike.[635] For China, the logical conclusion is that, when determining that certain STAF should be excluded from the product under consideration, the European Union applied the like product test.[636] Thus, China argues, it is irrelevant whether or not the European Union made "any statement concerning the "likeness" of the products included in the product under consideration". What matters for China is that differences between STAF and non-STAF footwear found by the European Union preclude a finding that these products could be considered "like".[637]

7.303 China points out that the Commission did not exclude all STAF from the product under consideration, but only STAF priced not less than €7.50 per pair. Thus, China asserts, the Commission sub-categorized STAF into lower- and higher-priced categories, and excluded only the higher-priced category, which China considers impermissible. For China, based on the ordinary meaning of the word "product" and the context of Article 2.6, the "product" under consideration remains a product irrespective of its price, and therefore, an investigating authority may not define the product under consideration with reference to its export price. China considers that Article 2.6 requires that investigating authorities "define" the product under consideration, and publish this definition, in order to inform interested parties. China asserts that if the product under consideration is determined by reference to its export price, this would make it difficult for interested parties to assess whether they are concerned with the investigation.[638] In China's view, by determining that STAF is a different like product from other footwear, but nevertheless deciding to exclude only STAF of not less than €7.50 per pair, the European Union failed to correctly define the product under consideration within the meaning of Article 2.6 of the AD Agreement.

7.304 China also considers that having concluded that STAF is a different product from other footwear, STAF below a certain price level cannot be "like" non-STAF footwear. Therefore, China contends, the European Union violated Article 2.6, read together with Articles 3.1 and 4.1 of the AD Agreement, by determining that "the product concerned and all corresponding types of footwear with uppers of leather produced and sold in the in the analogue country Brazil, as well as those produced and sold by the Community industry on the Community market are alike." China asserts that this like product conclusion, set out in recital 41 of the Definitive Regulation, is inconsistent with Article 2.6 of the AD Agreement.[639]

b. European Union

7.305 The European Union considers that China's claim proceeds from a false premise. The European Union asserts that the Commission never made any finding that STAF and non-STAF

[633] China, first written submission, paras. 985-986.
[634] China, first written submission, para. 991.
[635] China second written submission, para. 1345. China considers that recitals 46-52 of the Provisional Regulation, as confirmed by recitals 40-41 of the Definitive Regulation, confirm this view.
[636] China, second written submission, para. 1346.
[637] China, second written submission, para. 1348.
[638] China, first written submission, paras. 993-994, and 996-999.
[639] China, first written submission, paras. 1001-1003.

footwear were not like products.[640] Rather, the Commission considered the question of whether to include STAF, and if so which STAF, in the scope of the product under consideration. The European Union notes that several panel reports establish that the scope of the product under consideration is not limited to "like" products, and that Article 2.6 does not apply to the definition of the product under consideration.[641] Moreover, the European Union considers that difficulties that might be caused for exporters by the definition of the product under consideration do not create any legal basis to challenge the measure in dispute.[642] In the European Union's view, neither logic nor any legal constraint precludes using price as a criterion in defining the product under consideration.[643] The European Union considers that China has failed to identify any legal basis for its view that a price level cannot be used in defining the product under consideration, and that considerations about the difficulties for exporters in assessing whether they are concerned by an investigation do not create any legal basis for a finding of violation.[644]

(ii) Arguments of third parties

a. Brazil

7.306 Brazil submits that the decision to exclude certain STAF and to maintain certain other STAF was a decision by the Commission defining the scope of the product under consideration. Based on its understanding of previous panel reports, Brazil asserts that there is no discipline in the AD Agreement governing how the product under consideration should be defined. Brazil considers that investigating authorities have a large degree of discretion under the WTO in deciding whether to exclude a subset of a certain type of goods from the scope of the product under consideration.[645]

b. Colombia

7.307 Colombia considers that this issue, as addressed by the parties, raises two questions to be resolved by the Panel: i) whether investigating authorities must define the product under consideration; and ii) to what extent is there an obligation of assessing the injury and identifying the domestic industry, with regard to similar products. Colombia notes that the panel report in *EC – Salmon (Norway)* clarified that national authorities are free to choose the product subject to investigation. Colombia asserts that in view of that decision, there is no legal requirement that WTO Members include in the product under consideration all possible similar products. Colombia asserts that in identifying the domestic industry involved and the injury to that industry, it is necessary to assess likeness between the product under consideration and the like domestic product. In this context, taking into account discussions of likeness in other contexts, Colombia considers such elements as, *inter alia*, physical characteristics, uses or applications, substitutability, distribution channels, consumer preferences and tastes to be relevant considerations.[646]

(iii) Evaluation by the Panel

7.308 Article 2.6 of the AD Agreement provides:

> "2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the

[640] European Union, first written submission, para. 638.
[641] European Union, first written submission, para. 638.
[642] European Union, first written submission, para. 642.
[643] European Union, first written submission, para. 639.
[644] European Union, first written submission, para. 642. The European Union did not address this claim in its second written submission.
[645] Brazil, third party written submission, paras. 53-54.
[646] Colombia, third party written submission, paras. 97-99, 101 and 103.

> product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

While China asserts that the violation it alleges is of this provision "read together with" Articles 4.1 and 3.1 of the AD Agreement, it is not clear what import these latter two provisions have in the context of China's argument. China quotes these two provisions, emphasizing the phrase "like products", which appears in both, but makes no substantive arguments based on either. China does not elucidate how these two provisions should be "read together" with Article 2.6, nor in what manner such a "reading together" informs its claim, leaving us at something of a loss to understand the relevance of Articles 3.1 and 4.1 in this regard. China has made no arguments concerning the meaning of Article 2.6 based on context or referring to Articles 3.1 or 4.1 of the AD Agreement. Fundamentally, we understand China to be making a claim based on Article 2.6 of the AD Agreement, and will proceed on that basis in our analysis.

7.309 We note that, as the European Union asserts, and China acknowledges, a number of panels have held that Article 2.6 of the AD Agreement does not apply to the determination of the scope of the product under consideration.[647] China attempts to distinguish these decisions on the basis that, in this case, the European Union concluded that STAF was not "like" other footwear, and framing its claim, at least in part, as a claim regarding the correctness of this "like product" determination. However, in our view, China has misapprehended the nature of the Commission's analysis and conclusions in this regard.

7.310 A brief review of the relevant facts is in order. The Notice of Initiation in the original investigation defined the product being investigated as:

> "footwear with uppers of leather or composition leather **other than**: footwear which is designed for a sporting activity and has, or has provision for the attachment of, spikes, sprigs, stops, clips, bars or the like, skating boots, ski-boots and cross-country ski footwear, snowboard boots, wrestling boots, boxing boots and cycling shoes, slippers and other indoor footwear, and footwear with a protective toecap originating in the People's Republic of China and Viet Nam ("the product concerned")".[648]

Various interested parties argued that certain other types of sports footwear should also be excluded from the scope of the product being investigated, and specifically, that "special technology athletic footwear", or "STAF", should be excluded. The Commission considered these assertions and addressed them in the Provisional Regulation, concluding that STAF is highly sophisticated footwear with distinctive technical features, designed specifically for use in sporting activities. The Commission also concluded that STAF is "different from the other types of footwear" in various respects. The Commission reviewed these differences in sales channels, end-use and consumer perception and import trends, and provisionally concluded that STAF should be excluded from the definition of the product under consideration, and thus from the scope of the investigation. The Commission also considered arguments made by the domestic industry that STAF should not be

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[647] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937; Panel Report, *Korea – Certain Paper*; and Panel Report, *EC – Salmon (Norway)*.

[648] Notice of Initiation, Exhibit CHN-6, recital 2 (emphasis added). The Notice of Initiation sets forth the CN codes in which the relevant footwear was normally declared, but emphasized that these were only given for information. *Id.* We recall, as noted above, footnote 319, that although the European Union uses the term "product concerned" for what the AD Agreement refers to as the "product under consideration", there is no dispute that these terms refer to the same concept, and we have generally used the terminology of the AD Agreement in our report.

excluded, because fashion trends had brought sports footwear into the same market segment as other casual footwear, and further considered arguments that all sports footwear, not only STAF, should be excluded, but rejected these arguments. The Commission concluded that all types of the product described, with the exception of STAF, should be regarded as forming one single product, comprising the "product concerned."[649] The Commission went on to conclude that:

> "all types of footwear with uppers of leather or composition leather produced and sold in the countries concerned and in Brazil and those produced and sold by the Community industry on the Community market are alike to those exported from the countries concerned to the Community."[650]

7.311 In the Definitive Regulation, the Commission revisited the decision to exclude STAF, based on arguments from the then-EC footwear industry contesting the exclusion of STAF in the Provisional Regulation. The then-EC footwear industry asserted that STAF had the same sales channels and customer perceptions as the product under consideration, and stressed that, should STAF nevertheless be excluded, the minimum value for STAF in the then-current TARIC definition should be increased.[651] Importers, on the other hand, argued that the minimum value of STAF should be lowered from €9.00 to €7.50. The Commission accepted these latter arguments, concluding that a "reduction of the STAF threshold of EUR 1,5 is considered reasonable and necessary to reflect" changes in production costs, waste, and competition affecting price levels for STAF. The Commission rejected arguments of various exporters to broaden the definition of STAF to include footwear with EVA soles and/or direct moulding. The Commission concluded by confirming "the exclusion of STAF from the definition of the product concerned."[652] The Commission went on to conclude that "the minimum value for STAF should be lowered from EUR 9,00 to EUR 7,50 ... STAF of not less than EUR 7,5 is therefore definitively excluded from the proceeding."[653] The Commission confirmed the provisional conclusions, as modified, and concluded that "all types of the product concerned should be regarded as forming one single product." It went on to state that, in the absence of any comments, the provisional conclusions regarding like product were confirmed, and definitively concluded that "the product concerned and all corresponding types of footwear with uppers of leather produced and sold in the analogue country Brazil, as well as those produced and sold by the Community industry on the Community market are alike."[654]

7.312 Based on the foregoing, it is clear to us that the Commission determined that STAF of not less than €7.50 was excluded from the product under consideration in the original investigation.[655] This is not, however, a determination of like product under Article 2.6 of the AD Agreement.[656] We agree with the several previous panels which have concluded that Article 2.6 of the AD Agreement does not

[649] Provisional Regulation, Exhibit CHN-4, recitals 10-45.
[650] Provisional Regulation, Exhibit CHN-4, recital 52.
[651] Definitive Regulation, Exhibit CHN-3, recitals 11-13.
[652] Definitive Regulation, Exhibit CHN-3, recitals 15-19.
[653] Definitive Regulation, Exhibit CHN-3, recital 19. The Commission went on to consider other arguments concerning the scope of the product under consideration which are not relevant to China's claim in this dispute. Definitive Regulation, Exhibit CHN-3, recitals 20-38.
[654] Definitive Regulation, Exhibit CHN-3, recitals 39-41.
[655] We note that, even assuming there were some definition of product under consideration in the AD Agreement, we see no basis in either law or logic for China's assertion that a price level may not be a relevant criterion in that regard. Certainly, even if such a definition were somehow more difficult for exporters to understand, we do not see how this would preclude it.
[656] We note in this regard that, while not determinative, in both the Provisional and Definitive Regulations, the exclusion of STAF appears in the section of the Regulation addressing the product concerned, and not in the separate section of the Regulations addressing the like product.

apply to the determination of the scope of the product under consideration.[657] Thus, the European Union's determination excluding STAF of not less than €7.50 from the product under consideration is not subject to Article 2.6 of the AD Agreement, and we therefore conclude that China's claim is without legal basis.

7.313 China seeks to bring the Commission's determination with respect to the exclusion of STAF from the product under consideration within the purview of Article 2.6 by arguing that the Commission "effectively" made a like product determination. Apparently, in China's view, the fact that in assessing whether to exclude STAF from the product under consideration, the Commission appears to have considered factors similar to those it considers in making like product determinations, renders the European Union's definition of the product under consideration subject to Article 2.6. We reject this effort to transform what is clearly a consideration and conclusion by the Commission concerning the scope of the product under consideration into a like product determination under Article 2.6. Simply because an investigating authority may find certain factors relevant to its analysis and definition of product under consideration in a particular case, and publish notice thereof, and that those factors are also relevant to assessment of like product, does not mean the former determination becomes a like product determination subject to Article 2.6.

7.314 To the extent that China is arguing that the European Union violated Article 2.6 in determining that "all corresponding types of footwear with uppers of leather produced and sold in the in the analogue country Brazil, as well as those produced and sold by the Community industry on the Community market" are like the product under consideration, which included STAF below €7.50, this would seem to be an argument that all goods within the scope of the like product must be "like" all goods within the scope of the product under consideration, and that this is not the case here as a matter of fact, because the European Union determined that STAF and non-STAF footwear are not like. While it is not clear to us that China has in fact made this argument, in this context, we note that the same WTO panel reports referred to above also rejected the view that all goods within the like product must be "like" all goods within the scope of the product under consideration – the notion of "cross-likeness".[658] We agree with this conclusion. Even assuming that China were correct in asserting that STAF and non-STAF footwear are not "like" within the meaning of Article 2.6, both STAF below €7.50 and non-STAF footwear are within the scope of the product under consideration as defined by the Commission, and as we have concluded above, this does not constitute a violation of Article 2.6. In our view, an absence of "cross-likeness" does not establish a violation of Article 2.6 of the AD Agreement. China has not argued that there is any inconsistency between the scope of the product under consideration as defined by the Commission and the scope of the like product as determined by the Commission – the two are clearly co-extensive.

7.315 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 2.6 of the AD Agreement, read together with Articles 3.1 and 4.1, in the original investigation by excluding Special Technology Athletic Footwear (STAF) of not less than €7.50 per pair from the scope of the product under consideration, or from the like product, while not excluding STAF priced below that level.

[657] Panel Report, *US – Softwood Lumber V*; Panel Report, *Korea – Certain Paper*; and Panel Report, *EC – Salmon (Norway)*. In this context, we reject China's contention that Article 2.6 of the AD Agreement somehow "requires" an investigating authority to define the product under consideration and publish that definition. While this may, as a matter of logic, be a necessary step for an investigating authority, that is a far cry from finding it to be a requirement of Article 2.6 itself.

[658] Panel Reports, *EC – Fasteners (China)* and *EC – Salmon (Norway)*, paras. 7.43-7.76.

5. Claims II.2, II.3, II.4, III.5, III.7 and III.8 – Injury

7.316 In this section of our report, we address China's claims concerning the injury aspects of both the Review Regulation and the Definitive Regulation. Before turning to China's specific injury-related claims, we address below our approach to China's claims with respect to the Review Regulation and Article 11.3 in the context of the injury aspects of the expiry review.

(a) Consideration of alleged violations of Article 3 of the AD Agreement in the context of the Review Regulation

7.317 China's claims in this dispute raise the question of the relevance of Article 3 of the AD Agreement in the context of the determination of likelihood of continuation or recurrence of injury. China asserts that injury determinations in expiry reviews are subject to the requirements of Article 3, and that if an investigating authority relies on a finding of injury inconsistent with Article 3 in making its determination of likelihood of continuation or recurrence of injury, the latter determination is inconsistent with Article 11.3. The European Union, on the other hand, disagrees as a matter of law with China's argument, and also disputes, as a matter of fact, that the Commission in this case relied only on its finding of injury in making its determination of likelihood of continuation or recurrence of injury. We address this question below.

(i) Arguments of the parties

a. China

7.318 China argues that the Review Regulation is subject to the requirements of Article 3 of the AD Agreement with respect to the injury determination. China acknowledges that Article 11.3 of the AD Agreement, specifically dealing with expiry reviews, does not explicitly mention or incorporate the requirements of Article 3.[659] Nevertheless, China presents three arguments to explain its view that the Commission in this case was subject to the requirements of Article 3. First, China asserts that panels and the Appellate Body have noted that Article 3 of the AD Agreement may apply to expiry reviews.[660] According to China, not every provision in Article 3 applies to expiry reviews, but Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement would be applicable to reviews under Article 11.3 of the AD Agreement where two conditions are fulfilled: (i) the investigating authority makes an injury determination in the expiry review; and (ii) the investigating authority relies upon this determination in finding a likelihood of continuation or recurrence of injury.[661]

7.319 Second, China argues that the particular facts of this case also support the application of certain provisions of Article 3 of the AD Agreement to the expiry review. According to China, the European Union conducted a detailed injury examination in the expiry review, determining the existence of injury to the EU industry during the review investigation period.[662] China asserts that in its injury determination, the European Union does not indicate whether it is evaluating the likelihood

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[659] China, first written submission, paras. 421-422.

[660] China cites Panel Reports, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WTDS244/AB/R, DSR 2004:I, 85, paras. 7.99-7.101; and *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews*"), WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report W/DS/268/AB/R, DSR 2004:VIII, 3421, paras. 7.273-7.275; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284. China, first written submission, paras. 423-428; second written submission, paras. 523-535.

[661] China, first written submission, paras. 423-428; answer to Panel question 39, para. 278; second written submission, para. 518.

[662] China, first written submission, paras. 429-432; second written submission, para. 539.

of continuation or recurrence of injury, nor does it conduct an analysis of the "likely" situation of the EU industry.[663] In addition, China contends that the European Union subsequently used this injury determination as the basis for its finding of likelihood of continuation of injury within the meaning of Article 11.3 of the AD Agreement.[664] China argues that (i) the European Union simply based the likelihood determination on the finding of continued injury without undertaking any additional analysis, and any prospective considerations completely relied on the injury determinations; (ii) the examination of likelihood of continuation of injury was set out in only five paragraphs, and the lengthy likelihood of continuation or recurrence of injury causation analysis was merely the European Union's response to arguments presented by interested parties, and not part of the likelihood of continuation or recurrence of injury analysis itself; and (iii) if the injury determination were removed from the picture, there would be no basis for a determination of likelihood of continuation or recurrence of injury under Article 11.3 of the AD Agreement.[665] China specifically disputes the European Union's assertions that: (i) in the analysis of likelihood of continuation or recurrence of injury, the greatest emphasis was placed on the examination of individual factors relevant to the likelihood analysis, and not on a finding of injury; (ii) a considerable part of the Review Regulation is devoted to the examination of likelihood of continuation or recurrence of injury; and (iii) another basis for the determination of likelihood of continuation or recurrence of injury was found, in addition to the finding of injury, making the analysis of the likelihood of continuation or recurrence of injury independent from the determination of injury.[666]

7.320 Third, China asserts that the European Union's position in previous disputes with respect to the applicability of Article 3 of the AD Agreement to expiry reviews supports China's interpretation in this case. China points specifically to the summary of the then-European Communities' argument in *US – Oil Country Tubular Goods Sunset Reviews*.[667]

7.321 China concludes that the European Union was obliged to comply with Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement in its injury determination in the context of the expiry review.[668] In response to the European Union's arguments, China notes that it did not "request the Panel to review the determination of the likelihood of injury in the Review Regulation in light of Article 3 [of the AD Agreement]".[669] China submits that it has claimed violations of Article 3.1, 3.4, 3.5, *and* 11.3 of the AD Agreement in the context of the expiry review, and therefore Articles 3 and 11.3 form the legal bases for China's claims regarding the determination of the likelihood of continuation or recurrence of injury in the Review Regulation.[670]

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[663] China, second written submission, paras. 546, 548, 550, and 552.
[664] China, first written submission, paras. 433-435.
[665] China, second written submission, paras. 560-561, 570, 572 and 1218.
[666] China, second written submission, paras. 558-559. China specifically refers to the European Union's answer to Panel question 43.
[667] China, first written submission, para. 427.
In *US – Oil Country Tubular Goods Sunset Reviews*, the panel summarized the European Union's arguments as follows:

> "The European Communities agrees with Argentina that the provisions of Article 3 of the Anti-Dumping Agreement apply *mutatis mutandis* in the context of sunset reviews. According to the European Communities, given the introductory wording of Article 3.1, the absence of an explicit cross-reference in Article 11.3 to Article 3 is irrelevant."

Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.266, 7.315 and 7.320.
[668] China, first written submission, para. 435.
[669] China, second written submission, paras. 503 and 578.
[670] China, second written submission, para. 504.

b. European Union

7.322 The European Union submits that China's understanding of Article 11.3 of the AD Agreement is erroneous for two reasons.[671] First, the European Union reiterates its view that China committed legal error by dividing its claims into: (i) independent claims based on Article 3 of the AD Agreement, and (ii) consequential claims based on Article 11.3 of the AD Agreement. According to the European Union, with this division, China forces the Panel to disregard Article 11.3 in the consideration of all injury-related aspects of the analysis and determination, that is, to consider claims related to injury in expiry reviews in light of Article 3, and in isolation from Article 11.3.[672]

7.323 Second, the European Union argues that, separate from, and in addition to, the analysis of and determination that injury continued during the review investigation period, the Commission also independently considered the various injury indicators in light of its obligations under Article 11.3 of the AD Agreement to establish a likelihood of continuation or recurrence of injury.[673] The European Union explains that the focus of the injury analysis in an expiry review is fundamentally prospective, whereas the focus in original investigations is retrospective.[674] The European Union asserts that several factors, such as volumes of dumped imports, capacities and movements in the volumes of exports, levels of dumping and undercutting, were assessed in a prospective manner, and that a considerable part of the Review Regulation was devoted to the likelihood of continuation or recurrence of injury analysis.[675] Therefore, the European Union asserts, the Review Regulation refers to particular facts that led to the finding of likelihood of continuation of injury and to the prospective development of these facts, demonstrating that the likelihood of continuation or recurrence of injury analysis was not based only on the injury determination.[676] The European Union adds that:

> "inconsistencies in the injury finding with Article 3 can lead to a violation of Article 11.3 of the *Anti-Dumping Agreement* only 'if the investigating authority bases its likelihood of continuation or recurrence of injury determination entirely on the injury determination' (as phrased by China), or if 'IA based its likelihood determination to *a decisive degree* on a defective finding of injury' (the European Union) or if 'defects in this new present injury finding are critical to the expiry review and undercut the factual basis underlying the determination of continuation or recurrence of injury' (the United States)."[677]

The European Union maintains that none of these situations is the case in this dispute.[678]

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[671] As discussed further below, the European Union also contends that China's assertions of violations of Article 3 of the AD Agreement are not justified.

[672] European Union, first written submission, para. 244. With respect to this matter, see also paragraph 7.152 above.

[673] European Union, first written submission, para. 246.

[674] European Union, answer to Panel question 52, para. 148.

[675] European Union, first written submission, para. 248; answer to Panel question 43, paras. 94-95.

[676] European Union, first written submission, para. 250.

[677] European Union, second written submission, para. 91. The European Union recalls that, pursuant to the Panel's working procedures, the first meeting with the parties represented the last opportunity for China to present evidence to support its claims. The European Union considers that China has not presented a *prima facie* case, since "[e]ven if Article 3 ADA were applicable to expiry reviews and were the Panel to find that China has established a violation of it, China never explained how or on the basis of which evidence that alleged violation amounted to a violation of Article 11.3." European Union, second written submission, para. 91. We consider the question before us at this juncture to be one of proper understanding of the requirements of Article 11.3. Whether China presented its evidence in a timely fashion pursuant to the working procedures is not relevant to our resolution of that question.

[678] European Union, closing oral statement at the first meeting with the Panel, para. 3.

7.324 The European Union considers the focus of the Panel's analysis should be whether China has established that the European Union's determination of likelihood of continuation or recurrence of injury was inconsistent with the requirements of Article 11.3 of the AD Agreement, and not whether the Commission violated Article 3 of the AD Agreement.[679] The European Union contends that the Panel may either (i) consider that China's claims are vitiated by an erroneous factual understanding – that the European Union relied entirely on its finding of injury in its determination of the likelihood of continuation or recurrence of injury – and a failure to discharge China's burden of proof; or (ii) conclude that China's claims are vitiated by a legal error arising from the manner in which China formulated its claims of violation of Articles 3 and 11.3 of the AD Agreement.[680]

(ii) Arguments of third parties

a. Brazil

7.325 Brazil asserts that Articles 3 and 11.3 of the AD Agreement deal with two independent determinations: a determination of injury or threat thereof under Article 3, and a determination of likelihood of continuation or recurrence of injury under Article 11.3. Brazil adds that no provision in the AD Agreement requires an investigating authority to comply with Article 3 provisions in expiry reviews.[681]

b. Colombia

7.326 Colombia notes that the only reference in Article 11 of the AD Agreement to the application of other provisions of that Agreement is Article 11.4, which requires the application of the "provisions of Article 6 regarding evidence and procedure" in any review under Article 11. Colombia asserts that, in *US – DRAMS*, the panel concluded that, for the purposes of injury determinations in administrative and expiry reviews, national authorities should follow the framework of Article 3 of the AD Agreement. Colombia goes on to note proposals made by Members in the Doha Negotiations to clarify issues regarding reviews, including the elements that should be taken into account in determining injury. Colombia invites the Panel to take these proposals into account as a "non-legally binding complement" in interpreting Article 11 of the AD Agreement, considering them especially relevant to clarify the role of Article 3 provisions in the present case in evaluating the Review Regulation.[682]

c. Japan

7.327 Japan asserts that "there is no difference in the applicability and meaning of the terms 'review' and 'determine', and 'likely' between the determinations of dumping and injury in sunset reviews". Japan considers that, "although an authority has no specific obligations to comply with the provisions of Article 3 [in expiry reviews], it still must obey the general duty to make its injury determinations based on positive evidence and objective examination." In Japan's view, previous Appellate Body reports suggest that if a likelihood of injury determination is inconsistent with the "fundamental requirements of 'positive evidence' and 'objective examination' mandated by Article 3.1, this would also demonstrate the inconsistency of the likelihood of injury determination with the requirement in Article 11.3 that the authority arrive at a reasoned conclusion." In addition, Japan considers that, by analogy to the Appellate Body findings regarding the relationship between Articles 2 and 11.3 of the

[679] European Union, second written submission, para. 103.
[680] European Union, second written submission, paras. 93-99.
[681] Brazil, oral statement, para. 18.
[682] Colombia, third party written submission, paras. 43-44 and 46-49, citing Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* ("*US – DRAMS*"), WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, fn. 501, and referring to document TN/RL/GEN/10.

AD Agreement, when an investigating authority conducts an injury determination and relies upon this determination in its likelihood of injury determination, Article 11.3 is violated if the investigating authority has made its injury determination in a manner inconsistent with Article 3.[683]

d. United States

7.328 The United States asserts that the Appellate Body has cogently explained that the obligations arising from Article 3 of the AD Agreement do not apply to likelihood of injury determinations in expiry reviews conducted under Article 11.3 of the AD Agreement. The United States notes that Article 11.3 does not contain any cross-reference to Article 3 that would indicate the applicability of Article 3 to expiry reviews, nor does Article 3 provide that whenever the term "injury" is used in another provision of the AD Agreement, a determination of injury must be made pursuant to Article 3. The United States contends that the Appellate Body has never made a finding that if an investigating authority conducts a new injury determination in an expiry review, such injury determination must comply with the requirements of Article 3, despite China's arguments to the contrary. The United States argues that, even assuming *arguendo* that a new injury finding by the investigating authority in an expiry review context must comply with Article 3, the likelihood of injury finding will still be subject to Article 11.3.[684]

(iii) Evaluation by the Panel

7.329 As we have previously noted, it is clear that Article 11.3 of the AD Agreement "does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review."[685] Article 11.3 of the AD Agreement does not require an investigating authority to undertake a new injury determination in the context of an expiry review, and it is clear that original investigations and expiry reviews are distinct processes with different purposes.[686] The nature of the determinations concerning injury to be made in each type of proceeding is different. In original anti-dumping investigations, investigating authorities must determine whether the domestic industry of a Member is materially injured by dumped imports. At this stage, the focus is on the existence of "material injury" at the time of the determination. That determination is made under Article 3, based on information concerning the necessary and relevant factors for some previous period.[687] In contrast, in an expiry review, an anti-dumping measure has been in place for some time, and investigating authorities must, based on a fresh analysis, determine whether the expiry of that measure would be likely to lead to continuation or recurrence of injury.[688]

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[683] Japan, third party written submission, paras. 26 and 31; oral statement, para. 8; answer to Panel question 12, para. 8.

[684] United States, third party written submission, paras. 22 and 24, citing Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, p. 285, and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 151-152; oral statement, para. 21.

[685] Appellate Body Reports, *US – Continued Zeroing*, fn. 418; *US – Corrosion-Resistant Steel Sunset Review*, para. 149.

[686] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107.

[687] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279. The period of time over which factors are examined is not defined in the AD Agreement, and Members have different practices in this regard. The Committee on Anti-Dumping Practices adopted a non-binding "Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations" in 2000. Document G/ADP/6, 16 May 2000.

[688] With respect to expiry reviews under Article 21.3 of the SCM Agreement, the Appellate Body in *US – Carbon Steel* stated that the "[m]ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient." Appellate Body Report, *US – Carbon Steel*, para. 88. The nature of expiry reviews under the SCM and AD Agreements is essentially the same, and we consider that this view is equally applicable in the context of Article 11.3 of the AD Agreement.

7.330 Thus, in an expiry review, the analysis is focused on what would happen if an existing anti-dumping measure were removed.[689] In light of these differences between original investigations and sunset reviews, the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* concluded that "[t]he disciplines applicable to original investigations cannot, therefore, be automatically imported into review processes."[690] Addressing the relationship between Articles 11.3 and 3 of the AD Agreement specifically, the Appellate Body stated that:

> "Article 11.3 does not contain any cross-reference to Article 3 to the effect that, in making the likelihood of injury determination, all the provisions of Article 3—or any particular provisions of Article 3—*must* be followed by investigating authorities. Nor does any provision of Article 3 indicate that, wherever the term "injury" appears in the *Anti-Dumping Agreement*, a determination of injury must be made following the provisions of Article 3. …
>
> Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. **We therefore conclude that investigating authorities are not mandated to follow the provisions of Article 3 when making a likelihood of injury determination**."[691]

China acknowledges that "the requirements contained in the various paragraphs of Article 3 of the *Anti-Dumping Agreement* pertaining to the establishment of injury are not explicitly mentioned in the text of Article 11.3 of the *Anti-Dumping Agreement*".[692]

7.331 Although Article 11.3 of the AD Agreement does not require that injury be determined in accordance with Article 3 in expiry reviews, as noted above, Article 11.3 does impose certain discipline on investigating authorities in the determination of likelihood of continuation or recurrence of injury. As the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* observed:

> "The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. ... Thus, even though the rules applicable to sunset reviews may not be identical in all respects to those applicable to original investigations, it is clear that the drafters of the *Anti-Dumping Agreement* intended a sunset review to include both full opportunity for all interested parties to defend their interests, and the right to receive notice of the process and reasons for the determination."[693]

While this case concerned a determination of likelihood of continuation or recurrence of dumping, the concepts of "review" and "determine" in Article 11.3 are not limited to that context. The text of Article 11.3 requires investigating authorities to "determine" in a "review" that "expiry of the duty

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[689] Appellate Body Report, *US – Carbon* Steel, para. 87.

[690] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 359. See also Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 119.

[691] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 278 and 280 (bold emphasis added).

[692] China, first written submission, para. 422.

[693] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111-112. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 180.

would be likely to lead to continuation or recurrence of dumping **and** injury" (emphasis added). In our view, it is clear that the views expressed by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* apply equally in the context of a determination of likelihood of continuation or recurrence of injury. Therefore, we consider that Article 11.3 obliges the investigating authority in an expiry review to "act with an appropriate degree of diligence" in order to arrive at a "reasoned conclusion", with respect to the determination of likelihood of continuation or recurrence of injury.

7.332 The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* clarified how an investigating authority in an expiry review could arrive at a "reasoned conclusion" with respect to a determination of likelihood of continuation or recurrence of injury, stating:

> "Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood of injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood of injury determination. **But the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3*—not Article 3—that a likelihood of injury determination rest on a 'sufficient factual basis' that allows the agency to draw "reasoned and adequate conclusions**".[694]

7.333 Therefore, we consider that in order for China to demonstrate a violation of Article 11.3 of the AD Agreement, it must show that the European Union's likelihood of injury determination does not rest on sufficient factual basis allowing the Commission to draw a reasoned and adequate conclusion. In our view, a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a "reasoned conclusion", which would result in a violation of Article 11.3 of the AD Agreement. However, we recall that a determination of injury under Article 3 is not required under Article 11.3. Thus, we do not consider that all factors relevant to an injury determination under Article 3 are necessarily relevant to a determination of likelihood of continuation or recurrence of injury under Article 11.3.

7.334 It is uncontested in this dispute that the European Union did in fact make a finding of injury in the expiry review.[695] China alleges that various aspects of that injury determination are inconsistent with Article 3 of the AD Agreement. However, China makes no argument with respect to whether the various inconsistencies it alleges concern factors that are necessary to the determination of likelihood of continuation or recurrence of injury under Article 11.3. Rather, China argues that the European Union relied exclusively on the determination of injury in making its determination of likelihood of continuation or recurrence of injury, and that a violation of Article 3 in the injury determination in an expiry review establishes a violation of Article 11.3. The European Union, on the other hand, contends that it reached a "reasoned conclusion" of likelihood of injury on two different and independent bases: (i) the finding of injury during the review investigation period, and (ii) an examination of individual factors pertaining to both injury and causation that are relevant to the

[694] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284 (bold emphasis added).

[695] European Union, answer to Panel question 108, para. 20.

determination of likelihood of injury. The European Union asserts that "by far the greatest emphasis" was on the latter examination.[696]

7.335 We recall that previous panel and Appellate Body reports establish that, if an investigating authority relies on a dumping margin calculated inconsistently with Article 2 in determining likelihood of continuation or recurrence of dumping, the inconsistency with Article 2 taints the likelihood determination.[697] This is because, by relying on the inconsistent determination of dumping the investigating authority fails to make a likelihood determination based on a "sufficient factual basis" allowing it to draw "reasoned and adequate conclusions" concerning the likelihood of continuation or recurrence of dumping.

7.336 China argues that the same conclusion should be reached with respect to determinations of injury in the context of expiry reviews, and that a determination of violation of Article 3 demonstrates a violation of Article 11.3.[698] The European Union argues against the view that an inconsistency with Article 3 of the AD Agreement in the context of an expiry review automatically demonstrates a violation of Article 11.3 of the AD Agreement. First, the European Union observes that the calculation of a dumping margin is an essentially mathematical exercise, in which the result follows automatically from the data, while a finding of injury is a judgement process, involving the weighing up of multiple, possibly contradictory, factors. The European Union notes that the examination of injury and likelihood will involve consideration of the same factors, but that the findings regarding individual injury factors are more important in the context of a determination of likelihood of continuation or recurrence of injury than the overall finding of injury based on those factors. Thus, in the European Union's view, there is "unlikely to be a clear-cut conclusion that 'there was injury and therefore there is a likelihood of future injury'." Second, the European Union notes that the existence of an anti-dumping measure has different consequences for dumped imports: on the one hand, the imposition of the measure encourages exporters to increase the dumping margin in order to off-set the duty, while on the other hand, the effect of the duty is to increase the price of dumped imports, reducing the harm to the domestic industry. Thus, the European Union asserts that "an expiry review is more likely to detect dumping, but less likely to detect injury."[699]

7.337 We recognize that dumping and injury are distinct concepts, and that the findings of dumping and injury are different in nature. Nevertheless, we consider that, a similar result should be reached with respect to the effect of reliance on an inconsistent determination of injury in the context of an expiry review with respect to the determination of likelihood of continuation or recurrence of injury as has been reached in the dumping context.[700] That is, in our view, if in the course of an expiry review,

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[696] European Union, answer to Panel question 43, para. 93; answer to Panel question 108, para. 20.

[697] See paragraphs 7.163-7.166 above.

[698] China, first written submission, paras. 421-435; and 810-813; second written submission, paras. 504-537; and 1207-1220; answer to Panel question 39, paras. 275-284; answer to Panel question 52, paras. 323-332; answer to Panel question 105, paras. 5-16; and answer to Panel question 110, paras. 40-53.

[699] European Union, second written submission, paras. 161-162.

[700] We note that one panel has reached a similar conclusion:

> "[T]he obligations set out in Article 3 do not normally apply to sunset reviews. If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3. For instance, Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. In our view, this means that an investigating authority is not necessarily required to carry out that calculation in a sunset review. However, if the investigating authority decides to do such a calculation, then it would be bound by the relevant provisions of Article 3 of the Agreement. Similarly, if, in its sunset injury determinations, an investigating authority uses a price effect calculation made in the

an investigating authority makes a determination of injury that is inconsistent with Article 3, and relies on that injury determination in making its determination of likelihood of continuation or recurrence of injury, the inconsistency with Article 3 taints the likelihood determination, because by relying upon the inconsistent determination of injury the investigating authority fails to make a likelihood determination based on a "sufficient factual basis" allowing it to draw "reasoned and adequate conclusions" concerning the likelihood of injury. We see no basis in the text of Article 11.3 that would support the conclusion that a different conclusion should be reached in this regard in the context of determinations of likelihood of continuation or recurrence of injury than in the context of determinations of continuation or recurrence of likelihood of dumping.

7.338 There is no dispute in this case that the Commission relied upon its determination of injury in making its determination of likelihood of continuation or recurrence of injury.[701] Thus, the question for us, in reviewing that determination, is whether China has demonstrated that the Commission acted inconsistently with the asserted provisions of Article 3 in determining injury, so as to taint the determination of likelihood of continuation or recurrence of injury, and thus failed to make a determination based on a "sufficient factual basis" and "reasoned and adequate conclusions".

7.339 We note that the European Union asserts that, in the expiry review, the Commission did not rely exclusively on the injury determination in making its determinations of likelihood of continuation or recurrence of injury. The European Union asserts that the Commission also undertook a separate and independent examination of individual factors pertaining to injury relevant to the determination of likelihood of continuation or recurrence of injury, and made independent conclusions on that basis which support its determination of likelihood of continuation or recurrence of injury.[702] China has made no claim with respect to these aspects of the Review Regulation, and makes no specific arguments challenging the Commission's analysis and determination with respect to these factors, although it does argue, in general, that they are an insufficient basis for the determination of likelihood of injury. In the absence of any claim by China in this respect, we do not consider, and make no findings regarding, the asserted independent basis for the determination of likelihood of continuation or recurrence of injury. We also make no finding with respect to whether this asserted independent basis would be sufficient, in itself, to demonstrate that the Commission made a "reasoned conclusion" based on a "sufficient factual basis" with respect to likelihood of continuation or recurrence of injury.[703]

7.340 With the foregoing principles in mind, we now turn to the alleged inconsistencies with Article 3 of the AD Agreement in the injury aspects of the expiry review and the original investigation asserted by China.

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original investigation or in the intervening reviews, it has to assure the consistency of that calculation with the existing provisions of Article 3."

Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.274.

[701] European Union, answer to Panel question 108, para. 20; Review Regulation, Exhibit CHN-2, recitals 225-260.

[702] European Union, answer to Panel questions 43 and 52, paras. 93-104 and 166, respectively. The European Union refers, in this regard, to recitals 286, 326, 389 and 397of the Review Regulation, Exhibit CHN-2.

[703] However, we note that, in principle, we see no reason why, if an investigating authority does in fact have two separate and independent bases for a conclusion of likelihood of continuation or recurrence of dumping or injury, either one of those bases could be considered sufficient to demonstrate the consistency of the determination with Article 11.3 of the AD Agreement.

(b) Claims II.2, II.3 and III.5[704] – Alleged violations of Articles 3.1, 6.10 and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994 – Sampling in the context of examining injury

7.341 In this section of our report, we address China's claims challenging various aspects of the European Union's selection of a sample of EU producers in the context of the injury examination in both the expiry review and the original investigation.

(i) Arguments of the parties

a. China

7.342 China claims that the European Union acted in an un-objective manner by failing to apply the objective sampling procedure of sending sampling forms and soliciting the necessary data from the complainant EU producers which would have provided the relevant positive information of the selection of the domestic industry's sample, inconsistently with the alleged obligation to accord "even-handed treatment" to interested parties in its procedure for selection of a sample in the context of the injury assessment in the expiry review, and violated Articles 3.1 and 17.6(i) of the AD Agreement.[705] China also claims that the European Union violated Articles 3.1, 6.10 and 17.6(i) of the AD Agreement, and Article VI:1 of the GATT 1994 in the original investigation, by selecting a sample without objective, credible and verifiable information concerning the pool of complainant EU producers from which the sample was selected, necessary for an objective examination based on positive evidence, which China asserts is normally solicited in a sampling form.[706]

7.343 With respect to the expiry review, China asserts that the European Union did not solicit the necessary information from the complainant EU producers with respect to sampling for considering them for inclusion in the sample, while all other interested parties were required to complete detailed sampling forms in order to be considered for inclusion in the sample.[707] China considers the difference in the amount of information requested demonstrates that the Commission was unfair, non-objective, and biased. China disputes the European Union's contention that relevant information for sampling was available in the complaint, sampling forms and CEC submissions. In addition, China considers that credible and verifiable evidence, concerning the criteria assertedly applied in selecting the sample,[708] were not available to the Commission at the time of the selection of the sample from the

[704] China's claim III.5 with respect to sampling in the original investigation has two aspects concerning (i) the procedure for sample selection, and (2) the examination of injury and the cross-checking of information in that context. Despite China's explanation that what "the two sub-parts of the claim [III.5] have in common is that both sub-parts constitute violations of the Articles cited in connection with the claim", China, answer to Panel question 106, para. 17, we fail to see how arguments concerning alleged violations of the AD Agreement in the procedure for sample selection relate to arguments concerning alleged violations in the injury examination and the reliance on certain data and the cross-checking of information with producer associations. However, China also clarified that the two aspects are "in no way dependent on one another." China, answer to Panel question 106, para. 17. Therefore, for clarity, we analyse the first part of claim III.5, relating to the procedure for sample selection, in this section of our report. The second part of claim III.5, relating to injury examination and the reliance on certain data and the cross-checking of information with producer associations, is examined together with claims III.8 and II.4, which also concern the injury aspects of, respectively, the original investigation and expiry review, in paragraphs 7.406-7.463 below.

[705] China, second written submission, paras. 601-602, 613-614.

[706] China, first written submission, paras. 1065, 1067, 1070, 1074, 1076 and 1086.

[707] China, first written submission, paras. 451, 454; second written submission, paras. 601-602; 640.

[708] China refers in this regard to information concerning production, sales volume, sector segment, and geographical location. China, first written submission, paras. 468; 471, 480-482; second written submission, paras. 633, 640- 650.

sources mentioned in the Review Regulation,[709] and the European Union failed to accord even-handed treatment to interested parties in its procedures for selecting samples. China asserts that the selection of the sample was therefore not based on positive evidence and an objective evaluation.

7.344 In addition, China argues that the sample of EU producers in the expiry review was inconsistent with Articles 3.1, 6.10 and 17.6(i) of the AD Agreement, and Article VI:1 of the GATT 1994, as it cannot be considered statistically valid, does not represent the largest volume that could reasonably be investigated, and included a producer that outsourced its entire production of the like product to a third country during the review investigation period.[710] Overall, China claims that the sample of the EU industry was not based on "credible and affirmative data" and was selected in the absence of "requisite data". China claims consequently that the European Union's evaluation of injury to the EU industry based on this sample was inconsistent with Article 3.1 of the AD Agreement and Article VI:1 of the GATT 1994.[711]

7.345 Finally, China claims that the European Union violated Articles 3.1, 6.10 and 17.6(i) of the AD Agreement, and Article VI:1 of the GATT 1994 in the expiry review by using an incorrect and overly broad product classification methodology, and reclassifying footwear categories in the middle of the investigation.[712]

7.346 With respect to the original investigation, China asserts that the European Union's procedure for selecting the sample for purposes of the determination of injury is inconsistent with Articles 3.1, 6.10, and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994. China argues that Chinese exporters and complainant EU producers were not subject to the same treatment with respect to selection of the sample, as Chinese producers were required to complete sampling forms within a short timeframe, while the EU producers were not required to complete sampling forms at all, and were automatically eligible to be included in the sample.[713]

b. European Union

7.347 The European Union argues that the Commission's selection of the sample of EU producers was consistent with all relevant requirements of the AD Agreement. The European Union asserts that Article 3.1 of the AD Agreement is the basis for an evaluation of whether an injury analysis based on sampling is consistent with the AD Agreement, and not Article 6.10. The European Union argues that Article 6.10 of the AD Agreement does not apply to the selection of a sample of the domestic industry, although it may provide some indication as to how sampling may be undertaken for purposes of injury analysis. [714]

7.348 With respect to the expiry review, the European Union asserts that it was not necessary to send sampling forms to complainant EU producers, since these producers had already provided all required information, and therefore no EU producer was automatically eligible to be sampled without having provided relevant information.[715] The European Union asserts that the Commission had

[709] China refers in this regard to information in the non-confidential files and the Review Regulation. China, request for interim review, para. 30, referring to China, first written submission, paras. 443, 451, 454, 468-469 and 471; second written submission, paras. 633 and 640.

[710] China, first written submission, paras. 488, 514-515 and 524.

[711] China, first written submission, paras. 468, 500 and 515; second written submission, paras. 633 and 666.

[712] China, first written submission, para. 526; second written submission, para. 693.

[713] China, first written submission, paras. 1065, 1067, 1074 and 1076; Notice of Initiation, Exhibit CHN-6; answer to Panel question 40, para. 302.

[714] European Union, first written submission, paras. 268-269.

[715] European Union, first written submission, paras. 255, 257 and 263-264, referring to Review Regulation, Exhibit CHN-2, recital 19.

sufficient company-specific or aggregate data for production and sales factors in a fully sufficient amount for the European Union to discharge its obligations under the AD Agreement with respect to sampling.[716] In addition, the European Union asserts that it is not possible to determine a certain percentage of production as a minimum threshold for purposes of sampling for an injury determination, since the total production of companies included in the sample will vary depending on the sector, and on the average size of these companies. With respect to the EU producer which outsourced its production activities during the review investigation period, the European Union maintains that only data pertaining to the activity of this complainant as an EU producer were used. Finally, the European Union argues that China's factual assertions concerning the product classification methodology and alleged reclassification of footwear categories are incorrect, and therefore China's legal arguments are baseless.[717]

7.349 With respect to the original investigation, the European Union refers to its explanations and arguments in the context of the expiry review,[718] where the European Union argued that it was not necessary to send sampling forms to complainant EU producers "[g]iven the detailed and extensive information available on file (emanating i.a. from the complaint, standing exercise, and CEC submissions)."[719] With respect to China's reliance on Article 6.10 of the AD Agreement, the European Union asserts that this provision does not apply in the context of sampling in injury determinations.[720]

(ii) Arguments of third parties

a. Brazil

7.350 Brazil notes that Article 6.10 of the AD Agreement sets out criteria and methodological guidelines for sampling when used for purposes of a dumping determination, and asserts that such "criteria and methodologies are not applicable for sampling in the context of injury determination." Brazil also notes that investigating authorities enjoy a certain degree of discretion in selecting a methodology to guide their injury analysis, as Article 3.1 of the AD Agreement does not prescribe any particular methodologies that must be followed for purposes of the injury analysis. Article 3.1 does establish that an injury determination should be based on "positive evidence" and on an "objective examination", and these parameters should also be followed with respect to sampling in the context of injury assessment. Brazil concludes by stating that

> "[w]hile a methodology mirroring the one contained in Article 6.10 should be seen as complying with the requirements of "positive evidence" and [of] "objective examination" under Article 3.1 of the ADA, this does not lead to the conclusion that a different methodology is *a priori* inconsistent with Article 3.1."[721]

b. Japan

7.351 Japan notes that, although the AD Agreement does not determine any specific methodologies for sampling in the context of injury determination, investigating authorities do not have unfettered discretion. Japan explains that, in expiry reviews, investigating authorities are obliged by Article 11.3 of the AD Agreement to arrive at a reasoned conclusion with sufficient factual basis regarding the

[716] European Union, answer to Panel question 45, paras. 115-116.
[717] European Union, first written submission, para. 283, 286 and 292, citing Review Regulation, Exhibit CHN-2, recital 23.
[718] European Union, first written submission, para. 644.
[719] European Union, first written submission, para. 255; Review Regulation, Exhibit CHN-2, recital 19.
[720] European Union, first written submission, para. 262. The European Union refers to Panel Report, *EC – Salmon (Norway)*, para. 7.132, fn. 309.
[721] Brazil, third party written submission, paras. 57-58, 60 and 62.

likelihood of continuation or recurrence of injury. Thus, the requirements contained in Article 3.1 of the AD Agreement that an injury determination be based on "positive evidence" and on an "objective examination" would be equally relevant to likelihood determinations under Article 11.3. Japan notes that the panel in *EC – Salmon (Norway)* concluded that sampling is legitimate in the context of injury determination to the extent that the investigating authority satisfies its general obligations and the sampled information was sufficiently representative of the domestic industry as a whole. While Japan takes no position on the facts of this case, it considers that these views also apply in the context of a likelihood of injury determination.[722]

c. United States

7.352 The United States takes no position on the merits of China's factual allegations, but asserts that an investigating authority would fail to conduct an "objective examination", in violation of Article 3.1 of the AD Agreement, if it limited its injury examination of the domestic industry only to complaining producers, particularly when non-complaining producers have a meaningful presence in the industry. The United States asserts that this approach would be bias, as it would cover only the segment of producers most likely to be injured, and the lack of objectivity would permeate many aspects of the investigating authorities' analysis of injury, including aspects dealt with under Articles 3.2, 3.4 and 3.5 of the AD Agreement. The United States disagrees with China's view that Article 6.10 governs how an authority must select a sample in an injury investigation, asserting that this provision concerns only how dumping margins are to be calculated, and noting that the panel in *EC – Salmon (Norway)* concluded that it saw "no basis to impose the criteria of Article 6.10 on sampling in the context of injury." Thus, the United States concludes that any such selection would be governed by the "objective examination" standard of Article 3.1. The United States also asserts that the AD Agreement contains no provision concerning sampling in the context of expiry reviews, and thus the decisions of the investigating authority are governed by the "objective examination" standard applicable to determinations of continuation or recurrence of injury under Article 11.3 of the AD Agreement.[723]

(iii) Evaluation by the Panel

7.353 Before addressing the specific claims and arguments, we note the following relevant facts concerning the sampling of domestic producers in the expiry review and the original investigation.

7.354 In the expiry review, the Commission decided to conduct the injury examination on the basis of a sample of EU producers. The CEC, acting on behalf of complainants, confirmed that all complaining producers were willing to cooperate and participate in the sampling exercise. The Commission noted the extensive information available on file, and considered it unnecessary to send sampling forms to individual complaining producers. However, the Notice of Initiation in the expiry review invited any EU producer to make itself known should it wish to cooperate. Five EU producers responded after initiation, and requested to be included in the sampling exercise. All five were sent sample forms, but only two of them returned completed forms. However, these two companies were not included in the sample, since they were excluded from the definition of the EU industry as related parties. The Commission noted that EU production of the product concerned was largely concentrated in three EU member States, with around 66 per cent of all production, and the remainder spread over the other member States. The Commission also noted the different business models of EU producers. On the basis of the information obtained, the Commission selected a sample of eight companies operating in four EU member States, representing 8.2 per cent of the production of the complainant EU producers, and 3.1 per cent of total EU production. The Commission indicated its selection was

[722] Japan, third party written submission, paras. 28-31, 33-34 and 36, citing Panel Report, *EC – Salmon (Norway)*, para. 7.130; answer to Panel question 13, paras. 18-21.
[723] United States, third party written submission, paras. 26-29, and fn. 25; answer to Panel question 13.

based on the largest representative volumes of production and sales within the European Union which could reasonably be investigated within the available time. However, the Commission also noted that the industry was not homogenous, and therefore took into account producers' geographical spread and the segment to which their products belonged, in order to assess the representativeness of the selected companies. The Commission noted that the selected companies represented the major business models, and included production across all major price segments, gender and age segments, included all major levels of distribution, and included companies with full in-house manufacturing and companies which outsourced part of the manufacturing process. During the course of the expiry review, it became known that one of the sampled EU producers progressively discontinued production in the European Union during the review investigation period, transferring its full manufacturing activity outside the European Union.[724]

7.355 Sampling was also used in the injury aspect of the original investigation. In the original investigation, the Commission selected a sample based on information provided by the producers and their national associations, based primarily on the size of the producers in terms of production volume. The Commission considered the geographical location of the producers in order to reflect the geographical spread of the industry, in addition to the size and importance of the producing companies. Ten producers were selected, representing around 10 per cent of the production of the complaining producers.[725] In the Definitive Regulation, the Commission noted that the industry was highly fragmented, and that therefore it was unavoidable that the companies in the sample accounted for a relatively small portion of the total production. The Commission stated that ten companies was the number which could reasonably be investigated within the time available, and that increasing the number of sampled companies would not have had a significant impact on the proportion of the sample compared to total production.[726]

7.356 China's claims concerning sampling in the context of the injury assessment in both the original investigation and the expiry review rest on the premise that the AD Agreement establishes procedural requirements for the selection of a sample of domestic producers, and substantive requirements for the sample selected. While China's arguments rest on Articles 3.1, 6.10 and 17.6(i) of the AD Agreement, as well as Article VI:1 of the GATT 1994, China does not contend that any of these provisions specifically addresses these questions.[727] Thus, before addressing the specifics of China's allegations, we set forth our general understanding of these provisions with respect to the issue of sampling in the context of injury in anti-dumping investigations.

7.357 Article 3.1 and footnote 9 of the AD Agreement provide, respectively:

> "*Article 3*
> *Determination of Injury*[9]
>
> 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products."

[724] Review Regulation, Exhibit CHN-2, recitals 19-23.
[725] Provisional Regulation, Exhibit CHN-4, recital 65.
[726] Definitive Regulation, Exhibit CHN-3, recitals 57-58.
[727] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[9] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

It is clear to us, as a number of previous panels and the Appellate Body have found, that Article 3.1 of the AD Agreement does not prescribe a specific methodology that must be followed by an investigating authority in the conduct of its injury analysis.[728] As a result, investigating authorities enjoy a certain degree of discretion in the methodologies used in making an injury determination.[729] However, investigating authorities do not have unfettered discretion to pick and choose any methodology they see fit, as whatever methodology is used by an investigating authority, the resulting determination of injury must be based on "positive evidence" and an "objective examination" of the volume and effects of dumped imports.[730]

7.358 In our view, the same rationale applies to the use of a sample for purposes of the injury determination. It is clear that Article 3.1 does not contain any guidance on how an investigating authority is to select a sample for purposes of an injury determination. We see nothing in the text of that provision which can be read as establishing how an investigating authority is to obtain information from domestic producers for the purposes of selecting a sample, how a sample is to be selected, or criteria for judging the sample selected. Indeed, China does not argue otherwise.

a. Procedure to select the sample

7.359 With respect to both the original investigation and the expiry review, China argues that the requirements of "objective examination" and "positive evidence" in Article 3.1 require "even-handed treatment" with respect to the process of gathering information used in selecting a sample. China argues that the European Union's procedure for selecting samples with respect to Chinese and Vietnamese exporters, EU importers and non-complaining EU producers, on the one hand was objective, but with respect to the complainant EU producers, on the other hand, it was not.[731] China recognizes that each group of interested parties is required to provide different types and amounts of information for sampling purposes, and does not argue that "the same information, or the same quantity of information is required to be sought from all sets/groups of interested parties" but does argue that within each group, the same quantity and level of information should be sought.[732] Nonetheless, China continues to refer to the different procedures used with respect to the different groups in support of its argument.[733]

[728] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204; and Panel Report, *EC – Salmon (Norway)*, paras. 7.128-7.129.

[729] Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 113; and *Mexico – Anti-Dumping Measures on Rice*, para. 204.

[730] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 111 and 113.

[731] China, answer to Panel question 107, para. 36.

[732] China, answer to Panel question 40, para. 299.

[733] China, second written submission, para. 601. China explains that its claim is not limited to the difference in the treatment between complaining and non-complaining EU producers. China, opening oral statement at the second meeting with the Panel, para. 37. See also answer to Panel question 107, para. 38. However, China also asserts that the concept of fundamental fairness requires that all companies within the same group must be required to provide the same level of information in a sampling form or an anti-dumping questionnaire, and that its claim is supported by the difference in treatment with respect to the sampling procedure applied for "Chinese (and Vietnamese) exporters; EU importers and non-complaining EU producers on the one hand; and the complainant EU producers on the other hand." China, opening oral statement at the second meeting with the Panel, para. 37, fn. 44; and answer to Panel question 107, para. 30.

7.360 China makes four arguments in support of its assertion that the different groups were treated differently: (i) while complainant EU producers were not asked to complete sampling forms, Chinese exporters, non-complaining EU producers and EU importers were required to do so;[734] (ii) Chinese exporters, non-complaining EU producers and EU importers were considered eligible for sampling only if they submitted sampling forms; (iii) eight complainant EU producers were selected to be in the sample without their consent; and (iv) the aggregate data in the complaint is not a substitute for information that should be provided in a sampling form.[735] China considers that the application of different sampling procedures by the European Union for different groups to the benefit of the complainant EU producers, and the failure to seek the requisite information from the EU producers through sampling forms in order to objectively select a sample based on positive evidence demonstrates that the Commission was unfair, non-objective, and biased. In addition, China argues that the European Union's actions in this case were not consistent with its own practice, asserting that since 1995 the European Union required that complaining EU producers complete sampling forms in several anti-dumping investigations.[736]

7.361 China asserts that, as a result of the failure to treat interested parties even-handedly in the procedure for selecting a sample in the context of injury assessment, evidence necessary for the selection of the EU industry sample was not available to the European Union and that the sample selection was not based on positive evidence and objective evaluation.[737] China asserts that the sample of the EU industry in the expiry review was selected inconsistently with the criteria of Article 6.10 of the AD Agreement.[738] China posits that, while Article 6.10 does not so specify, the "largest percentage of the volume" referred to in Article 6.10, in the case of domestic producers, relates to the production and sales of the like product by the domestic industry, and the fundamental basis for the selection of a sample of the domestic industry should have been the production, as well as sales, of the like product during the review investigation period.[739] China notes that the Commission's baseline for the selection of the sample was the production volume of the like product in the review investigation period, but that other factors such as sales, location, sector segment, and business models were also taken into account for the selection of the sample.[740] China questions how the European Union had data regarding these factors, as sampling forms were not submitted by the complainant EU producers. China asserts that, despite the European Union's position that relevant information was available in the Commission's files, there is no trace in the non-confidential file that

[734] In this regard, China asserts that while Chinese exporters, EU exporters, EU importers, and non-complaining EU producers had to spend significant time and resources completing sampling forms, the complaining EU producers did not. China, first written submission, paras. 434, 451 and 453; answer to Panel question 40, para. 302; Notice of Initiation, Exhibit CHN-6. China contends that "the time and resources spent in completing sampling forms/giving sampling information can provide the factual evidence in support of [] the present case." China, answer to Panel question 40, para. 301.

[735] China, answer to Panel question 107, para. 33.

[736] China, first written submission, paras. 458-459; Exhibit CHN-24; answer to Panel question 40, para. 304; second written submission, para. 592; answer to Panel question 107, paras. 19-26.

[737] China, first written submission, paras. 450-451, 468 and 471; answer to Panel question 40, paras. 285, 289 and 291-294; second written submission, paras. 588-589 and 633; opening oral statement at the second meeting with the Panel, para. 36; answer to Panel question 107, para. 33.

[738] China, first written submission, para. 468; second written submission, para. 633.

[739] China, first written submission, paras. 472-473.

[740] China, first written submission, paras. 475 and 481, referring to Note for the File dated 9 December 2008, Exhibit CHN-26, Note for the File dated 9 March 2009, Exhibit CHN-27, and Review Regulation, Exhibit CHN-2, recital 21. See also China, second written submission, paras. 634-635, 639 and 655.

information in this regard was provided by complainant EU producers in the complaint, the standing forms, and CEC submissions.[741]

7.362 The European Union considers that China's claim, based on a difference between the sampling procedures for the determination of dumping and the determination of injury, is "most extraordinary", and asserts that China's interpretation of Article 3.1 of the AD Agreement is not viable. In the European Union's view, Article 3.1 sets an objective standard for the determination of injury, which must be complied with, but whether it has been complied with cannot be determined on the basis of a comparison with what is done with respect to sampling for the dumping determination. Moreover, the European Union asserts that notwithstanding China's arguments, the panel in *EC – Salmon (Norway)* stated it saw "no basis to impose the criteria of Article 6.10 on sampling in the context of injury."[742]

7.363 The European Union asserts that China has changed its focus throughout the Panel proceedings. First, China argued that the European Union acted inconsistently with the AD Agreement by using different sampling procedures for Chinese exporters, EU importers, and non-complaining EU producers on the one hand, and complainant EU producers on the other hand, and then shifting the focus to the "alleged difference of treatment between non-complaining and complaining EU producers", before finally reverting to its original arguments, stating that "its claim was not confined to the difference in the treatment between the complainant and non-complainant [EU] producers only as claimed by the EU."[743] The European Union contends that it remains unclear exactly what comparison is at issue with respect to whether even-handed treatment was accorded in this phase of the anti-dumping investigation.[744] In any event, the European Union disagrees with China's proposition that a failure to seek information from interested parties in the same way constitutes a violation of Article 3.1 of the AD Agreement.[745]

7.364 Turning to the facts, the European Union argues that it was not necessary to send sampling forms to complainant EU producers, since these producers had already provided all required

[741] China, first written submission, paras. 476-477; second written submission, paras. 636 and 641. Specifically, China argues that (i) the expiry review request/complaint contained only aggregate production data of EU producers for 2006 and 2007, and thus did not contain information on production and sales of EU producers for 2005 and the full review investigation period, and contained no information regarding sales volumes and value of the like product, business models, product types, and relation with Chinese exporting producers; (ii) the declarations of support only contained sales volumes and values for 2007 and January 2008, but not data for 2005, 2006 and the review investigation period regarding production, sales, production activities, imports, and relations with exporting producers; and (iii) CEC submissions were dated 10 October 2008 or later, allegedly after the sample was selected, and did not provide any information regarding individual production and sales volume of each complaining EU producer. China, first written submission, para. 480; China, second written submission, paras. 641-650. Based on the CEC fax dated 10 October 2008, China also argues that, the CEC letter confirming the consent of complaining producers to be sampled was insufficient, as it was faxed to the Commission the morning of the day that the eight complaining EU producers were sent the anti-dumping questionnaires, although a Note for the File dated 9 March 2009 suggests otherwise. China, first written submission, para. 478, referring to Note for File date 9 March 2009, Exhibit CHN-27, and to the CEC fax dated 10 October 2008, Exhibit CHN-28.

[742] European Union, first written submission, paras. 259-262.

[743] European Union, first written submission, para. 252; second written submission, para. 111; Comments on China's answers to Panel question 107, para. 12, citing China, answer to Panel question 107, para. 38.

[744] European Union, second written submission, para. 114; Comments on China's answers to Panel question 107, para. 12.

[745] European Union, second written submission, para. 117.

information.[746] The European Union asserts that no EU producer was automatically eligible to be sampled without having provided relevant information.[747] In addition, the European Union contends that China's argument with respect to the relevance of the amount of time and resources spent in answering requests for information from the Commission is self-contradictory, noting that China asserts both that it does not consider that "the amount of time and resources necessary to respond to the requests for information … is relevant [to] assessing whether the sample selection process … is "fair"", and that "this factor can be a basis [for] assessing the lack of objectivity and fundamental fairness in the sampling procedure … in a given case".[748] Moreover, the European Union notes that the fact that the forms for the selection of exporting producers and EU producers are both referred to as "sampling" forms does not mean they have the same purpose and are governed by the same provisions of the AD Agreement or that their content should be compared.[749]

7.365 The European Union asserts that the Commission had company-specific or aggregate data for production and sales sufficient for the European Union to discharge its obligations under the AD Agreement with respect to sampling.[750] The European Union argues that the complaint, the standing forms, and the CEC submissions contained the information necessary for the selection of the sample.[751] The European Union recalls that the selection was based on the largest representative volumes of production and sales which could be investigated, geographical location of producers, and sector segment. The European Union asserts that the questionnaire sent to eight EU producers on 10 October 2008 was preliminary, without prejudice to the final selection of the sample, which was done only in December 2008.[752] The European Union asserts that whether the Commission acted inconsistently with the AD Agreement depends on whether there was sufficient information before the Commission for the selection of the sample, and not on whether the information sought from different groups was the same and of the same quantity and level.[753] The European Union considers that the Commission had sufficient and requisite information, including company-specific data for the criteria considered by the European Union, for the selection of the sample of EU producers.[754]

7.366 China asserts that Article 3.1 of the AD Agreement requires "even-handed" treatment in the gathering of information used in selecting a sample of the domestic industry for purposes of an injury analysis.

7.367 Article 3.1 establishes the standards for the determination of injury, requiring that a determination of injury be "based on positive evidence and involve an objective examination of" the volume of dumped imports, their effect on prices, and the consequent impact on domestic producers. This provision cannot, in our view, be understood as requiring any particular approach to the collection of information for purposes of selecting a sample. Nothing in the text refers to sampling, or to the collection of information in aid of selecting a sample. We do not agree that Article 3.1 can be understood to establish specific requirements for the process of selecting a sample in the context of an injury determination. Nor do we consider that Article 3.1 can be understood to require that an investigating authority gather the same information from all producers potentially eligible to be

[746] European Union, first written submission, paras. 255, 257 and 263. The European Union did not make separate arguments in this regard concerning the original investigation, referring to its arguments in the context of the expiry review. European Union, first written submission, para. 644.

[747] European Union, first written submission, para. 264.

[748] European Union, second written submission, paras. 115-116, quoting China, answer to Panel question 40, para. 301.

[749] European Union, second written submission, para. 118.

[750] European Union, answer to Panel question 45, paras. 115-116.

[751] European Union, first written submission, para. 276.

[752] European Union, first written submission, paras. 279-280, referring to Note for the File dated 29 October 2008, Exhibit CHN-25.

[753] European Union, second written submission, paras. 131-133.

[754] European Union, second written submission, paras. 141 and 143.

selected for such a sample, and in particular cannot be understood to require an investigating authority to seek the same information from exporters, importers and domestic producers in order to select samples of these groups.

7.368 Indeed, no specific provision of the AD Agreement provides for sampling in the context of the injury aspect of an anti-dumping investigation.[755] However, as the panel in *EC – Salmon (Norway)*, found, this does not mean that there are no limits on an investigating authority in this regard. That panel stated:

> "the AD Agreement establishes some general parameters for the use of sampling in the injury context. Thus, in our view, the obligation in Article 3.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the volume, price effects, and impact of dumped imports, limits an investigating authority's discretion both in choosing a sample to be examined in the context of injury, and in collecting and evaluating information obtained from the sampled producers. The Appellate Body stated, in *US – Hot-Rolled Steel*, that "an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation."[756] **A sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the AD Agreement**."[757]

Thus, the only obligation that panel found with respect to sampling in the context of injury determinations is that the sample selected must be "sufficiently representative of the domestic industry". We agree. However, we do not agree with China that this standard for judging a sample in the context of injury determinations has implications for the process of gathering information preparatory to the selection of a sample of the domestic industry.

7.369 We reject China's view that the Article 3.1 requirement of "objective examination" entails "even-handed treatment" in the collection of information for purposes of selecting a sample for the injury determination. Objective examination presumes that information, or positive evidence, is available to be examined, but says nothing about the collection of that information. China's arguments suggest that, in order to be "even-handed", sampling forms must be sent to every interested party, regardless of whether the investigating authority already possesses, with respect to certain parties, what it considers to be sufficient information for purposes of selecting a sample. We see no legal basis in the text of the AD Agreement which could establish that any particular methodology must be used by investigating authorities in this regard. In particular, we see no basis to impose a methodology which would require an investigating authority to undertake the redundant exercise of asking for information it already possesses. The time and resources spent by some parties in completing sampling forms, while other parties are not required to do so, does not affect our view in this regard. We fail to see why, for purposes of selecting the sample, the investigating authority should be required to seek and collect anew information already in its possession, simply to treat all

[755] While Article 6.10 of the AD Agreement specifically authorizes, and sets out criteria and methodological guidelines for, the use of sampling in the context of determinations of dumping, there is no similar provision with respect to determinations of injury.

[756] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[757] Panel Report, *EC – Salmon (Norway)*, para. 7.130, quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193 (footnotes omitted, emphasis added).

parties even-handedly.[758] Moreover, even-handed treatment in the collection of information for purposes of selecting a sample is no guarantee that the determination of injury ultimately made will be based on an objective examination of positive evidence. Thus, the requirement China seeks to impose would not, in our view, necessarily further the objectives of Article 3.1, and we see no basis on which to impose it on investigating authorities.

7.370 With respect to China's argument that the procedure to select the sample was flawed because the complainant EU producers did not give their express consent to be sampled by completing the sampling form, we see nothing in Article 3.1 of the AD Agreement that would require that consent must be given by each company considered in the selection of the sample. Even if such a requirement were to be implied, we can see no basis for concluding that such consent must be obtained through the use of sampling forms. In our view, the very act of participating as complainants in an anti-dumping investigation suggests a willingness to be considered for inclusion in a sample. In this case, the CEC, acting on behalf of all complainants, explicitly confirmed that all complainant EU producers were ready to cooperate and participate in the sampling exercise.[759] Thus, to the extent any consent were considered necessary, it was given in this case.

7.371 We agree with the European Union that, with respect to the expiry review, China appears to have shifted the focus of its claim of lack of even-handed treatment throughout the Panel proceedings, sometimes pointing to the different treatment of groups of interested parties, and sometimes to the different treatment of members of a single group of interested parties.[760] As we understand it, China's claim is concerned with the alleged advantage or benefit to complainant EU producers of being automatically considered eligible for sampling, because they were not required to complete sampling forms, while non-complaining EU producers, Chinese exporters and EU importers were required to complete such forms. We understand China to argue that this "benefit" is inconsistent with the asserted obligation to accord "even-handed treatment" to interested parties China derives from Article 3.1 of the AD Agreement.

7.372 Since we do not agree that Article 3.1 of the AD Agreement requires such even-handed treatment in the selection of a sample, we do not consider relevant the fact that some EU producers

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[758] Indeed, such an exercise would seem to be a waste of the investigating authorities' time and resources. We recall that Article 5.10 establishes time limits on original investigations, and Article 11.4 similarly provides that reviews, including expiry reviews, shall be carried out "expeditiously", and normally concluded within 12 months of initiation.

[759] Review Regulation, Exhibit CHN-2, recital 19.

[760] Request for consultations, item 3.2 ("as the EU used different sampling procedures for Chinese exporters and EU importers, on the one hand, and EU producers on the other hand"); Panel request, item II.2 ("as the EU used different sampling procedures for Chinese exporters, EU importers, and non-complaining EU producers on the one hand, and complainant EU producers on the other hand."); answer to Panel question 40, para. 299 ("China does clarify that within each group, the information sought should be the same and of the same quantity and level. In other words, if sampling information is sought from exporters, the same information should be sought from all exporters"); second written submission, para. 601 ("comparison of the procedures followed with regard to three set of interested parties on the one hand, i.e. Chinese exporters, non-complaining European Union producers and European Union importers, and on the other hand the complaining European Union producers"); opening oral statement at the second meeting with the Panel, para. 37; answer to Panel question 107, para. 38 ("China does not admit that claim II.2 is limited to the difference in the treatment between complaining and non-complaining EU producers only"); and opening oral statement at the second meeting with the Panel, para. 37, fn. 44 ("concept of fundamental fairness equally demands that all companies within the same group or set of interested parties be required to provide the same level of information in a sampling form or an anti-dumping questionnaire").

See also European Union, Comments on China's answers to Panel question 107, para. 12, citing China, answer to Panel question 107, para. 38; first written submission, para. 252; second written submission, para. 111.

had to submit sampling forms, while complainant EU producers did not.[761] We note, in any event, that the European Union did not limit the EU producers who could be considered for inclusion in the sample for the injury analysis. Non-complaining EU producers, about whom the Commission did not have information sufficient to consider them for the sample, were eligible to be included in the sample for the injury determination, if they provided the necessary information.[762] Thus, the procedure for the selection of the sample did not *a priori* prevent the European Union from obtaining a sample, on the basis of which the European Union could reach an injury determination based on "positive evidence" and on an "objective examination".[763] Had the European Union *a priori* excluded non-complaining EU producers from the sample such a selection process might well have resulted in a sample that is "not sufficiently representative of the domestic industry." But this was not the case here. Thus, there is no basis in fact to support the conclusion that the sample selection process "favour[ed] the interests of [an] interested party, or group of interested parties, in the investigation."[764]

7.373 Based on the foregoing, we conclude that China has failed to demonstrate that Article 3.1 establishes obligations on investigating authorities with respect to the procedure for selecting a sample for purposes of examining injury.

b. Representativeness of the sample

7.374 China asserts that the sample of EU producers in the expiry review is inconsistent with Articles 3.1, 6.10 and 17.6(i)[765] of the AD Agreement, and Article VI:1 of the GATT 1994, as it cannot be considered statistically valid, does not represent the largest volume that could reasonably be investigated, and included a producer that outsourced its entire production of the like product to a third country during the review investigation period.[766]

7.375 We recall that, as discussed above, we share the view of the panel in *EC – Salmon – (Norway)*, that "a sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the

[761] We consider the fact that exporters and importers were required to submit sampling forms while complainant EU producers were not required to do so is even less relevant. As we understand it, sampling of exporters and importers is used principally in the context of making a determination of dumping. Article 6.10 provides specific guidance for the selection of a sample of exporters or foreign producers for purposes of a dumping determination. Other than to suggest that even-handedness should prevail, China has proffered no basis for concluding that all these groups must be treated alike.

[762] Notice of Initiation of an expiry review, Exhibit CHN-7, recital 5.1(a)(iii), p. 23; Review Regulation, Exhibit CHN-2, recital 19; European Union, first written submission, para. 265; answer to Panel question 44, paras. 107-108. We do not consider that the fact that, in the end, non-complaining EU producers were not included in the sample to demonstrate, without more, that the Commission failed to be objective in selecting the sample, or that the sample selected was not representative of the EU industry.

[763] Whether it did make its injury determination based on "positive evidence" and on an "objective examination" is a separate issue not relevant to the resolution of China's claim with respect to the procedure for selecting the sample.

[764] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193 (footnote omitted)("[t]he word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.").

[765] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[766] China, first written submission, paras. 488, 514-515 and 524.

AD Agreement".[767] However, we note that this standard does not establish how a panel might judge whether a sample is "sufficiently representative" of the domestic industry.

7.376 Article 6.10 of the AD Agreement, which is invoked by China in this regard, provides in pertinent part,

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

7.377 China posits the applicability of Article 6.10 of the AD Agreement in the context of sampling for purposes of an injury determination.[768] China refers in this regard to the statement of the panel in *EC – Salmon (Norway)* that "a sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the AD Agreement."[769] China contends that if an investigating authority establishes a sample for an injury determination, the criteria in Article 6.10 "provide the appropriate guidance and standard for sample selection for an injury determination and restrict the direction of the investigating authority".[770]

7.378 China considers that, since it did not select a statistically valid sample, the European Union was required to select a sample of the domestic industry representing the "'largest percentage of volume' of production, sales of the like product."[771] According to China, since the European Union based the selection of the sample principally on the volume of production of the domestic producers, "it is obliged to follow the criteria prescribed in Article 6.10 of the *Anti-Dumping Agreement* and there is no other methodology which would ensure that the domestic industry as whole is represented by the sample."[772] China argues that the sampled EU producers did not account for the largest percentage of volume of production or sales of the domestic industry in the review investigation period since (i) the European Union included one or more companies that had small production volumes; (ii); the European Union applied "miscellaneous criteria" not found in the text of Article 6.10 of the AD Agreement in selecting the sample, even though the volume of production of the complainant EU producers was the principal basis of sample selection; (iii) the sample selected represented an unusually small percentage of total EU production compared to other anti-dumping proceedings the European Union conducted between 1995 and 2010; and (iv) the sample included a producer that outsourced its entire production of the like product during the review investigation

[767] Panel Report, *EC – Salmon (Norway)*, para. 7.130.
[768] China, first written submission, para. 490.
[769] China, second written submission, para. 619, citing Panel Report, *EC – Salmon*, para. 7.130. See also China, answer to Panel question 53, paras. 339-340.
[770] China, second written submission, para. 622. In addition, China contends that its position regarding the applicability of Article 6.10 criteria is supported by footnote 13 of the AD Agreement. Footnote 13 of the AD Agreement provides: "In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques."
[771] China, first written submission, paras. 496 and 498.
[772] China, second written submission, para. 629.

period.[773] China also argues that the European Union could have investigated more than eight EU producers.[774]

7.379 The European Union argues that Article 6.10 of the AD Agreement does not establish any legal disciplines applicable to sampling with respect to injury analysis, and that only Article 3.1 of the AD Agreement is relevant in this regard.[775] Moreover, the European Union asserts that the Commission did not select the sample based on the largest volume. The European Union notes that the criteria considered were set out in a Note for the File, which states:

> "The 8 retained Companies were chosen on the basis of production, sales, location and sector segment. The baseline for the selection was founded on a ranking of the producers with the highest production volume in the IP. In order to ensure the representativeness of the sample, companies selling niche products were not retained for the sample. Another factor considered was the need of ensuring representativity in terms of geographical spread of the companies in the sample and the final sample therefore came to include representatives of the four biggest producing countries in the Community."[776]

Thus, while the Commission started with a consideration of volume of production, given the fragmented state of industry, the other criteria mentioned played an important role in the final selection of the sample to ensure its consistency with the requirements of Article 3.1 of the AD Agreement.[777] In addition, the European Union asserts that it is not possible to determine a certain minimum percentage of production for purposes of sampling for an injury determination, since the total production of companies included in the sample will vary depending on the sector, and on the average size of these companies.[778] The European Union argues that in this case the domestic industry consists of some 18,000 companies, mostly small and medium-sized enterprises. The European Union considers that China is effectively saying that in such circumstances an injury investigation cannot take place, since it is not feasible to select a statistical sample, and China considers that a sample that accounts for a small percentage of total production cannot be considered representative.[779] The European Union argues that the Panel need not consider the representativeness of the sample *per se*, since in its view, China relies on the assertion that the sample was not representative because it was neither statistically valid, nor did it represent the "largest percentage of production as required by Article 6.10 [of the] Anti-Dumping Agreement." Since Article 6.10

[773] China, first written submission, paras. 500-504 and 512, referring to Note for the File dated 29 October 2008, Exhibit CHN-25 ("eight large producers"), and Note for File dated 9 March 2009, Exhibit CHN-27 ("ranking of the producers with the highest production volume in the RIP"), and citing Review Regulation, Exhibit CHN-2, recital 22; second written submission, para. 658. China also submits that a sample representing only 8.2 per cent of the complaining EU production, and 3.1 per cent of the total EU production cannot be representative of this EU industry, and that findings for such a small sample cannot be transposed to the whole EU industry. China, second written submission, para. 629, 657 and 659.

[774] China, first written submission, para. 513. China notes that the European Union argues that reliance on the largest volume in selecting a sample for injury investigations might result in a sample inconsistent with the requirements of 3.1 of the AD Agreement, and contends that the European Union has failed to explain why this could or would have happened in this particular case, and if so, why the sample selection process began with a ranking of the producers with the highest production volume. China, second written submission, para. 631.

[775] European Union, first written submission, paras. 268-269.

[776] European Union, second written submission, para. 122, quoting Note for the file dated 9 March 2009, Exhibit CHN-27.

[777] European Union, second written submission, para. 124.

[778] European Union, first written submission, para. 283.

[779] European Union, second written submission, para. 126.

establishes no legal requirements with respect to sampling in an injury analysis, the European Union considers that the Panel should reject China's claims as a matter of law.[780]

7.380 In our view, it is clear from the text of Article 6.10 that it does not establish any criteria or guidelines for sampling in the context of an injury determination, but rather relates specifically to the selection of a sample for the determination of dumping. Moreover, we agree with the statement of the panel in *EC – Salmon (Norway)*, in that

> "we see no basis to impose the criteria of Article 6.10 on sampling in the context of injury. It is not clear that the "largest volume that can reasonably be investigated" criterion of Article 6.10 would [be] an appropriate basis for the selection of a sample in the context of an injury investigation. On the dumping side, ensuring that an adequate portion of total exports is investigated might be sufficient to justify imposition of an anti-dumping duty, particularly given that there is a possibility for subsequent refunds if an individual producer is not actual [sic] dumping. In the investigation of injury, factors other than the volume of production would seem at least equally, if not more, relevant to ensuring that a sample adequately represents the domestic industry as a whole, sufficient to justify a finding of injury to the domestic industry. Thus, while the volume of production covered by a sample may be relevant in assessing whether a determination based on information from sampled domestic producers satisfies the requirements of Article 3.1, other considerations may also be as relevant, or potentially more relevant."[781]

7.381 China asserts, relying on the report of the panel in *EC – Salmon (Norway)*, that Article 6.10 provides a good contextual basis for determining the consistency of the sample with the requirements of "positive evidence" and "objective examination.[782] We disagree. In this case, the facts indicate that the European Union started with the volume of production in selecting the sample for the injury examination, but took into account other criteria which it considered relevant.[783] That an investigating authority chooses to consider the volume of production, which is a criterion in Article 6.10, as part, or even a principal part, of its selection of a sample for the injury analysis does not, in our view, mean that the investigating authority is bound by the provisions of Article 6.10 in selecting a sample for the injury examination. Such an interpretation would create an obligation on WTO Members that is not set out in the AD Agreement.[784] In addition, we do not accept China's argument that Article 6.10 is "a good contextual basis" for understanding the requirements for sampling in the injury context. Pursuant to Article 31.1 of the Vienna Convention, a provision of a treaty shall be interpreted in its context. However, Article 31.1 of the Vienna Convention presupposes that there is a provision of a treaty being interpreted. As discussed above, and as China does not dispute, there is no provision of the AD Agreement that specifically addresses sampling in the context of injury determination. Therefore, as we understand it, China's argument is that Article 6.10 is relevant context for how an investigating authority should undertake sampling in injury determinations in the absence of any specific treaty text in this regard. While nothing prevents an investigating authority from looking to

[780] European Union, second written submission, para. 128.
[781] Panel Report, *EC – Salmon (Norway)*, fn. 309.
[782] China, first written submission, para. 445.
[783] We note that this comports with the statement of the panel in *EC – Salmon (Norway)* that "factors other than the volume of production would seem at least equally, if not more, relevant to ensuring that a sample adequately represents the domestic industry as a whole, sufficient to justify a finding of injury to the domestic industry". Panel Report, *EC – Salmon (Norway)*, fn. 309.
[784] Moreover, we recall that it is China's burden to establish a legal and factual basis for its claim. Thus, whether or not the European Union explained how, in this case, reliance on the largest volume alone would not result in a sample satisfactory for purposes of Article 3.1 is irrelevant, since we have concluded that Article 6.10 does not apply to the selection of a sample in the injury context. See footnote 774 above.

Article 6.10 for some indications as to how sampling might be undertaken in the context of injury, this does not transform Article 6.10 into an obligation on the investigating authority in that exercise.

7.382 Thus, we consider that Article 6.10 is not applicable to the selection of a sample for purposes of an injury determination, either directly, or as "context". We therefore dismiss China's claims under Article 6.10 with respect to sampling in the expiry review as matter of law.[785]

7.383 We agree with the European Union that, having concluded that Article 6.10 establishes no legal requirements with respect to sampling in an injury analysis, we need not consider the representativeness of the sample *per se*. As we understand it, China claims that, having shown that the EU industry's sample was inconsistent with the European Union's obligations under the AD Agreement, the European Union's evaluation of injury to the EU industry based on this sample was consequently inconsistent with Article 3.1 of the AD Agreement and Article VI:1 of the GATT 1994.[786] We have found that the European Union's sample of the EU industry was not inconsistent with Article 6.10. Thus, we reject China's consequential claims. Nonetheless, to the extent China may be considered to have made an independent claim under Article 3.1 that the sample selected is not representative of the domestic industry, its only arguments in support of this claim appear to concern the inclusion of a company that outsourced production during the relevant period, and the small volume of production represented by the sample.

7.384 With respect to the producer that outsourced its entire production, China asserts that this producer should have been excluded from the sample because it ceased production in the review investigation period and could not thereafter be considered representative of the situation of non-sampled EU industry producers.[787] China contends that business model was not one of the criteria for sample selection, and the outsourcing in question was of the entire production to a country outside the European Union. Therefore the inclusion of this company in the sample could not enhance its representativity.[788] China also disputes the European Union's assertion that the company's submission of its data as EU production was a good faith mistake".[789] The European Union notes that subcontracting or outsourcing of production is an important business model in the footwear industry in the European Union, and therefore keeping this company in the sample improved the

[785] We note that China's claim with respect to the procedures for selecting the sample of EU producers in the original investigation also invoked Article 6.10 of the AD Agreement, and Article VI:1 of the GATT 1994. However, China's argument in this regard focused on the assertion that by failing to follow Article 6.10, the Commission failed to select a representative sample. In light of our conclusion that Article 6.10 does not apply, as a matter of law, to sampling in the context of an injury determination, we do not consider it necessary to address this aspect of China's claim.

[786] China, first written submission, paras. 468 and 500; second written submission, paras. 633 and 666-667.

[787] China, second written submission, para. 677; first written submission, para. 521. China considers that the producer that outsourced its production underwent a permanent change in production location, and could not have been injured by the allegedly dumped imports during the review investigation period. In addition, China argues that the business model of this producer does not contribute to any aspect of the injury determination regulated by Article 3 of the AD Agreement.

[788] China, second written submission, para. 681. Responding to the European Union's assertion that only the data of this producer pertaining to its activity as a producer in the European Union was taken into account, China submits that the injury data for this producer would be negatively affected by outsourcing, and thus "an injury analysis based on a sample including such a producer cannot be considered objective and based on positive evidence." China, second written submission, para. 683. See also first written submission, para. 522.

[789] China, second written submission, para. 690. China considers it common knowledge that Bosnia, where the production was moved, is not part of the European Union, and asserts that the company would have known it was importing footwear from Bosnia. *Id.*

representativeness of the sample.[790] In any event, the European Union maintains that only data pertaining to its activity in the European Union was used.[791]

7.385 We do not agree that the European Union was required to exclude this company from the sample it had originally selected. We note that the fact of this company outsourcing its production to a country outside the European Union was only discovered at verification, long after the sample had been selected.[792] We consider that the view that the representativeness of the sample was improved by the presence of this company is a reasonable conclusion in light of the facts that were before the Commission. Moreover, we note that the Commission addressed the concerns raised in this regard by interested parties, and concluded that inclusion of this company in the sample did not affect the overall trends with respect to the industry.[793] In these circumstances, we cannot conclude that the European Union's determination of injury was inconsistent with Article 3.1 as being based on a sample that was not sufficiently representative of the domestic industry as a whole.

7.386 China asserts that the fact that the EU industry is fragmented and comprises principally small-and-medium-sized enterprises does not justify selecting a small sample. For China, in such a situation, a statistically valid sample would have ensured that the sample is representative of the domestic industry as a whole, but the European Union chose to rely on a sample selected on the basis of largest volumes of production.[794] China considers that the European Union did not, however, "select a sample that represented the largest volume of production" since the sample selected represented at most 8.2 per cent of total production of the complainants or 3.1 per cent of total EU production.[795] China asserts that the small volume of production represented by the sample means that it "cannot logically be considered representative."[796] The European Union asserts that there is no minimum percentage of total production which must be represented in a sample for injury purposes. Indeed, the European Union notes that the total production of companies included in the sample in any investigation will vary, depending on the number of big, medium and small companies in the industry being examined, and that the total percentage of production of the companies included in the sample is a function of the industry structure. [797]

7.387 We consider that the relatively small percentage of total production volume of the EU industry represented by companies included in the sample does not, standing alone, demonstrate that the sample selected was not sufficiently representative of the domestic industry as a whole. There is no minimum number of producers, nor a minimum percentage of volume of production, that must be

[790] European Union, first written submission, para. 290; second written submission, para. 290.

[791] European Union, first written submission, para. 286, citing Review Regulation, Exhibit CHN-2, recital 23. In addition, the European Union notes that, although it was not required to do so, the Commission conducted "an alternative second analysis based on the assumption that the decreased production of the sample [due to the situation of the producer in question] could be extrapolated to the entire domestic industry," and concluded that the overall trends in the injury factors relevant for this determination would not be affected. European Union, first written submission, para. 289, citing Review Regulation, Exhibit CHN-2, Table 9; second written submission, para. 148.

[792] European Union, answer to Panel question 49, para. 129; Note for the File dated 9 December 2008, Exhibit CHN-27; Review Regulation, Exhibit CHN-2, recital 23.

[793] Review Regulation, Exhibit CHN-2, recital 23.

[794] China, second written submission, para. 661.

[795] China, second written submission, para. 661 (footnote omitted). China states that even if the Panel were to accept that the definition of the EU industry for the expiry review included complaining and non-complaining EU producers, China maintains its claims that a sample "representing 3,1% of the domestic industry production is not representative of the domestic industry as a whole and also does not account for the largest volume of production that can reasonably be investigated." China, second written submission, para. 666; opening oral statement at the first meeting with the Panel, para. 48.

[796] China, answer to Panel question 53, para. 352.

[797] European Union, first written submission, para. 283.

reached before a sample can be considered sufficiently representative of the domestic industry as a whole. In our view, that judgement can only be made in light of all the relevant facts and circumstances in a given investigation.

7.388 Based on the foregoing, we conclude that China has failed to demonstrate that the sample of EU producers selected by the Commission was not representative of the domestic industry in either the original investigation or the expiry review.

c. PCN Methodology

7.389 China claims, with respect to the expiry review, that the use of an overly broad PCN classification system, and the reclassification of certain footwear in the middle of the expiry review, precluded an objective examination of the volume of dumped Chinese imports, the effect of those imports on prices, and their consequent impact on domestic producers, in violation of Articles 3.1, 6.10 and 17.6(i) of the AD Agreement, and Article VI:1 of the GATT 1994.[798] China argues that the use of this overly broad PCN system precluded a proper comparison between footwear produced by sampled EU producers and that produced by the sampled Chinese exporting producers in terms of volume and value, as it resulted in the calculation of an injury margin or undercutting margin based on "PCNs comprising extremely divergent and incomparable footwear types." China also asserts that the European Union "re-classified and shuffled the data of the Chinese exporters and European Union producers on its own without the actual input of these companies", resulting in unverifiable data. China argues that the European Union's determination of injury based on "the volume and price effect of the imports to the extent it involved a PCN-based analysis including the injury margin calculation cannot be considered objective and based on positive evidence" and is therefore inconsistent with Articles 3.1 and 17.6(i) of the AD Agreement, and Article VI:1 of the GATT 1994.[799] The European Union argues that China's factual assertions concerning the PCN system and alleged reclassification of footwear categories are incorrect, and therefore China's legal arguments are baseless.[800] The European Union refers to its explanations on this issue provided in its response to China's claim II.1, which concerns the PCN methodology with respect to the determination of dumping.[801]

7.390 China premises its argument on the assertion that it demonstrated that the European Union used an "extremely broad and imprecise PCN classification system".[802] However, we have concluded, in the context of China's claims II.1 and III.3, that the European Union's use of the PCN methodology in the original investigation and expiry review was not inconsistent with either Article 2.1 of the AD Agreement or Article VI:1 of the GATT 1994.[803] China has not made any additional substantive arguments in this regard in the context of its claim concerning injury. Indeed, there is nothing in China's arguments at paragraphs 526-529 of its first written submission, and paragraph 693 of its second written submission, that addresses any alleged flaws in the PCN system used by the European Union. Moreover, China has failed to explain the relevance of its assertions with respect to the PCN system to the issue of sampling, which we recall is the subject of China's claim here. Nor has China explained the connection between the use of the PCN system and the determination of the injury margin on the one hand, and the issue of sampling on the other. Moreover, China's argument is that the determination of injury based on "the volume and price effect of the imports to the extent it involved a PCN-based analysis including the injury margin calculation cannot be considered objective and based on positive evidence" demonstrates a violation of Articles 3.1 and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994. We fail to see either a legal or factual basis for a

[798] China, first written submission, para. 528; second written submission, para. 693.
[799] China, first written submission, paras. 528-529.
[800] European Union, first written submission, para. 292.
[801] See paragraphs 7.272-7.274 above.
[802] China, first written submission, para. 526.
[803] See paragraphs 7.276-7.287 above.

claim with respect to sampling in these arguments.[804] We therefore dismiss this aspect of China's claim.

7.391 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Articles 3.1, 6.10 and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994 in the procedures for and selection of a sample of the domestic industry for purposes of examining injury in the original investigation. We also conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 11.3 of the AD Agreement in the procedures for and selection of a sample of the domestic industry for purposes of examining injury, or likelihood of injury, in the expiry review.[805]

(c) Claim III.7 – Alleged violation of Article 3.3 of the AD Agreement – Cumulative assessment of imports from China and Viet Nam in the original investigation

7.392 In this section of our report, we address China's claim that the Commission erred in undertaking a cumulative assessment of the effects of dumped imports from China and Viet Nam in the original investigation.

(i) Arguments of the parties

a. China

7.393 China claims that the European Union violated Article 3.3 of the AD Agreement by undertaking a cumulative assessment of the effects of imports from China and Viet Nam in the original investigation. China asserts that the cumulative assessment of imports from China and Viet Nam in this case did not satisfy the conditions for such analysis set out in Article 3.3 of the AD Agreement.[806] Specifically, China contends that cumulative analysis was inappropriate in this case, in light of the conditions of competition between the imported products themselves, and between imported products and the like domestic products.[807] China claims that the European Union failed to properly take into account differences between China and Viet Nam, specifically that: (i) trends in import volume and prices differed between China and Viet Nam, (ii) Viet Nam is one of the world's poorest countries, and (iii) the product mix between China and Viet Nam was different.[808]

7.394 In addition, China argues that the European Union failed to recognize important differences between China and Viet Nam with respect to import volumes, market shares, and prices, and did not take into account the sudden increase of imports from China caused by the lifting of the quota on imports of footwear as of January 2005.[809] China asserts that the market share of Chinese imports was lower than that of Viet Nam during the investigation period, and thus the market shares developed differently, contrary to the European Union's statement that the volume of imports "developed in parallel".[810] China contends that the term "parallel" must be understood in this context as "continuously equidistant", and argues that this was not the case for imports from China and

[804] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[805] We recall in this regard our views concerning the consideration of alleged violations of Article 3 of the AD Agreement in the context of an expiry review, paragraphs 7.329-7.340 above.

[806] China, answer to Panel question 93, para. 553.

[807] China, first written submission, para. 1154.

[808] China, first written submission, para. 1151.

[809] China, first written submission, para. 1157.

[810] China, first written submission, paras. 1158 and 1165, citing Provisional Regulation, Exhibit CHN-4, recital 158.

Viet Nam.[811] China also contends that the volume of imports from China was much lower than the volume of imports from Viet Nam in 2001, but registered an important increase towards the end of the period of investigation.[812] Finally, China argues that imports from China and Viet Nam did not have the same tendency, in light of the quota on imports from China in force until 2005, which does not reflect normal "conditions of competition".[813]

7.395 While China maintains that it is pursuing a claim under Article 3.3 of the AD Agreement, it considers that Article 3.1 applies to the determination under Article 3.3(b) of whether cumulation is "appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product."[814] In response to the European Union's argument that any claim of failure to make an objective examination should be brought under Article 3.1 of the AD Agreement, China argues that Article 3.1 informs the obligations under Article 3.3 of the AD Agreement.

b. European Union

7.396 The European Union contends that the right to undertake a cumulative analysis under Article 3.3 of the AD Agreement does not depend on the existence of "normal" conditions of competition, and asserts that China has not refuted the Commission's finding that the market shares of China and Viet Nam developed similarly.[815] According to the European Union, divergent trends in export volumes do not of themselves constitute a barrier to cumulation. Moreover, the European Union contends that China's argument that the volumes of imports must have been "continuously equidistant" is without legal basis, and would be "inherently improbable" in the context of anti-dumping investigations.[816] The European Union considers that "in describing the movements as 'similar', the European Union is not assuming that such a finding is required before the conditions specified for cumulation in Article 3.3 are satisfied".[817] The European Union asserts that the data with respect to China and Viet Nam show that market share of imports from each was increasing, and that towards the end of the period of investigation, China's share increased faster. [818] The European Union maintains that the Commission, in this case, reached an overall conclusion that the facts justified cumulation.[819]

7.397 The European Union asserts that China seems to be arguing a violation of Article 3.1 of the AD Agreement, and that any claim of "failure to make an objective examination" should be framed under that provision, and not under Article 3.3 of the AD Agreement.[820] The European Union submits

[811] China, first written submission, paras. 1159-1160. China notes in this regard that in 2002 imports from China dropped by 6 per cent, while imports from Viet Nam increased by 17 per cent.

[812] China, second written submission, para. 1404. China asserts that "the European Union seems to regard a +300% increase imports volumes (for China), against a +100% increase in imports volumes (Vietnam), as well as a -39% decrease in prices (China) against a -22% decrease (Vietnam), as evidence of 'similar conditions of competition'." China, second written submission, para. 1407. See also China, Comments on European Union, answer to Panel question 111, para. 38.

[813] China, first written submission, paras. 1161-1162; second written submission, para. 1409.

[814] China, first written submission, para. 1156; answer to Panel question 90, para. 532.

[815] European Union, first written submission, paras. 699-700.

[816] European Union, first written submission, para. 697.

[817] European Union, first written submission, para. 700; answer to Panel question 111, para. 32.

[818] European Union, first written submission, paras. 698 and 700.

[819] European Union, first written submission, para. 700, referring to Definitive Regulation, Exhibit CHN-3, recital 164.

[820] European Union, first written submission, para. 694; answer to Panel question 93, paras. 260-261.

that China's claim should be dismissed because Article 3.3 does not contain an obligation to make an objective examination.[821]

(ii) Arguments of third parties

a. Colombia

7.398 Colombia asserts that Article 3.3 of the AD Agreement requires an examination of, *inter alia*, whether, considering the conditions of competition between imported and like domestic products subject to the investigation, there are appropriate conditions for an investigating authority to undertake a cumulative assessment in an anti-dumping investigation. Colombia recalls that Article 3.3 is a voluntary option, that is, an investigating authority can decide whether to cumulate in order to facilitate its administrative activities during the investigation. The requirements for use of cumulation are set out in Article 3.3, and Colombia notes that Members may determine criteria to establish in which circumstances it would be appropriate to cumulate. However, Colombia contends that this discretion is not absolute, as those criteria must be reasonably related to the inquiry in question, that is, whether products compete in the domestic market of the importing Member. In addition, investigating authorities may specify the conditions of competition, as the AD Agreement does not determine such conditions. Colombia states that in order to involve two or more countries in a single anti-dumping investigation, authorities must analyse whether cumulation is appropriate by taking into account the particular facts of the case, especially the characteristics of the parties subject to investigation. Finally, with respect to the relation between imported and like domestic products, Colombia states that it is relevant to compare the effects and impact of the dumped imported goods over the like domestic product, in light of the market conditions.[822]

b. United States

7.399 The United States disagrees with the legal premise of China's argument that an investigating authority must establish that imports from different countries have similar volume and market share trends in order to demonstrate that cumulation is appropriate in light of the conditions of competition between imported products. The United States asserts that investigating authorities may cumulate imports if (i) dumping margins for the individual countries are more than *de minimis*, (ii) the volumes of imports from the individual countries are not negligible, and (iii) a cumulative assessment is appropriate in light of the conditions of competition between imported products, and between the imported products and the like domestic product.[823]

(iii) Evaluation by the Panel

7.400 Before addressing China's claim, we recall the relevant facts concerning the Commission's decision to undertake a cumulative analysis of the effects of imports from China and Viet Nam. In the Provisional Regulation, the Commission considered whether the effects of dumped imports from the countries concerned should be assessed cumulatively, on the basis of the criteria set out in EU legislation, which provides that the effects of imports from two or more countries simultaneously subject to anti-dumping investigations shall be assessed cumulatively only if it is determined that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9(3) of the Basic AD Regulation and that the volume of imports of each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product. The Commission found

[821] European Union, first written submission, para. 695.
[822] Colombia, third party written submission, paras. 110, 112, 114, 117-118 and 120.
[823] United States, third party written submission, paras. 32-33 and 35.

that the dumping margins for each country were more than *de minimis*, and the volume of the dumped imports from each of those countries was not negligible. The Commission further concluded that the conditions of competition both between the dumped imports and between the dumped imports and the like Community product were similar, noting in this respect that irrespective of origin, imported and domestically-produced footwear compete against each other since they are alike in terms of their basic characteristics, interchangeable from the consumer's point of view and distributed via the same distribution channels. The Commission also noted that the "volume of imports developed in parallel", noting that imports from both countries increased by around 40 million pairs between 2001 and the investigation period. In addition, the Commission found that import prices followed a similar decreasing trend, falling by 39 per cent for China and by 22 per cent for Viet Nam, and that the prices of imports undercut the domestic industry's prices at a comparable level of trade. The Commission considered and rejected arguments by certain interested parties that conditions for cumulative assessment were not fulfilled because the market shares of the countries concerned developed differently and their price level was not comparable, concluding that the import volumes, market shares and average unit prices of both countries developed similarly over the period considered. The Commission noted that the sudden increase of Chinese imports during the investigation period was likely related to the lifting of the quota on those imports as of January 2005, that Chinese and Vietnamese imports clearly followed the same trends, and followed its established practice of examining trends in import volume and prices over the period 1 January 2001 to 31 March 2005. In addition, the Commission concluded that the absolute difference in the level of the prices between the two countries, which might be explained by various factors such as a different product mix, was not relevant in the context of the cumulative assessment, while the price trends over the period considered were relevant, and these trends were comparable for the two countries. The Commission therefore concluded that all conditions of cumulation are met and that accordingly the effect of the dumped imports originating in the countries concerned would be assessed jointly for the purpose of the injury analysis.[824]

7.401 In the final stage of the investigation, certain interested parties claimed that the cumulative assessment was not warranted, based on differences in the trends in import volume and prices for China and Viet Nam, and the fact that Viet Nam is one of the world's poorest countries, benefiting from the Generalised System of Preferences', and should therefore not be cumulated with China for the injury assessment. The Commission noted that the first argument had been addressed in the Provisional Regulation, and rejected the second argument, stating that there was no provision in the Basic AD Regulation stipulating that one of the countries simultaneously subject to anti-dumping investigations should not be cumulated because of its overall economic situation, and noting that such an interpretation would also not be in line with the object and purpose of the provisions on cumulation, which focus on whether the imports from the various sources compete with each other and the like Community product. In other words, the Commission concluded the characteristics of the traded products matter but not the situation of the country from which the imports originate. One interested party also claimed that the cumulation was not warranted on the grounds that the product mix of the two countries concerned is different. The Commission concluded that, even if there were differences in product mix, there was still a significant overlap, and thus, overall, imports from China and from Viet Nam competed against each other. Therefore, and on the basis of the provisional findings in recitals 156 to 162 of the Provisional Regulation, the Commission definitively concluded that all conditions of cumulation were met and that the effect of the dumped imports originating in China and Viet Nam should be assessed jointly for the purpose of the injury analysis.[825]

[824] Provisional Regulation, Exhibit CHN-4, recitals 156-162.
[825] Definitive Regulation, Exhibit CHN-3, recitals 163-167.

7.402 Article 3.3 of the AD Agreement, which is at issue in this claim, provides:

> "Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product."

Article 3.3 of the AD Agreement allows, but does not require, investigating authorities to "cumulatively assess the effects" of imports of a product from more than one country when those imports are simultaneously subject to investigation.[826] The text of Article 3.3 is clear on its face. The option to undertake a cumulative assessment is subject to three conditions, expressly set out in the text, namely: (a) the dumping margins from each individual country must be more than *de minimis*, (b) the volume of imports from each individual country must not be negligible, and (c) cumulation must be appropriate in light of the conditions of competition (i) between imported products, and (ii) between the imported products and the like domestic product.[827]

7.403 Article 3.3 of the AD Agreement does not contain any further guidance with respect to these "conditions of competition". Unlike Articles 3.2, 3.4 and 3.5 of the AD Agreement, which set out indicative lists of factors to be considered in examining the volume and price effects and impact of imports on the domestic industry, and the question of causation, in making a determination of injury, Article 3.3 does not indicate anything with respect to factors that might be relevant in assessing the appropriateness of cumulative analysis in light of the "conditions of competition".[828] Nevertheless, while investigating authorities enjoy a certain degree of discretion in establishing an analytical framework for determining whether a cumulative assessment is appropriate under Article 3.3, investigating authorities must take into account the particular circumstances of the case in light of the particular conditions of competition in the marketplace.[829] While we agree with China that Article 3.1 informs the obligations under Article 3.3 as a general matter,[830] we consider that this obligation

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[826] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 144. The rationale for a cumulative assessment is that the domestic industry faces the impact of dumped imports as a group, and may be injured by the total impact of such dumped imports, regardless of whether they have the same origin or come from the same country. Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("*EC – Tube or Pipe Fittings*"), WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613, para. 116.

[827] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 109.

[828] We note in this regard that this is among the questions examined by the Working Group on Implementation of the Committee on Anti-Dumping Practices. While a number of proposals regarding this matter were presented to and discussed extensively in that Group, no recommendation was ever adopted in this regard. See, e.g. documents G/ADP/W/410, G/ADP/AHG/R7, G/ADP/W/93, and G/ADP/W/121 and revs. 1-4. In addition, proposals on this question have been made in the negotiations on anti-dumping in the context of the Doha Development Agenda. Document TN/RL/W/143. These considerations support our view that the current text of Article 3.3 does not prescribe any criteria or methodologies for assessing whether cumulation is appropriate in light of the conditions of competition among imports, and between imports and the domestic like product.

[829] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.241.

[830] "[T]he right under Article 3.3 to conduct anti-dumping investigations with respect to imports from different exporting countries does not absolve investigating authorities from the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of 'positive evidence' and an 'objective examination'."
Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 145.

requires that the investigating authority rely on positive evidence and an objective examination of that evidence in exercising its right to undertake a cumulative assessment. It does not, however, establish any substantive obligations on the analysis of whether a cumulative assessment of the effects of imports is appropriate. In this case, we consider that the Commission explained the evidentiary basis and reasoning underlying the decision to undertake a cumulative analysis.[831] China does not dispute that the Commission considered relevant facts and explained its conclusions, but disagrees with the conclusions reached, and asserts that other facts should have been taken into account as well. However, these are questions of the substantive sufficiency of the Commission's decision, which in our view can be considered, if at all, only in light of the obligations of Article 3.3, and not under Article 3.1. Thus, to the extent China may be asserting a violation of Article 3.1, we consider that the European Union acted consistently with that provision.

7.404 Turning to the alleged violation of Article 3.3, we see no basis in the text of Article 3.3 for China's view that an investigating authority must establish that imports from different countries have similar volume and market share trends, or that the conditions of competition in the different exporting countries were "similar" or "normal", in order to conclude that a cumulative assessment is appropriate in light of the "conditions of competition". As we observed above, Article 3.3 contains no specific mandatory or indicative factors that should be considered in assessing whether cumulative analysis is appropriate in light of the "conditions of competition". We note in this regard that the Appellate Body has rejected arguments that would create additional obligations under Article 3.3 of the AD Agreement:

> "By seeking to place additional obligations on investigating authorities beyond those specified in Article 3.3, namely, that investigating authorities first determine *on a country-specific basis* the existence of significant increases in dumped imports, and their potential for causing injury to the domestic industry, Brazil ignores the role of cumulation in ensuring that each of the multiple sources of 'dumped imports' that cumulatively contribute to a domestic industry's material injury be subject to anti-dumping duties."[832]

In the absence of any relevant legal obligations under Article 3.3, we cannot conclude that the Commission's determination is inconsistent with that provision. We certainly see no basis for the view that a statement by the investigating authority that imports "developed in parallel" requires that the imports referred to developed in lock-step, that is, were "continuously equidistant", before a cumulative analysis can be undertaken.

7.405 On the basis of the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 3.3 of the AD Agreement in undertaking a cumulative assessment of the effects of imports from China and Viet Nam in the original investigation.

(d) Claims II.4, III.5 and III.8 – Alleged violations of Articles 3.1, 3.2, 3.4, 6.10, and 17.6(i) of the AD Agreement and Article VI:1 of the GATT 1994 – Evaluation of injury indicators

7.406 In this section of our report, we address China's claims concerning the evaluation of certain injury indicators by the European Union in both the original investigation and the expiry review, as well as the data considered in those evaluations.

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[831] See Definitive Regulation, Exhibit CHN-3, recitals 162-167; Provisional Regulation, Exhibit CHN-4, recitals 158-161.

[832] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 117 (emphasis in original, footnote omitted).

(i) Arguments of the parties

a. China

7.407 With respect to the expiry review, China claims violations of Articles 3.1, 3.4, and 17.6(i) of the AD Agreement. Specifically, China claims (i) that the European Union based its evaluation of certain macroeconomic injury indicators on data pertaining to producers that were not part of the domestic industry; and (ii) that the European Union did not conduct its evaluation of macroeconomic injury indicators in an objective manner based on positive evidence.[833] China claims that the Prodcom data, and data provided by eight national footwear associations, both used by the Commission in its injury analysis, included information of producers not part of the EU industry. China asserts that the European Union's definition of the EU industry in the expiry review included only the complainant EU producers and their domestic supporters, with the exception of those producers who were related to exporters of the product under consideration or who imported the allegedly dumped product.[834] China contends that the European Union asserted for the first time in its first written submission in this dispute that the domestic industry for the purposes of the expiry review included both complaining and non-complaining EU producers.[835] In addition, China contends that the Prodcom database, and the data provided by eight national footwear association, included information of producers regardless of whether they were related to Chinese producers, or whether they were importers of Chinese or third country footwear.[836] Thus, regardless of the definition of domestic industry in the expiry review, China asserts that the European Union violated Articles 3.1, 3.4 and 17.6(i) of the AD Agreement. China also argues that, with respect to certain macroeconomic injury indicators, specifically, production capacity, capacity utilization, sales volume, employment, productivity, and market share, the only source of information used by the European Union in its evaluation was the data provided by EU member States' national producer associations, and data of some individual producers. However, China asserts that the data provided by national producer associations were on an aggregate basis for 2006, 2007 and the review investigation period. China contends that not only was it impossible for the European Union to exclude the data of producers that no longer produced or that outsourced their production, but this data included information concerning products other than the like product, was based on estimates, came from associations that supported the expiry review, and some producers' associations clearly stated in their responses that they did not have the relevant data for the injury indicators.[837]

7.408 With respect to the original investigation, China claims that the European Union violated Articles 3.1 and 17.6(i) of the AD Agreement. Specifically, China asserts that the European Union

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[833] China, first written submission, para. 561, second written submission, para. 694.

[834] China, first written submission, paras. 534-535. China contends that:

> "the European Union defines the European Union industry as constituting the complainants (i.e. the complainants plus their supporters or the domestic producers supporting the complaint). This is evident from standard European Union practice and the fact that Article 17(1) of the Basic AD Regulation, which provides for sampling explicitly states that '*[i]n cases where the number of complainants, exporters or importers, types of product or transactions is large …*', (emphasis added) sampling can be applied. It should be noted that this provision does not mention the term 'producers' in the context of sampling of the domestic industry but instead mentions the term 'complainants'."

China, first written submission, para. 535 (footnotes omitted). See also second written submission, para. 697.

[835] China, second written submission, para. 695.

[836] China, second written submission, paras. 734 and 735.

[837] China, first written submission, para. 558; second written submission, para. 748; Questionnaire response of ANCI dated 19 November 2008, Exhibit CHN-38; Questionnaire response of Polish Chamber of Shoe and Leather Industry dated 19 November 2008, Exhibit CHN-39; Questionnaire response of Chaussure de France dated 20 November 2008, Exhibit CHN-40; Correspondence between the British Footwear Association and the European Commission, Exhibit CHN-41.

relied, in its evaluation of injury, on unverified data allegedly collected from individual producers at the complaint stage, that is, the parties requesting the measures.[838] Furthermore, China claims that the European Union violated Articles 3.1, 6.10 and 17.6(i) of the AD Agreement by attempting to "cross-check" some of this data with the information provided by national associations, because data provided by national associations included producers not part of the EU industry, companies that were neither complainants nor part of the sample.[839] China also claims that the European Union violated Articles 3.1, 3.2, and 3.4 of the AD Agreement by failing to objectively examine all of the relevant economic factors on the basis of positive evidence. Specifically, China argues that the European Union failed to use verified figures on production capacity and capacity utilization provided by the sampled EU producers, instead focussing its examination on the level of employment. In addition, China claims that the European Union did not sufficiently consider various injury factors, specifically: sales values, market shares based on turnover, and trend in sales prices with respect to domestic prices; the large variations in profitability and return on investments; magnitude of the margin of dumping; the fact that several sampled producers did not show any signs of injury; and the extent to which the sudden increase of imports from China was caused by the lifting of the quota on imports of footwear as of January 2005.[840]

b. European Union

7.409 With respect to the expiry review, the European Union argues that the "domestic industry" did not comprise only the complainant EU producers, but also included non-complaining EU producers.[841] In addition, the European Union explains that with respect to producers that outsourced their production outside the European Union, only the data pertaining to the production in the EU was considered.[842] The European Union adds that Prodcom data contained only genuine EU production.[843] Moreover, the European Union asserts that the Commission also used other sources of information on the macroeconomic indicators, notably the information provided by the industry associations and market studies regarding the sector.[844] The European Union contends that the Commission verified the data provided by national associations by conducting verification visits to those associations, and that the data covered more than 80 per cent of EU industry production.[845] In addition, the European Union asserts that the verified and non-verified data were further cross-checked, where possible, against information and data from other sources and the trends emanating from this information were also cross-checked against the information from the sample to determine whether there were any divergences.[846]

7.410 With respect to the original investigation, the European Union asserts that the domestic industry was defined as the complaining producers, and that, while the Provisional Regulation

[838] China, first written submission, paras. 1078 and 1082.
[839] China, first written submission, para. 1084.
[840] China, first written submission, paras. 1167, 1184-1186 and 1188-1190; second written submission, paras. 1420-1423; answer to Panel question 91, para. 539.
[841] European Union, first written submission, para. 294; answer to Panel question 50, para. 130. The European Union clarifies that "[f]rom the outset of the review exercise, the domestic industry for the purposes of the review has been defined as the totality of the European Union producers, i.e. as including both the complainants and the non-complaints European Union producers." European Union, first written submission, para. 294, citing Review Regulation, Exhibit CHN-2, recitals 193-199 and 337.
[842] European Union, first written submission, para. 298. The European Union clarifies that "companies that were found related to exporting producers and importing significant quantities were also excluded … (Recital 198 of the Review Regulation (and the last sentence of Recital 19))." European Union, first written submission, fn. 252.
[843] European Union, second written submission, para. 153.
[844] European Union, first written submission, para. 302.
[845] European Union, first written submission, para. 303; second written submission, para. 154.
[846] European Union, second written submission, para. 154.

included a brief discussion of the entire footwear sector as background, information concerning the entire sector was not used as input for the examination of macroeconomic data. Thus, the European Union argues that China is factually incorrect in asserting that the Commission relied on data from associations which included companies not part of the domestic industry. The European Union contends that the Commission based its analysis on information from multiple sources, subject to multiple cross-checking.[847] The European Union asserts that the focus on employment in considering the issue of capacity was appropriate in the context of the footwear industry, and considers that China's interpretation of the notion of production capacity is too rigid to adequately deal with the wide variety of forms that industry may take in modern economies.[848] The European Union explains that it distinguishes in investigations between macro- and microeconomic indicators regarding the state of the domestic industry, and asserts that consideration of production capacity and capacity utilization on a macroeconomic basis, rather than on the basis of information from the sampled companies, was appropriate.[849] The European Union responds to each of China's allegations concerning insufficient consideration of specific injury factors, namely: sales volumes; market share analysis based on turnover; factors affecting domestic prices; that several sampled EU producers did not show signs of injury; variations in profitability and return on investments; level of productivity maintained by the industry; the magnitude of the margin of dumping; and the effects of the lifting of the quota on imports from China.[850]

(ii) Arguments of third parties

a. Colombia

7.411 Colombia recalls that Article 3.1 of the AD Agreement does not prescribe a methodology that must be followed by an investigating authority in conducting an injury analysis. Reviewing previous panels and Appellate Body decisions, Colombia asserts that not only the factors listed in Article 3.4 of the AD Agreement are mandatory, but also that, in certain cases, it could be necessary to examine economic factors different than those enumerated in this provision. Thus, Colombia asserts that the Panel should analyse whether the European Union examined all the relevant factors listed in Article 3.4, and whether this provision would be breached if the Panel finds that the European Union took into consideration data regarding producers not part of the EU industry.[851]

(iii) Evaluation by the Panel

7.412 China claims that the European Union's evaluation of injury in the expiry review is inconsistent with Articles 3.1, 3.4, and 17.6(i) of the AD Agreement, and its evaluation of injury in the original investigation is inconsistent with those provisions, and also with Articles 3.2 and 6.10 of the AD Agreement.[852] Article 3.4 of the AD Agreement, which is most directly relevant to our analysis of China's claims, provides:

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[847] European Union, first written submission, paras. 646-648.
[848] European Union, first written submission, para. 706.
[849] European Union, first written submission, paras. 711-712.
[850] European Union, first written submission, paras. 716-726 and 728.
[851] Colombia, third party written submission, paras. 58, 64-67 and 68.
[852] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

We note that China makes no independent arguments concerning Article 6.10 with respect to the injury determination in the original investigation, but asserted, in the context of its arguments concerning sampling, that the cross-checking of information with producers' associations is inconsistent with Article 6.10. China, first written submission, para. 1084. We fail to see the relationship of this assertion to China's claim with respect to

> "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

7.413 Article 3.4 expands on the requirement of Article 3.1 to undertake an objective examination of the "consequent impact" of imports on the domestic producers of the like product, that is, the domestic industry, setting out certain factors to be considered in this regard. We note that the determination of injury is to be made with respect to the domestic industry as a whole.[853] In this regard, while an investigating authority may consider information pertaining to a sample in making its determination, companies who are not included in the sample may nonetheless be included in the domestic industry, and thus their information is relevant to the determination.[854] While Article 3.4 lists a number of factors which are deemed to be relevant and must be considered in all cases, it requires investigating authorities to evaluate "all relevant economic factors".[855] It is clear, in our view, that all relevant factors may include, in a given case, factors in addition to those listed in Article 3.4.[856] Moreover, while all listed factors must be considered in every investigation, this does not mean that each of those factors will be relevant to the investigating authority's determination in a given case, as the relevance, and significance, of each factor will vary depending on the nature of the product and industry in question. In addition, we consider it clear that it is not necessary that all relevant factors, or even most or a majority of them, show negative developments in order for an investigating authority to make a determination of injury.[857] Finally, as the text of the Article 3.4 explicitly states, no one or several factors can necessarily give decisive guidance. In our view, this means that an overall evaluation of the information, in context, is necessary, as well as an explanation of how the facts considered by the investigating authority support its determination.[858] With these principles in mind, we turn to China's specific allegations in this dispute. With respect to each of the measures in dispute, the Review and Definitive Regulations, we will first describe the relevant findings of the Commission in the Regulation, and then examine China's allegations with respect to that measure.

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the evaluation of injury factors, and we make no findings with respect to Article 6.10 in this regard. We recall that we have already addressed Article 6.10 with respect to China's claim III.5 regarding sampling in the context of an injury examination. See paragraphs 7.353-7.391 above.

[853] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190.

[854] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077, para. 6.181; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 112; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.326.

[855] Appellate Body Reports, *EC – Tube or Pipe Fittings*, paras. 146 and 156; *US – Hot-Rolled Steel*, para. 194; and *Thailand – H-Beams*, paras. 125-128.

[856] Appellate Body Report, *US – Hot-Rolled Steel*, para. 194.

[857] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.329; and Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC – Bed Linen (Article 21.5 – India)*"), WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, 1269, para. 6.163.

[858] *See* Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities ("Mexico – Olive Oil")*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179, para. 7.372; Panel Report, *EC – Bed Linen*, paras. 6.163 and 6.213; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.329.

a. Review Regulation

7.414 The Commission began its analysis of economic factors and indices having a bearing on the state of the industry by noting that sampling had been used. The Commission explained that the injury indicators had been established at two levels: (i) macroeconomic elements and (ii) microeconomic elements. The Commission stated that the macroeconomic elements were assessed at the level of the entire industry, that is, all of EU production, on the basis of the information collected from national producers associations and individual companies. These factors were cross-checked, where possible, with the overall information provided by the relevant official statistics. The analysis of the microeconomic elements was carried out at the level of the EU producers in the sample.[859] Concerning macroeconomic indicators, the Commission evaluated information regarding output, production capacity, capacity utilisation, sales volume, market share, employment, productivity, growth, magnitude of dumping margin, and recovery from the effects of past dumping or subsidisation. Concerning microeconomic indicators, the Commission evaluated information regarding stocks, sales prices, cash flow, profitability, return on investments, ability to raise capital, investments, and wages.[860]

7.415 The Commission addressed the information with respect to these factors, and arguments of interested parties, and concluded that considering that production takes place on order and stocks are normally either not held or only consist of completed orders not yet delivered/invoiced, these factors were found to have very little meaning in the injury analysis. Similarly, since the sector remained labour intensive, the Commission considered that production capacity was not technically limited and mainly depended on the number of workers hired by the producers. EU production as well as sales volume decreased at approximately the same rate as consumption, and sales, market share and employment of Union producers thus remained stable. Productivity decreased moderately. The Commission found that, while it would have been expected that the move to a new business model would have enabled an increase in sales and production, it was clear that the economic free fall of the industry before the imposition of the measure had been halted, allowing a large part of the industry to change business model by way of streamlining production processes through the development of specialised clusters, moving up in the product segment as well as changing focus from wholesale distribution to direct supply to retail. The Commission stated that analysis of the relevant microeconomic indicators also supported the view that the industry had partially recovered, showing an increase in sales prices, cash-flow investment, and profit, but had not been able to recover to normal profit and investment levels, and still had problems raising capital and in salary development, showing that the situation was still fragile and that injury has not been totally removed. Overall, the Commission concluded that the investigation revealed that the EU industry continued to suffer material injury.[861]

1. alleged change in the definition of the domestic industry

7.416 China observes that, in the original investigation, the Commission evaluated injury factors at two levels, "the level of the entire European Union industry" with respect to macroeconomic indicators, and "the level of the sampled European Union producers" with respect to microeconomic indicators.[862] China further notes that, in the expiry review, the Commission again evaluated the injury factors at two levels, identified as "the level of the '*whole [European] Union production*' " with respect to macroeconomic factors, and "the level of the sampled European Union producers" with

[859] Review Regulation, Exhibit CHN-2, recitals 225-226.
[860] Review Regulation, Exhibit CHN-2, recitals 227-256.
[861] Review Regulation, Exhibit CHN-2, recitals 257-260.
[862] China, first written submission, para. 542, referring to Provisional Regulation, Exhibit CHN-4, recital 175.

respect to microeconomic factors.[863] For China, this indicates that the Commission took into account the data of producers not part of the EU industry in its injury determination,[864] or changed the definition of the EU industry between the original investigation and the expiry review. China notes that EU producers importing over 25 per cent of their output from China and/or Viet Nam were excluded from the domestic industry. However, the evaluation of the imports from China and Viet Nam of EU producers, and whether or not any producer was related to any Chinese or Vietnamese exporter, was done only for the complainants, who accounted for around 35 per cent of the total EU production.[865] As a consequence, China asserts that the European Union analysed the macroeconomic factors on the basis of information that included the data of two groups of producers not part of the EU industry: (a) non-complaining EU producers, accounting for almost 65 per cent of EU production of the like product, and (b) EU producers that ceased production, outsourced the majority of their production outside the European Union, or were major importers of the product under consideration and/or were related to exporters in China.[866] China contends that these two groups may have produced the like product in the European Union, but they were not in the EU industry as defined by the Commission in the expiry review. Thus, China asserts that consideration of information pertaining to them, as part of "whole European Union production", was inconsistent with Article 3.4.[867]

7.417 China maintains that the European Union asserted for the first time in its first written submission in this dispute that the domestic industry for purposes of the expiry review included both complaining and non-complaining EU producers.[868] China asserts that, in the original investigation, the European Union defined the domestic industry as including only complainant EU producers.[869] China maintains that, contrary to the European Union's position in this dispute, several factors confirm that the domestic industry in the expiry review consisted only of complainants.[870] China asserts that the European Union was obliged under EU law to use the same definition of domestic industry in the expiry review as it had in the original investigation, and, if the definition of the domestic industry was changed, it was obliged to justify the change.[871]

7.418 China contends that, if the "domestic industry" in the expiry review consisted only of the complainants, the European Union violated Articles 3.1, 3.4 and 17.6(i) of the AD Agreement by taking into account in its injury determination data pertaining to non-complainant EU producers and producers that either ceased production in the European Union, outsourced majority of their

[863] China, first written submission, para. 543, referring to the Review Regulation, Exhibit CHN-2, recital 226.

[864] China, first written submission, paras. 542-543.

[865] China, second written submission, paras. 731-733. China provided as evidence the then-Community interest questionnaires of two EU producers sampled in the original investigation to claim that they imported more than 25 per cent of their output from China/Far East. China, second written submission, para. 739, referring to Community interest questionnaire response of Company D dated 16 January 2009, Exhibit CHN-44; and Community interest questionnaire response of Companies E, G and H dated January 2009, Exhibit CHN-49.

[866] China, second written submission, paras. 695 and 728.

[867] China, second written submission, paras. 717 and 743. China explains that these arguments are not affected by the "new" definition of the domestic industry asserted by the European Union in this dispute.

[868] China, second written submission, para. 695.

[869] China, first written submission, para. 536; second written submission, paras. 696 and 709.

[870] See China, second written submission, paras. 698-700, 714, 721 and 724. In particular, China emphasises that the "Review Regulation does not define, indicate or clarify that the domestic industry consisted of complainants and non-complainants." China, second written submission, para. 714. In addition, China argues that the Commission was under an obligation, pursuant to Article 11(9) of the Basic AD Regulation, to follow the same methodology used in the original investigation, and therefore to adopt the same definition of domestic industry. China, second written submission, para. 719.

[871] China, second written submission, paras. 719-724, citing Article 11(9) of the Basic AD Regulation and EU court proceedings.

production outside the European Union, were major importers of the product concerned and/or were related to exporters in China.[872] China argues that the European Union should have "acted consistently" and should have evaluated the macroeconomic factors on the basis of data of the complainant EU producers, which China contends comprised the domestic industry, or the data of the sampled EU producers, as China asserts the Commission had done in the original investigation, because Article 3.4 requires the evaluation of the impact of the dumped imports on the domestic industry.[873]

7.419 On the other hand, China contends that if the domestic industry in the expiry review did include all EU producers, the European Union nonetheless violated Articles 3.1, 3.4 and 17.6(i) of the AD Agreement.[874] China argues first that the data relied on by the Commission included data pertaining to producers related to Chinese producers, or major importers of Chinese or third country outsourced footwear.[875] Second, China asserts that production was evaluated on the basis of 100 per cent of EU production as reported in Prodcom, while the other injury indicators, specifically, production capacity, capacity utilization, productivity, employment, growth, and magnitude of dumping margin were evaluated on the basis of the data provided by the national producers' associations, which accounted for around 80 per cent of EU production.[876]

7.420 The European Union maintains that the domestic industry in the expiry review was not defined as only the complainant EU producers, but also included non-complaining EU producers.[877] The European Union asserts that documents in the non-confidential file make clear that the European Union's analysis was not based on information pertaining to producers outside the domestic industry.[878] In addition, the European Union explains that, with respect to producers that outsourced their production outside the European Union, only data pertaining to their production in the EU was considered.[879] The European Union contends that, as the domestic industry was defined as the entire EU production, it was not difficult to adjust the Prodcom data to exclude the two companies found to be related to Chinese exporting producers, and the one company that discontinued production.[880]

7.421 We note at the outset that China has not made a claim under Article 4.1 of the AD Agreement alleging that the European Union wrongly defined the domestic industry in the expiry review. Rather,

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[872] China, first written submission, paras. 550 and 553. China asserts that the data of these groups of producers was included in Prodcom data, and in the aggregate data provided by producers' associations, which was the basis of the European Union's evaluation of the macroeconomic injury indicators. China, first written submission, para. 550.

[873] China, first written submission, para. 551.

[874] China, second written submission, paras. 730 and 741.

[875] China refers in this regard to the Prodcom database and the data from the eight national associations. China, second written submission, paras. 734 and 735.

[876] China, second written submission, para. 741.

[877] European Union, first written submission, para. 294; answer to Panel question 50, para. 130. The European Union clarifies that "[f]from the outset of the review exercise, the domestic industry for the purposes of the review has been defined as the totality of the European Union producers, i.e. as including both the complainants and the non-complaints European Union producers." European Union, first written submission, para. 294, citing Review Regulation, Exhibit CHN-2, recitals 337 and 193-199. The European Union confirms however that the EU industry in the original investigation was defined as the complaining producers. European Union, first written submission, para. 646.

[878] European Union, first written submission, para. 295, quoting Note Verbal of 17 April 2009, Exhibit EU-10, and Review Regulation, Exhibit CHN-2, recital 22.

[879] European Union, first written submission, para. 298. The European Union clarifies that "companies that were found related to exporting producers and importing significant quantities were also excluded … (Recital 198 of the Review Regulation (and the last sentence of Recital 19))." European Union, first written submission, fn. 252.

[880] European Union, first written submission, para. 302; Review Regulation, Exhibit CHN-2, recitals 19, 23 and 198.

China's claim, as we understand it, is that the European Union violated Articles 3.1, 3.4 and 17.6(i) of the AD Agreement by (i) changing the definition of the domestic industry from that used in the original investigation in the context of the expiry review, and (ii) that it considered data for producers not part of the domestic industry as defined in the expiry review in evaluating injury factors.[881] China also disputes the European Union's assertion that the Commission defined the domestic industry in the expiry review as the whole of EU production of the like product.

7.422 Turning to the latter question first, we note that the Review Regulation addresses the question of the definition of the EU industry as follows:

> "Overall, the investigation has shown that there continues to be a significant leather footwear production in the Union, established in several Member states employing around 262 000 people. The footwear production sector is constituted of around 18000 SME mainly situated in seven European countries with a concentration in three major producing countries.
>
> The investigation did however reveal that two companies belonging to the same group were found to be related to exporting producers in the PRC and the group was also itself importing significant quantities of the product concerned, including from its related exporters in the PRC. Therefore, these companies were excluded from the notion of Union production in the meaning of Articles 4(1) and 5(4) of the basic Regulation.
>
> Based on the above it was found that overall production of the Union Industry in the meaning of Articles 4(1) and 5(4) of the basic Regulation was 366 million pairs during the RIP.
>
> Considering that the Union producers supporting the request accounted for more than 25% of the total production and in the absence of opposition equal to or larger than that magnitude, it is therefore concluded that the request is supported by a major proportion of the Union industry within the meaning of Article 4(1) and Article 5(4) of the basic Regulation."[882]

We recall that, as alleged by China, the Commission evaluated production, a "macroeconomic" factor, on the basis of total EU production, as reported in Prodcom data. This is evident later in the Review Regulation, at table 9, which reports production in the review investigation period as 365,348,000 pairs. In our view, while the Commission could have been clearer in stating the definition of the EU industry, it is apparent that, as a matter of fact, the EU industry in the expiry review was defined as the entirety of EU production of the like product footwear. Thus, we conclude that there is no factual basis for China's claim that the Commission acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement by taking into account data for producers not part of the EU industry with respect to macroeconomic factors. The evidence before us demonstrates that information referred to by China in this regard relates to all, or a significant proportion of, total EU production, that is, to the EU industry identified by the Commission.

7.423 China asserts that the European Union changed the definition of the domestic industry from that used in the original investigation, and contends that in doing so, it acted inconsistently with

[881] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[882] Review Regulation, Exhibit CHN-2, recitals 197-200.

Articles 3.1 and 3.4 of the AD Agreement. Even accepting China's assertion to be true, and the European Union does not deny that the domestic industry was defined as complainant EU producers in the original investigation, we note that China's arguments in this regard appear to be based on EU law. The requirements of EU law in this respect, whatever they may be, are irrelevant to our consideration of whether the European Union has acted inconsistently with its obligations under the AD Agreement. China has failed to demonstrate any obligation under that Agreement that would preclude the European Union from defining the domestic industry differently in an expiry review than it had in the original investigation.

2. use of the Prodcom database and information provided by national footwear associations

7.424 China asserts that, regardless of the definition of the EU industry, the European Union's assessment of injury was not based on an "objective examination" of "positive evidence".[883] China contends that the Prodcom database used by the European Union is a non-objective source of data and did not provide positive evidence to determine EU production of the domestic industry in this case, as it includes data of producers not part of the domestic industry, is based on data reported on an annual basis and not for the review investigation period, which comprised six months of 2007 and 2008 respectively, contains data concerning a broader category of footwear than the like product, includes estimates,[884] and is generally based on volume sold and not on volume produced.[885] Thus, China submits that the Commission's evaluation of the EU industry's production and productivity was not based on precise, objective and verifiable data, and was thus not based on positive evidence. In addition, China notes that the Commission's evaluation of macroeconomic indicators also relied on data provided by national footwear associations with respect to production volumes. China asserts that the data provided by these associations (i) included data regarding producers not part of the domestic industry, as associations provided data concerning all producers in the EU member State represented; (ii) was based on non-verifiable estimation and assumptions made by the associations; (iii) was partly based on Eurostat-Prodcom data; and (iv) was not specific to the like product but pertained to a broader category of footwear than the like product. Thus, China submits that the European Union's evaluation of production was inconsistent with Article 3.4, which requires that the evaluation be made only for the "domestic industry".[886]

7.425 China also asserts that with respect to production capacity, capacity utilization, sales volume, employment, productivity, and market share, the only source of information was the data provided by EU member States' national producer associations, and data of some individual producers. China asserts that these data were on an aggregate basis for 2006, 2007 and the review investigation period, and contends that it was impossible for the European Union to exclude the data of producers that no longer produced or that outsourced their production.[887] In addition, China alleges, referring to statements made by the specific national producer associations, that most of the data provided by the cooperating national producer associations were estimates or assumptions, and did not pertain to the like product but to a broader category of footwear, and asserts that these cannot constitute "positive evidence" within the meaning of Article 3.1 of the AD Agreement.[888] China argues that the

[883] China, second written submission, para. 743. China clarifies that its allegations "in this regard are not affected by the "new" definition of the domestic industry claimed by the European Union."

[884] China, first written submission, para. 556. China submits that it is not possible to single out data of producers that were not part of the EU industry, in order to exclude such information from the Prodcom data used in the evaluation of the injury indicators. See also, China, second written submission, para. 746.

[885] China, second written submission, para. 746.

[886] China, first written submission, paras. 556-557; second written submission, para. 746.

[887] China, first written submission, para. 558; China, second written submission, para. 748.

[888] China, first written submission, para. 558; second written submission, para. 749. China claims that five out of the eight national associations, whose data was used by the European Union, supported the expiry

verification of estimations, if possible, does not prove that such data was credible nor that it constituted positive evidence.[889]

7.426 The European Union contends that Prodcom data contained only genuine EU production.[890] The European Union observes that since there is always a risk that data of related companies may be included in general databases such as Prodcom, "if the possible inclusion of such data invalidates an analysis under Article 3.4, China is effectively arguing that where the domestic industry is very large, an analysis of the relevant factors cannot be made consistently with Article 3.4 ... since there is always the risk that some such companies would be included."[891] Moreover, the European Union explains that the Commission also used other sources of information on the macroeconomic indicators, notably the information provided by the industry association and market studies regarding the sector, and verified the data provided by national associations.[892] The European Union also contends that the Commission cross-checked verified and non-verified data against information and data from other sources, as well as cross-checking the trends against the information from the sample. The European Union considers, in a situation, like this case, where the industry is large and fragmented, this process is a reasonable and reliable method of generating data.[893] Indeed, the European Union suggests that the Commission's approach may have resulted in the most accurate data possible, and rejects China's suggestion that the Commission should have extrapolated from the sample as no more, and perhaps less, reliable.[894] The European Union contends that it is sometimes necessary to rely on estimates, and sees no reason why reasonable estimates, subject to verification visits to understand how they had been made and on which assumptions, should not constitute positive evidence.[895]

7.427 We recall our conclusion that the Commission defined the EU industry in the expiry review as all EU production of the like product footwear. Therefore, to the extent China's arguments assert that the data relied on by the Commission may have included information or producers not part of the domestic industry, we reject them. To the extent China is arguing that the Commission erred with respect to the sources of the data it obtained, we recall that there is nothing in Article 3.1 of the AD Agreement that prescribes a methodology for the determination of injury. In our view, there is certainly nothing in that provision, or in Article 3.4 of the AD Agreement, that prescribes how the investigating authority is to obtain information for the purposes of its injury determination, and still less is there any limitation, express or implied, on the sources from which information in that regard

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review, namely the national associations from Portugal, Spain, Italy, France and Poland. China, second written submission, para. 748 and fn. 419.

[889] China notes in this regard that the French footwear association reported that it had no data for the injury indicators, and therefore could not be verified. China, second written submission, para. 751. China contends that if the European Union defined the domestic industry as 100 per cent of EU producers, it was incumbent on it to conduct the injury determination for that industry, and rejects the European Union's arguments concerning the difficulty of obtaining and verifying information for some 18,000 small and medium-sized enterprises as justification for the Commission's approach. China, second written submission, para. 758.

[890] European Union, second written submission, para. 153. The European Union explained the process of gathering data for the Prodcom database in its answer to Panel question 49. It stated that the process involves reporting data on production for a period of time to the national statistical authority for the EU member State in question, which reviews the information, and then submits it to EUROSTAT. The European Union asserts that the data reported does not include outsourced production, as data reported to each EU member State statistical authority includes only production for that country, in which the producer reporting the data is operating. European Union, answer to Panel question 49. See also answer to Panel question 48.

[891] European Union, second written submission, para. 153.

[892] The European Union notes that the Commission conducted verification visits to the associations, and that these verifications covered more than 80 per cent of EU industry production. European Union, first written submission, paras. 302-303; second written submission, para. 154.

[893] European Union, second written submission, para. 154.

[894] European Union, first written submission, para. 304. See also answer to Panel question 48, para. 124.

[895] European Union, second written submission, para. 155.

may be obtained. Clearly, the investigating authority must "evaluate" all relevant economic factors, and to do so, it must have information pertaining to those factors. However, we cannot see in this obligation anything that would limit the investigating authority's actions in seeking necessary information. Moreover, while China has argued that there are flaws in the data obtained by the Commission, it has failed to persuade us that any such flaws were sufficiently significant, or of such a nature, as to undermine the determination of injury.

7.428 Indeed, it is not surprising to us that there might be flaws or gaps in the information obtained by an investigating authority in the context of its examination of injury, and we see nothing in Article 3.4, or any other provision of the AD Agreement, that would preclude consideration of and reliance on such data. Naturally, an investigating authority cannot simply ignore that the data on which it bases its determination may be lacking in some respect. However, in this case, it seems clear to us the Commission made reasonable efforts to obtain as much data as possible, verified the data collected to the extent it could, and undertook other methods of checking the data to satisfy itself of the accuracy of the data, as required by Article 6.6 of the AD Agreement. We note in this regard that, while China makes much of the alleged impossibility of verifying estimates and certain other information relied on by the Commission, "verification" of information is not, in fact, a requirement under the AD Agreement. Article 6.6 of the AD Agreement, which is not at issue in this dispute, requires investigating authorities, except where they rely on facts available, to "during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." While on-site verification is certainly one method by which an investigating authority may satisfy itself as to the accuracy of information, it is by no means the only method of doing so, and as noted above, is not required in any case. In our view, the Commission's methodology, taking into consideration different sources of information, verifying them when possible, and cross-checking them against one another, is a reasonable method in this respect. We therefore reject China's argument that the European Union acted inconsistently with Article 3.4 of the AD Agreement with respect to the sources of information relied upon and the data used in its evaluation of injury factors.

3. specific macroeconomic indicators

7.429 China contends that the Commission barely evaluated certain factors, specifically recovery from the past effects of dumping and the magnitude of dumping.[896]

7.430 China questions the length of the explanation given by the Commission of its consideration of the magnitude of dumping, but makes no assertions that it is substantively insufficient or otherwise inconsistent with Article 3.4 of the AD Agreement.[897] The Review Regulation states in this regard:

> "As concerns the impact on the Union industry of the magnitude of the actual margin of dumping, given the volume and the prices of the imports from the countries concerned, this impact cannot be considered to be negligible."[898]

While certainly succinct, this statement clearly sets out the Commission's evaluation of this factor – the magnitude of the margin had an impact on the domestic industry that was not negligible. In our view, this is sufficient, particularly in the absence of any dispute as to the substance of this conclusion, that is, the view that the impact of the magnitude of margin was not negligible. Merely because the Commission's statement is short does not demonstrate any insufficiency in that statement. We therefore reject this aspect of China's claim.

[896] China, first written submission, para. 559.
[897] China, first written submission, para. 559.
[898] Review Regulation, Exhibit CHN-2, recital 247.

7.431 Similarly, China questions the length of the explanation given by the Commission with respect to its consideration of recovery from the effects of past dumping or subsidisation, without further argument as to the sufficiency or consistency of this explanation.[899] We note that this is not a factor required to be considered under Article 3.4, but one which the Commission apparently considered relevant and therefore addressed. The Review Regulation states:

> "Anti-dumping measures against imports of certain footwear with uppers of leather originating in PRC and Viet Nam were imposed in October 2006. In this period only a partial recovery of the situation of the Union producers has been observed as detailed below."[900]

Again, while not lengthy, this statement clearly sets out the Commission's evaluation of this factor – despite the imposition of anti-dumping measures, the EU industry had only partially recovered from the injurious effects of dumped imports. In our view, this is sufficient, particularly in the absence of any dispute as to the substance of this conclusion, that is, that the industry had only partially recovered from the effects of past dumping. Again, merely because the Commission's statement is short does not demonstrate any insufficiency in that statement.

7.432 Based on the foregoing, we consider that China has failed to demonstrate that the European Union acted inconsistently with Article 3.4 of the AD Agreement in its evaluation of all relevant economic factors and indices having a bearing on the state of the industry in the context of its injury determination in the expiry review. Having found no inconsistency with respect to Article 3. 4, we further consider that China has failed to demonstrate any inconsistency with respect to Article 3.1 of the AD Agreement. We therefore conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 11.3 of the AD Agreement in concluding that there was a likelihood of continuation or recurrence of injury based, at least in part, on the determination that injury continued during the review investigation period.[901]

b. Definitive Regulation

7.433 In the Definitive Regulation, the Commission noted that, following its usual practice, injury indicators were established either at a macroeconomic level, based on data for the whole Community industry, or at a microeconomic level, based on data of the sampled companies, but not at both.[902] Production, production capacity, capacity utilisation, sales volume, market share, employment, productivity, growth, magnitude of dumping margin, and recovery from the effects of past dumping or subsidisation were considered at the macroeconomic level. Sales prices, cash flow, profitability, return on investments, and ability to raise capital were considered at the microeconomic level. The Commission addressed the information with respect to these factors, and the arguments of interested parties. The Commission concluded by confirming the conclusion in the Provisional Regulation that the Community industry had suffered material injury.[903]

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[899] China, first written submission, para. 559.

[900] Review Regulation, Exhibit CHN-2, recital 248.

[901] We recall in this regard our views concerning the consideration of alleged violations of Article 3 of the AD Agreement in the context of an expiry review, paragraphs 7.329-7.340 above.

[902] Definitive Regulation, Exhibit CHN-3, recital 186.

[903] Definitive Regulation, Exhibit CHN-3, recital 213. In the Provisional Regulation, the Commission had addressed certain peculiarities of the footwear sector, concluding that it had been facing serious negative developments and was in a critical situation. The Commission pointed out that not all factors listed in the EU Basic AD Regulation were found to have a bearing on the state of the industry for the determination of injury, noting in particular that because the industry produced on order, stocks had little meaning, and since the industry was relatively labour intensive, production capacity was not technically limited and depended mainly on the number of workers hired. The Commission stated that, for the injury analysis, injury indicators were established

7.434 More specifically, in the Definitive Regulation, the Commission confirmed that at the level of the macroeconomic indicators, i.e. at the level of the overall Community industry, the injury mainly materialised in terms of decreased sales volume and market shares, and that since footwear is manufactured on order, this also had a direct negative impact on the production level and employment in the Community. Furthermore, the Commission also confirmed that at the level of the microeconomic elements the situation was largely injurious, noting for instance, that the sampled companies had reached the lowest possible level of profit during 2003, although this could partially be explained by their relatively pronounced prior investment practice, that is, the effect of depreciation on profitability. However, the Commission found that their level of profit decreased subsequently despite a significant decrease in investment and, was at the lowest level for the period considered during the investigation period, with the exception of 2003. The Commission observed that this was far from any acceptable level and in the absence of other explanatory factors, like heavy prior investment, clearly materially injurious. Similarly, the Commission found that cash flow followed a dangerously declining trend and reached the lowest level during the investigation period, a level which could only be considered as materially injurious. The Commission stated that the sampled producers were no longer in a position, during the investigation period, to decrease their price levels further without incurring losses. In the case of relatively small and medium sized companies, the Commission found that losses cannot be sustained for a significant period without being forced to close down. Overall, the Commission concluded that, although prior to 2004 the situation of the Community industry may only have been qualified as injurious, the Community industry since 2004 clearly sustained material injury.[904]

1. reliance on unverified data and cross-checking of data with general information

7.435 China asserts that the European Union relied on unverified data allegedly collected from individual producers at the complaint stage.[905] In addition, China contends that the "cross-check" of

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at the macroeconomic level for production, sales volume, market share, employment, productivity, growth, magnitude of dumping margins and recovery from the effects of past dumping or subsidisation, and assessed at the level of the entire Community industry, on the basis of information collected from individual producers at the complaint stage, cross-checked where possible with the overall information provided by the relevant associations in the Community. Injury indicators were established at the microeconomic level for stocks, sales prices, cash flow, profitability, return on investments, ability to raise capital, investments, employment and wages, and assessed at the level of the sampled producers. Provisional Regulation, Exhibit CHN-4, recitals 169-175. After considering the information and arguments of interested parties, the Commission concluded that analysis of the macroeconomic indicators revealed that the injury mainly materialised in terms of decreased sales volume and market share. The Commission noted that since footwear is manufactured on order, this also had a direct negative impact on the production level and employment in the Community. During the period considered, the Community industry's sales volume on the Community market decreased by more than 30 per cent, market share declined by nine percentage points, production dropped by 34 per cent and employment was reduced by 31 per cent, i.e. a loss of 26,000 jobs. In addition, the Commission found that the cost structure of the footwear industry was such that individual companies were either profitable or had to go out of business. Indeed, with direct expenses, mainly labour and raw materials, representing up to 80 per cent of production costs, the Commission found that footwear was made on order only after a direct costing had shown a sufficient level of profit for each order. The analysis of the microeconomic elements revealed that the individual companies in the sample had reached the lowest possible level of profit during the investigation period, at around break-even, and cash flow followed a dangerously declining trend. The sampled companies were no longer in a position to further decrease their price levels without incurring losses during the investigation period, which, in the case of small and medium-sized enterprises, could not be sustained for more than a few months without their being forced to close down. The Commission noted, as especially relevant in this context, the information provided by the national federations concerning the more than 1,000 company closures between 2001 and the investigation period. In light of the foregoing, the Commission concluded that the Community industry had suffered material injury. *Id.*, recitals 197-201.

[904] Definitive Regulation, Exhibit CHN-3, recitals 214-215.

[905] China, first written submission, paras. 1078 and 1082.

such data against the overall information provided by national associations did not eliminate the error, as it was based on information provided by national associations which included producers that were not part of the then-EC industry.[906] China asserts that the Commission had at its disposal the information reported by sampled producers on production, production capacity, capacity utilization, number of employees, salaries and wages and sales in the European Union, which had been verified, and from which the Commission could have extrapolated. In addition, China objects to the consideration of capacity and capacity utilization on the basis of information regarding production and allegedly unreliable figures for employment.[907] China disputes the European Union's assertion that the reference to the entire footwear sector was background, and data concerning the entire sector was not used. China acknowledges that "the Definitive Regulation does not seem to mention the information concerning the entire footwear industry", but goes on to argue that "it is nevertheless clear that the essence of this information was taken up in the conclusion on injury".[908] For example, China contends that information provided by national federations, who were not complainants, concerning the number of company closures was considered "especially relevant" by the Commission in its finding that losses by the sampled producers could not be sustained for more than a few months their being forced to close down.[909]

7.436 The European Union explains that the domestic industry in the original investigation was defined as the complaining producers, and asserts that information on macroeconomic indicators with respect to the then-EC domestic industry was obtained from the complaint and the standing forms sent to complainants, and not from associations which included companies that were not part of the domestic industry. The European Union acknowledges that the Provisional Regulation included a brief discussion of the entire footwear sector, but contends that this was background information, and was moreover not taken up in the Definitive Regulation, which focused on analysis of the macro- and microeconomic indicators pertaining to the then-EC industry and to the sample of that industry, respectively. The European Union contends that the Commission based its analysis on information from multiple sources, subject to multiple cross-checking. The European Union rejects China's suggestion that the Commission could have, instead, extrapolated information from the sample to the entire domestic industry, as this method also has disadvantages with respect to lack of verification, and would cover less of the entire production of the domestic industry directly.[910]

7.437 The Definitive Regulation clearly states that information on macroeconomic factors was based on data for the whole Community industry.[911] China acknowledges that information in this regard was obtained from individual producers at the complaint stage.[912] We understand China's argument to be that, as this information was not verified, it could not be relied upon, and that cross-checking this data against information from national producer associations which included companies not part of the then-EC domestic industry did not rectify this problem. We recall our view that there is nothing in Articles 3.1 or 3.4 of the AD Agreement that prescribes how the investigating authority is to obtain information for the purposes of its injury determination. There is certainly no limitation, express or implied, on the sources from which information to be used in making that determination may be obtained. Moreover, we recall our view that nothing in Article 3.4, or any other provision of the AD Agreement, precludes consideration of and reliance on less than perfect or unverified data, so

[906] China, first written submission, para. 1084.
[907] China, first written submission, paras. 1082-1083. With respect to the unreliability of employment figures, China refers to its arguments in claim III.8. See paragraph 7.439 below.
[908] China, second written submission, para. 1353, referring to Provisional Regulation, Exhibit CHN-4, recital 199.
[909] China, second written submission, para. 1356.
[910] European Union, first written submission, paras. 646-648. The European Union expresses concern that China criticizes its method "without offering a credible and feasible alternative." European Union, second written submission, para. 224.
[911] Definitive Regulation, Exhibit CHN-3, recital 186.
[912] China, first written submission, paras. 1078 and 1082.

long as the investigating authority is satisfied as to the accuracy of the information. Finally, we recall our view that the Commission's methodology, taking into consideration different sources of information, verifying them when possible, and cross-checking them, was reasonable in this respect. We therefore reject China's argument that the European Union acted inconsistently with Articles 3.4 and 3.1 of the AD Agreement with respect to the sources of information relied upon and the data used in its evaluation of injury factors in the original investigation.

2. consideration of specific injury indicators

7.438 China asserts that the European Union failed to objectively examine all relevant economic factors on the basis of positive evidence in the original investigation.

a) production capacity and capacity utilization

7.439 China argues that the European Union failed to use the available verified data on production capacity and capacity utilization and instead focused on an examination of the level of employment.[913] China argues that employment figures are not "positive evidence" of production capacity, since capacity will also depend on other factors of production.[914] China notes that the European Union did not calculate production capacity on the basis of the employment figures at all, assuming that there was a direct correlation between employment and production capacity.[915]

7.440 The European Union considers that China's interpretation of the notion of production capacity is too rigid, when used as an injury factor, to adequately deal with the wide variety of forms that industry may take in modern economies.[916] The European Union explains that it did not use data from the sampled EU producers with respect to plant capacity and capacity utilization because it considered production capacity a macroeconomic indicator, with respect to which an industry-wide assessment was both possible and more appropriate.[917] The European Union further explains that the Commission focused on employment data, rather than physical plant capacity, because in the circumstances of the footwear industry, limitations on capacity are dependent on employment levels, and not physical plant capacity.

7.441 The Provisional Regulation explains the Commission's focus on the employment data with respect to its evaluation of capacity and capacity utilization as follows:

> "Although a factory is theoretically designed to achieve a certain production level, this level will strongly depend on the number of workers hired by this factory. Indeed, as explained above, most of the footwear manufacturing process is labour intensive. In those circumstances, for a stable number of companies, the best way to measure capacity is to examine the level of employment of those companies. It is therefore referred to the table below showing the Community industry's employment level. Alternatively, the development of the number of companies active in the sector also adequately reflects the overall production capacity. This development was examined above and it is recalled that during the period considered more than 1000 companies had to close down."[918]

[913] China, first written submission, paras. 1167 and 1184.
[914] China, first written submission, paras. 1179-1180.
[915] China, first written submission, para. 1184.
[916] European Union, first written submission, para. 706. The European Union cites, as an example, an anti-dumping investigation in which the traditional notion of "production capacity" was adjusted to be applied to an industry that was "knowledge or know-how intensive rather than machine-intensive".
[917] European Union, first written submission, para. 713.
[918] Provisional Regulation, Exhibit CHN-4, recital 177.

The Definitive Regulation repeats this view:

> "Although a factory is theoretically designed to achieve a certain production level, this level will strongly depend on the number of workers hired by this factory. Indeed, as explained above, most of the footwear manufacturing process is labour intensive. Under those circumstances, for a stable number of companies, the best way to measure capacity is to examine the level of employment of those companies. Reference is therefore made to the table concerning the development of employment below.
>
> As employment (and hence capacity) decreased broadly in line with production, capacity utilisation remained by and large unchanged throughout the period."[919]

In our view, the European Union's examination of "production capacity" and "capacity utilization" based on the level of employment was reasonable in light of the circumstances of the footwear industry. We see no basis to require the Commission to, in addition, analyse data on these factors which it deemed less relevant and probative, that is, the information from the sampled EU producers, particularly in view of its consideration of these indicators on a macroeconomic level. In addition, we find that the European Union clearly evaluated the capacity and capacity utilization of the then-EC industry, and thus we reject China's assertion that the European Union failed to objectively examine these factors as a matter of fact. China makes no other arguments as to the sufficiency or consistency of the Commission's examination in this regard, and we therefore reject this aspect of China's claim.

b) sales values, market shares based on turnover, and factors affecting domestic prices

7.442 China asserts that the European Union did not adequately consider sales values, market shares based on turnover, and factors affecting domestic prices.[920] China contends that the notions of "sales values" and "market share based on turnover" are implied within the terms "sales" and "market share", since nothing in Article 3.4 of the AD Agreement limits such terms to volumes, and therefore asserts that consideration of these factors was required.[921] The European Union contends that Article 3.4 of the AD Agreement refers to "decline in sales", which seems to imply a volume rather than value criterion, and sales volumes were evaluated, consistent with the Commission's normal practice.[922] The European Union contends that China fails to explain why market share analysis based on turnover should have been examined.[923] As for the failure to include an evaluation of the factors affecting domestic prices, the European Union argues that a substantial analysis of the factors causing injury was made elsewhere in the Regulations, referring in this regard to recital 200 of the Definitive Regulation, and the accompanying table, and recital 189 of the Provisional Regulation, and the accompanying table.[924] Moreover, the European asserts that China appears to interpret the term "affecting" as though an analysis of causation were required with respect to factors affecting domestic

[919] Definitive Regulation, Exhibit CHN-3, recitals 188-189.
[920] China, first written submission, para. 1185.
[921] China, answer to Panel question 92, para. 544.
[922] European Union, first written submission, para. 716. The European Union also asserts that nothing indicates that examination of sales values would have significantly changed the evaluation made by the Commission, and that value of sales can be considered by taking into account the information that is provided on unit prices.
[923] European Union, first written submission, para. 717; opening oral statement at the second meeting with the Panel, para. 407.
[924] European Union, first written submission, para. 718.

prices, which the European Union asserts is not the case even under Article 3.5, and in any event, causation is a topic not addressed Article 3.4.[925]

7.443 With respect to these injury factors, the Definitive Regulation states:

> "Because production takes place on order, the sales volume of the Community industry followed a decreasing trend similar to the production. The number of pairs sold on the Community market dropped by more than 60 million between 2001 and the IP, i.e. by 33 %.
>
> In terms of market shares, this corresponds to a loss of almost 9 percentage points. The Community industry market shares dropped from 26,5 % in 2001 to 17,7 % during the IP. …
>
> The average unit sales price continuously declined during the period considered. Overall, the decrease was of 7,5 %. The Community industry price depression may seem limited, especially as compared to the decrease of 30 % dumped import prices over the period considered. It should however be seen in the context that footwear is produced on order, and therefore new orders are normally accepted only if the corresponding price level allows for, at least, a break even. In this respect, reference is made to the table below showing that, during the IP, the Community industry could not further lower its prices without incurring losses."[926]

The Definitive Regulation also refers to the decrease in import prices of almost 30%, and calculates the percentage by which import prices were lower than the prices of the then-EC domestic industry, 13.5 per cent for Chinese imports, and 15.9 per cent for Viet Nam.[927]

7.444 We recall that Article 3.4 does not refer to either sales values or market shares based on turnover. Indeed, China does not argue otherwise, but asserts that "a well-reasoned and economically sound analysis would include more than just sales volumes" and that, "in the absence of data on turnover, a pure volume-based analysis is not sufficiently objective."[928] While we do not disagree with China that consideration of these elements may well result in a well-reasoned and economically sound analysis, this does not demonstrate that their consideration is required. Merely that consideration of certain factors might, in general, make a determination better does not demonstrate that such consideration is required, despite the factors in question not being mentioned in Article 3.4. China has made no specific arguments suggesting that the failure to undertake such an analysis in the original investigation undermined the Commission's reasoning and conclusions with respect to the factors it did consider, or the injury determination as a whole.

7.445 China also acknowledges that the Commission analysed trends in domestic sales prices, but asserts that there is no evaluation of the factors affecting those prices. "Factors affecting domestic prices" is identified in Article 3.4, and therefore must be evaluated by the investigating authority in all cases. There is, however, nothing in Article 3.4 that provides any guidance as to the scope of this factor, or how an investigating authority is to evaluate it, or on the basis of what information such evaluation should proceed. Nor has China made any arguments in this regard, simply asserting that the Commission did not address this factor. We agree with the European Union that consideration of "factors affecting domestic prices" does not require an investigating authority to analyse the causes of changes in those prices *per se*. We note, moreover, that the Commission did address at least one

[925] European Union, opening oral statement at the second meeting with the Panel, para. 407.
[926] Definitive Regulation, Exhibit CHN-3, recitals 190-191 and 200.
[927] Definitive Regulation, Exhibit CHN-3, recitals 170 and 176-182.
[928] China, first written submission, para. 1185.

factor affecting domestic prices, when it concluded that dumped imports undercut the prices of the domestic like product, and that the domestic industry's sales prices were depressed. China makes no other arguments as to the sufficiency or consistency of the Commission's examination in this regard, and we therefore reject this aspect of China's claim.

c) large variations in profitability and return on investments

7.446 China contends that there were large variations in profitability and return on investments which the European Union did not adequately examine.[929] The European Union explains that the level of profits was never high, and was deteriorating, so that small changes would produce large figures when presented in year-to-year terms, and that, as the industry is labour-intensive, the figures for return on investment were prone to volatility and not treated as of major significance.[930]

7.447 The Definitive Regulation, with respect to profitability and return on investment, sets out the following table, and evaluation:

> "*Cash flow, profitability and return on investments*
>
> | | 2001 | 2002 | 2003 | 2004 | IP |
> |---|---|---|---|---|---|
> | Cash-flow (EUR 000) | 13 943 | 10 756 | 8 575 | 10 038 | 4 722 |
> | Index: = 2001 100 | 100 | 77 | 61 | 72 | 34 |
> | % Profit on net turnover | 1,6 % | 1,8 % | 0,2 % | 1,8 % | 0,5 % |
> | Return on investments | 6,1 % | 7,3 % | 1,0 % | 8,2 % | 2,3 % |
>
> *Source*: verified questionnaire replies.
>
> The above return indicators confirm the picture described in recital 190 of the provisional Regulation and show a clear weakening of the financial situation of the companies during the period considered. It is recalled that the overall deterioration was especially marked during the IP and indicates significant adverse developments during the first quarter 2005, i.e. the last quarter of the IP. In fact, the already low level of profitability at the beginning of the period considered further decreased dramatically.
>
> In the absence of any new substantiated information or argument in this particular respect, recitals 191 to 193 of the provisional Regulation are hereby confirmed.
>
> The overall level of profit remained at a low level during the overall period considered and emphasises the financial vulnerability of those SMEs. As detailed below, the level of profit achieved during the period considered, and especially during the investigation period is far below the normal level of profit that the industry could achieve under normal circumstances."[931]

7.448 We note that while Article 3.4 requires an investigating authority to evaluate "profits", there is no explicit requirement that it evaluate variations in profitability, or whether such variations are large or small. We consider it clear that the Commission did address profits. China does not dispute this, or the facts underlying the Commission's evaluation of profits, but asserts that the Commission did not address one aspect of the profit information, the asserted large variations in profitability. However, we note, as above, that there is nothing in Article 3.4 that provides any guidance as to how an investigating authority is to evaluate profits, or on the basis of what information such evaluation

[929] China, first written submission, para. 1185; second written submission, paras. 1420-1421.
[930] European Union, first written submission, paras. 721-722.
[931] Definitive Regulation, Exhibit CHN-3, recitals 201-203. See also table based on the verified questionnaire replies at those recitals.

should proceed. Nor has China made any arguments in this regard, for instance, why, in its view, such large variations were significant in the original investigation. Nor has China contended that the significance or need to consider such variations was argued to the Commission so as to bring to its attention a relevant factor not listed in Article 3.4. China makes no other arguments as to the sufficiency or consistency of the Commission's examination in this regard, and we therefore reject this aspect of China's claim.

d) productivity

7.449 China claims that the European Union failed to explain why it concluded that there is injury despite the positive and stable productivity.[932] The European Union states that production levels are directly related to employment, but that the productivity of those who remained employed was unaffected, and therefore productivity remained relatively stable, despite the deterioration of the condition of the industry and of employment levels.[933]

7.450 With respect to productivity, the Definitive Regulation states:

> "Productivity was established by dividing the production volume with the Community industry's workforce, as reported in the above tables. On this basis, the Community industry's productivity remained relatively stable during the period considered."[934]

7.451 Article 3.4 requires an investigating authority to evaluate "productivity", and it is clear, and China does not dispute, that the Commission did address this factor. However, China argues that the Commission failed to explain why, in the face of "positive productivity", the Commission nonetheless found that the domestic then-EC industry was materially injured. China argues that,

> "[i]f productivity remains stable, it means that the industry was able to reduce employment if necessary, and therefore this factor does not show injury. An appropriate explanation as to why in view of this positive factor, the European Union nevertheless concluded that the industry was suffering injury, has not been provided."[935]

7.452 The basis of the Commission's conclusion regarding injury is set out in recitals 214 and 215 of the Definitive Regulation, as follows:

> "More specifically, it is confirmed that at the level of the macro-economic indicators, i.e. at the level of the overall Community industry, the injury mainly materialised in terms of decrease of sales volume and market shares. Since footwear is manufactured on order, this also had a direct negative impact on the production level and employment in the Community.
>
> Furthermore, it is also confirmed that at the level of the micro-economic elements the situation is largely injurious. For instance, the sampled companies have reached the lowest possible level of profit during 2003, which, however can be partially explained by their relatively pronounced prior investment practice (effect of depreciation on profitability). However, their level of profit decreased subsequently even despite a significant decrease in investment and, in fact, during the IP was at the lowest level

[932] China, first written submission, para. 1185; second written submission, para. 1422.
[933] European Union, first written submission, paras. 723-724.
[934] Definitive Regulation, Exhibit CHN-3, recital 193.
[935] China, second written submission, para. 1422.

> over the period considered with the exception of 2003, i.e. far from any acceptable level and in the absence of other explanatory factors, like heavy prior investment, clearly materially injurious. Similarly, the cash flow followed a dangerously declining trend and reached the lowest level during the IP, at a level, which can only be considered as materially injurious. The sampled companies, during the IP, were no longer in a position to decrease their price levels further without incurring losses. In the case of relatively small and medium sized companies, losses cannot be sustained for a significant period without being forced to close down. Overall, although prior to 2004 the situation of the Community industry may only be qualified as injurious, the Community industry since 2004 clearly sustained material injury."

The Provisional Regulation had reached similar conclusions:

> "The analysis of the macro-economic indicators, i.e. at the level of the overall Community industry, revealed that the injury mainly materialised in terms of decrease of sales volume and market share. Since footwear is manufactured on order, this also had a direct negative impact on the production level and employment in the Community. During the period considered, the Community industry's sales volume on the Community market decreased by more than 30 %, market share declined by nine percentage points, production dropped by 34 % and employment was reduced by 31 %, i.e. a loss of 26 000 jobs.
>
> The cost structure of the footwear industry is such that individual companies are either profitable or have to go out of business. Indeed, with direct expenses, mainly labour and raw material, representing up to 80 % of the production cost, footwear is made on order only after a direct costing has shown a sufficient level of profit for each order.
>
> The analysis of the micro-economic elements revealed that the individual companies in the sample have reached the lowest possible level of profit during the investigation period. Their level of profit during the IP was around break-even, and the cash flow followed a dangerous declining trend. The analysis of the situation of the sampled companies revealed that, during the IP, they were no longer in the position to further decrease their price levels without incurring losses which, in the case of SMEs, cannot be sustained for more than a few months without their being forced to close down.
>
> In this context the information provided by the national federations concerning the number of company closures is especially relevant. Between 2001 and the investigation period, the federations reported more than 1 000 closures of companies.
>
> In the light of the foregoing it is concluded that the Community industry has suffered material injury within the meaning of Article 3(5) of the basic Regulation."[936]

7.453 It is true that neither the Provisional nor the Definitive Regulation specifically mentions the issue of productivity in these conclusions. However, it is apparent to us that this is because the level of productivity was not considered a significant factor in the Commission's analysis. We recall that Article 3.4 specifies that no one factor can necessarily give decisive guidance with respect to the examination of the impact of dumped imports on the domestic industry. Moreover, as discussed above,[937] it is not necessary, in order to make a finding of injury, that all factors considered support

[936] Provisional Regulation, Exhibit CHN-4, recitals 187-201.
[937] See paragraph 7.413.

that finding directly by showing negative developments. Given the labour intensive nature of the then-EC footwear industry, it is clear that the Commission did not consider the fact that productivity was not declining was a significant factor detracting from a conclusion of injury. We certainly do not consider that a more detailed explanation of why a finding of injury was warranted despite stable productivity was necessary, although it might have been preferable had the Commission specifically addressed this in the context of its conclusion on injury. However, we cannot conclude that its failure to do so in this case demonstrates that its determination was not based on an objective evaluation of positive evidence, or was not a determination that a reasonable investigating authority could make, in light of the facts, and based on the reasons given. The Commission's conclusion notes that labour intensive nature of footwear production, and the declines in employment in the industry. This is sufficient for us to follow the Commission's reasoning and understand its conclusion that the industry was materially injured despite stable productivity, which is not, on its face, a distinctly negative development. Nor has China made specific arguments suggesting otherwise. China makes no other arguments as to the sufficiency or consistency of the Commission's examination in this regard. We therefore reject this aspect of China's claim.

e) magnitude of the margin of dumping

7.454 China also alleges that the European Union did not present any "persuasive explanation" with respect to the factor "magnitude of the margin of dumping".[938] The European Union explained that the impact of the magnitude of the margin of dumping was found not to be negligible.

7.455 China asserts that there was "no analysis at all" of this factor, although it acknowledges that the Provisional Regulation states that "given the volume and the prices of the imports from the countries concerned, this impact cannot be considered to be negligible". According to China, this is merely an abstract reference to certain factors, and is no more than a checklist approach, and that absent any indication of which volumes and prices were considered, must lead to the conclusion that no assessment took place.[939]

7.456 We do not agree. The Definitive Regulation states in this regard that it confirms recital 184 of the Provisional Regulation,[940] which in turn states:

> "With regard to the impact on the Community industry of the magnitude of the actual margin of dumping, given the volume and the prices of the imports from the countries concerned, this impact cannot be considered to be negligible."[941]

While certainly succinct, this statement clearly sets out the Commission's evaluation of this factor. Thus, there is no factual basis for China's assertion that the Commission failed to consider the magnitude for the margin of dumping. With respect to China's assertion that this evaluation was insufficient, we note, as above, that there is nothing in Article 3.4 that provides any guidance as to how an investigating authority is to evaluate the magnitude of the margin of dumping, or what information should be taken into account in that evaluation – beyond, of course, the actual margin of dumping in question. Nor has China made any substantive arguments in this regard, for instance, why, in its view, the magnitude of the margin of dumping should have been considered significant or insignificant. China makes no other arguments as to the sufficiency or consistency of the Commission's examination in this regard, and we therefore reject this aspect of China's claim.

[938] China, first written submission, para. 1186; second written submission, para. 1423.
[939] China, second written submission, para. 1423.
[940] Definitive Regulation, Exhibit CHN-3, recital 194.
[941] Provisional Regulation, Exhibit CHN-4, recital 184.

f) several sampled producers did not show any signs of injury

7.457 China asserts that several sampled producers did not show any signs of injury, which necessitated a more in-depth analysis.[942] China argues that "the analysis of the impact of the imports on domestic producers in case of sampling, should take into account that a large part of the non-sampled producers is not suffering injury, at least with respect to the injury factors with regard to which the EU has decided to establish a sample in the first place."[943] The European Union recalls that injury findings involve an overall appreciation of different factors, and should not be determined by any single factor. Moreover, the European Union asserts that there is no requirement that each and every individual firm must be found to be injured.[944]

7.458 We agree with the European Union. As discussed above, the determination of injury must be made with respect to the domestic industry as a whole. Article 3.4 of the AD Agreement does not require that each and every injury factor, considered individually, must be indicative of injury. We see no basis in Article 3.1 or 3.4 for the view that the situation of individual companies in the domestic industry must be examined to determine whether they, individually, show signs of injury. China asserts that the fact that a large portion of the sampled companies do not show any signs of injury constitutes "positive evidence" that the investigating authority must examine in considering the impact of imports on domestic producers within the meaning of Article 3.1.[945] However, this presupposes that the situation of individual companies must be evaluated in the first place, a proposition for which China has stated no legal basis. We note in this regard that this is not a case involving a regional industry as provided for in Article 4.1(ii) of the AD Agreement, where it is specifically required that, in order to conclude that injury exists, it must be found that "the dumped imports are causing injury to the producers of all or almost all of the production within such market." In our view, were any similar requirement applicable as a general rule, it would not have been necessary to include this specific provision in Article 4.1(ii). We thus conclude that the Commission was not required to consider the situation of individual companies to determine if, individually, they showed signs of injury. As a consequence, we consider that, *a fortiori*, the Commission did not act inconsistently with either Article 3.1 or Article 3.4 by not taking into account whether individual producers were suffering injury. We therefore reject this aspect of China's claim.

g) lifting of the quota

7.459 China claims that the European Union failed to adequately examine the extent to which the sudden increase of imports from China was caused by the lifting of the quota on imports of footwear as of January 2005, in order to ensure that any injury suffered as a result was not attributed to the dumped imports.[946] The European Union contends that Article 3.4 of the AD Agreement requires an examination of the condition of the industry to determine the impact of dumped imports on such industry, and questions of the cause(s) of that injury are to be examined in the framework of Article 3.5 of the AD Agreement.[947]

7.460 We agree with the European Union. We note that China made a claim with respect to the alleged failure of the European Union to separate and distinguish the effects of the lifting of the quota from the injury caused by dumped imports. We address that claim elsewhere in this report, concluding that the Commission did not err in finding that the lifting of the quota on Chinese footwear

[942] China, answer to Panel question 91, para. 539; first written submission, para. 1185.
[943] China, answer to Panel question 91, para. 542.
[944] European Union, first written submission, para. 720.
[945] China, answer to Panel question 91.
[946] China, first written submission, paras. 1188-1190.
[947] European Union, first written submission, para. 728.

was not an "other factor" causing injury to the then-EC domestic industry at the same time as dumped imports.[948]

7.461 China does assert that "related" to the violation with respect to causation, the European Union failed to adequately examine the volume of imports under Articles 3.1 and 3.2, because while it noted the acceleration of imports due to developments with respect to Chinese imports, it failed to conduct "an in-depth examination of the volume of imports in more detail and determine which volume of imports could be considered in line with expectations and which volume was due to the lifting of the quota."[949] However, China has made no argument suggesting that the lifting of the quota was a relevant economic factor to be considered in the context of Article 3.4 in the original investigation.

7.462 Article 3.1 requires an objective examination of the volume of dumped imports, while Article 3.2 specifies that,

> "[w]ith regard to the volume of dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member."

Neither provision contains any guidance as to how an investigating authority is to examine the volume of dumped imports, or consider whether they have increased. We certainly see nothing in those provisions that would require consideration of whether the lifting of a quota caused dumped imports to increase. In our view, nothing in Articles 3.1 and 3.2 suggests that an "in-depth" analysis, such as proposed by China, of the reasons underlying changes in the volume of dumped imports is required. Indeed, we fail to see the relevance of the reasons for a significant increase in dumped imports to the investigating authority's examination and consideration under Articles 3.1, 3.2 or 3.4 at all.[950] We therefore reject this aspect of China's claim.

7.463 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union violated Article 3.4 of the AD Agreement in its evaluation of all relevant economic factors and indices having a bearing on the state of the industry in the context of the original investigation. Having found no violation of Article 3.4, we consider that there is also no violation of Articles 3.1 and 3.2 of the AD Agreement, and we therefore reject China's claims under those provisions.

6. Claims II.5 and III.9 - Alleged violation of Articles 3.1, 3.5, and 17.6(i) of the AD Agreement – Causation

7.464 In this section of our report, we address China's claims concerning the European Union's causation analysis and conclusions in both the original investigation and the expiry review.

(a) Arguments of the parties

(i) China

7.465 With respect to the Review Regulation, China claims that the European Union violated Articles 3.1, 3.5, and 17.6(i) of the AD Agreement, since it failed to: (i) ensure that injury caused by other known factors was not attributed to the imports of the product concerned from China; (ii) analyse several other factors identified by interested parties as causing injury; and (iii) make an objective examination based on positive evidence demonstrating that imports from China are causing

[948] See paragraphs 7.524-7.527 below.
[949] China, first written submission, para. 1189.
[950] The reasons why dumped imports increased may well be relevant in the consideration of causation under Article 3.5, but that is not the subject of China's claim here.

injury to the European Union's industry, through the effects of dumping.[951] China asserts that if an investigating authority in an expiry review decides to conduct an injury determination, that determination must conform to the provisions of Article 3 of the AD Agreement, including Articles 3.1 and 3.5.[952] China argues that the finding of a causal link between continued allegedly dumped Chinese imports and continued injury to the EU industry was fundamental for the maintenance of the measures and "since the European Union conducted a causal link analysis and evaluated the other factors that may or may not have injured the domestic industry, it was under an obligation to conduct this analysis in compliance with Article 3.5".[953]

7.466 China asserts that Article 3.5 of the AD Agreement expressly requires that a causal link be established between dumped imports and injury to the domestic industry, while at the same time requiring that injury to the domestic industry caused by other known factors not be attributed to dumped imports.[954] China contends that in order to comply with the obligations in Article 3.5, an investigating authority must (i) separate and distinguish the injurious effects of the other known factors from the injurious effects of the dumped imports; (ii) assess the nature and extent of the injury caused by these other factors; and (iii) give a satisfactory explanation of those effects and consequently ensure that the injury caused by other known factors is not attributed to the dumped imports.[955] China asserts that the European Union did not comply with these requirements.

7.467 Specifically, China argues that the European Union failed to separate and distinguish the injurious effects of: (i) structural inefficiency of the EU producers; (ii) imports from third countries, notably India and Indonesia; and (iii) contraction in demand and changes in consumption patterns. China also argues that the European Union did not even evaluate the impact of certain factors identified by interested parties as causes of injury to the EU industry, specifically: (a) high labour costs in the European Union; (b) increasing outsourcing by EU producers; and (c) fluctuations in the Euro-U.S. dollar exchange rate.[956] China argues that irrespective of the magnitude of injury caused by another known factor, such injury must not be attributed to the allegedly dumped imports.[957]

7.468 China contends the European Union's finding that none of the other known factors in isolation or seen together break the causal link between dumped imports and injury is inconsistent with Article 3.5 of the AD Agreement. In addition, China argues that the European Union violated Articles 3.1 and 17.6(i) of the AD Agreement by failing to make an objective examination of positive evidence concerning (i) the injurious effects of other known factors available to the European Union, and (ii) the injurious effects of allegedly dumped Chinese imports, as China contends that the European Union's findings of dumping and injury are respectively inconsistent with Articles 2 and 3 of the AD Agreement.[958]

7.469 With respect to the Definitive Regulation, China claims that the European Union did not ensure that injury caused by other known factors was not attributed to Chinese imports, in violation of Article 3.1 and 3.5 of the AD Agreement.[959] In addition to recalling its legal arguments in the context of the Review Regulation, China asserts that the European Union's approach to deem "certain factors to be 'not attributable' even when [the European Union] clearly concedes that a given factor has

[951] China, first written submission, paras. 575-621; second written submission, paras. 768-852.
[952] China, first written submission, para. 568. China refers in particular to Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*.
[953] China, first written submission, para. 573. See also second written submission, paras. 359-362.
[954] China, first written submission, paras. 567 and 574.
[955] China, second written submission, para. 763.
[956] China, first written submission, paras. 577, 586, 593, 603, 605-607 and 609; second written submission, paras. 768, 809, 825, 827-839 and 841.
[957] China, first written submission, para. 590.
[958] China, first written submission, paras. 614-618 and 621.
[959] China, first written submission, para. 1192.

impact" is itself inconsistent with Article 3.5 of the AD Agreement, since the European Union effectively considers that the impact of such a factor was zero.[960] In China's view, "the European Union first establishes a correlation/coincidence between dumped imports and injury – which is of course only a necessary condition to be met for a demonstration of causation – but *then* clearly considers it to be a sufficient condition by which to prove causation, such that nothing could change that 'fact' once it is 'established'."[961]

7.470 In the Definitive Determination, China asserts that the European Union failed to correctly evaluate and address the injurious effects of: (i) poor export performance of EU producers; (ii) the lifting of the quota on Chinese footwear on 1 January 2005; (iii) changes in patterns of consumption and the decline in demand; and (iv) fluctuations in the Euro-U.S. dollar exchange rate. China also asserts that the European Union failed to analyse non-tariff barriers as an "other known factor" causing injury to EU producers. [962]

7.471 China argues that the non-attribution issue in this case is composed of two separate facets. One facet is whether the non-attribution requirement is to be seen as part of the causation analysis. China asserts that the European Union's practice in analysing causal link "effectively makes it impossible to determine the true 'cause' of the injury, thus making compliance with Article 3.5, first sentence logically impossible."[963] Although China recognizes that the AD Agreement does not prescribe any analytical methodology by which the injurious effects of other known factors must be analysed, China contends that the freedom to choose an analytical method cannot interfere with compliance with the requirements of Article 3.5.[964] China argues that the European Union's standard of assessing whether individual factors "break the causal link" necessarily precludes a collective assessment of other known factors causing injury, rendering the non-attribution requirement "a nullity except with respect to those factors which on their own are so strong as to sever the causal link between dumped imports and injury."[965] The other facet is that, even assuming that an investigating authority may examine "other factors in a cursory manner with no real intent to even try to determine the true cause of the injury, the European Union has failed to comply with even that low standard."[966]

(ii) European Union

7.472 With respect to the Review Regulation, the European Union argues that the Panel should conclude that a determination of causation in the context of an expiry review need not necessarily comply with Article 3 of the AD Agreement. The European Union acknowledges that the Appellate Body has established that if a determination of likelihood of dumping relies on a finding of past dumping, that finding must be made in accordance with Article 2 of the AD Agreement, but argues that the Panel should not reach a similar conclusion with respect to Article 3.5 of the AD Agreement.[967] The European Union does consider that a determination of likelihood of injury must include some assessment of causation, that is, whether likely dumped imports are likely to cause injury. The European Union suggests that the precise obligations of Article 3.5 need not apply, but the assessment could not completely ignore the likelihood of other factors having detrimental effects

[960] China, first written submission, paras. 1196, 1199 and 1201. See also answer to Panel question 55, para. 353.
[961] China, second written submission, para. 1429.
[962] China, first written submission, paras. 1202, 1216, 1228 and 1245. See also answer to Panel question 94, paras. 626-628, answer to Panel question 95, paras. 619-625.
[963] China, second written submission, para. 1435. See also answer to Panel's questions 94, paras. 613-615.
[964] China, answer to Panel question 96, para. 575.
[965] China, answer to Panel question 96, paras. 563-564. See also answer to Panel question 94, paras. 622-623; and second written submission, para. 766.
[966] China, second written submission, para. 1436.
[967] European Union, answer to Panel question 56; second written submission, para. 160.

on the domestic industry. The European Union contends that the Review Regulation makes just such an assessment. However, in the European Union's view, China has based its argument entirely on the inadequacy of the injury finding made in respect of past dumping, and did not address the other basis in the Review Regulation for the determination of likelihood of injury, and therefore whether the question of causation was properly assessed is academic.[968]

7.473 In any event, the European Union asserts that the AD Agreement does not establish a specific methodology for the determination of causation. According to the European Union, "what is important is that the authority identifies the nature and extent of the injurious effects of the other known factors", so that injury caused by other factors, and injury caused by the dumped imports, are not "'lumped together' and made 'indistinguishable'".[969] The European Union contends that the Commission in the two Regulations at issue undertook a thorough examination of the causes of injury, and went to considerable lengths to ensure that the effects of the various factors were fully distinguished.[970] Moreover, the European Union contends that in light of the standards of review set out in Article 17.6(i) of the AD Agreement and Article 11 of the DSU, the Panel should not undertake a *de novo* review of the Commission's findings, but should focus on "whether the conclusions of the authority are reasonable and reasoned and supported by the facts of the record."[971]

7.474 With respect to the substance of China's claim regarding the Review Regulation, the European Union asserts that the Commission addressed all known other factors causing injury, and that its conclusion that none of these other factors broke the causal link between dumped imports from China and Viet Nam and the injury to the EU industry was based on an objective evaluation of positive evidence.

7.475 With respect to the Definitive Regulation, the European Union contends that the Commission's causation analysis was consistent with the requirements of Article 3.1 and 3.5 of the AD Agreement. Concerning China's specific assertions with respect to the Definitive Regulation, the European Union asserts that the Commission addressed all known other factors causing injury, and that its conclusion that none of these other factors broke the causal link between dumped imports from China and Viet Nam and the injury to the EU industry was based on an objective evaluation of positive evidence.

7.476 With respect to China's argument that the European Union's methodology does not estimate the extent of the contribution of various other factors to the injury suffered by the EU industry, the European Union asserts that

> "estimations of extent are implicit in the methodology that the European Union refers to as breaking the causal link. If the European Union did not have an appreciation of the relative contribution of dumped imports (as manifested in volume and price factors), 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."[972]

The European Union maintains that its methodology does take into account the collective effect of other factors, where relevant, "by simply proceeding to consider such an effect after it has given individual consideration to each of the 'other factors'." Therefore, the European Union argues that it

[968] European Union, answer to Panel question 56.
[969] European Union, first written submission, paras. 313 and 733-734.
[970] European Union, first written submission, para. 314.
[971] European Union, first written submission, paras. 315 and 731. European Union, first written submission, para. 735.
[972] European Union, second written submission, para. 253.

considers first individually and then collectively whether other factors have broken the causal link between dumped imports and material injury: "in other words, having considered the effect of the other factors can one still say that the dumped imports are a cause of injury."[973] Moreover, the European Union argues that China's critique of the European Union's methodology is purely theoretical, and that "China has adduced no evidence to support a claim that failure to make a collective assessment in the initial investigation 'attributed improperly to dumped imports the injuries caused by other factors'."[974]

(b) Arguments of third parties

(i) Brazil

7.477 Brazil considers that, in order to comply with Article 3.5 of the AD Agreement, investigating authorities must identify, separate and distinguish the injurious effects of the dumped imports from the injurious effects of other factors. This does not mean, however, that Article 3.5 of the AD Agreement establishes an obligation on investigating authorities to quantify or otherwise estimate the injury caused by other factors. In Brazil's view, it is enough for the investigating authority to (i) investigate other factors claimed to be causing injury; (ii) separate and distinguish the injurious effects of these other factors, for instance by considering that it is not substantial, or not of a nature to break the causal link; and (iii) assess whether, in the absence of these factors, injury would still have taken place. Brazil asserts that the AD Agreement does not prescribe the methodology by which an investigating authority must avoid attributing the injury caused by factors other than dumped imports, and that investigating authorities have broad discretion to choose how to conduct such an analysis. According to Brazil, the Appellate Body has indicated only that investigating authorities must identify the effects of other factors, i.e. "undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors" and that "this requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports".[975]

(ii) Colombia

7.478 Columbia submits that, although Article 3.5 of the AD Agreement sets out different factors that might be relevant in order to determine the causal relationship between dumped imports and injury, this provision "neither requires the examination of any of the specific factors mentioned in its text, nor sets forth criteria regarding the best practices for authorities". In addition, Colombia notes that pursuant to the Appellate Body's interpretation of this provision, there are two mandatory criteria for the causal relationship analysis to be carried out by an investigating authority: "i) they should analyze all the relevant factors identified, except those regarding the imports subject of dumping; and ii) they should verify the non attribution of the injury, caused by other factors …, to the dumped imports."[976]

(iii) Japan

7.479 Japan contends that, pursuant to Article 3.5 of the AD Agreement, investigating authorities are required to "appropriately" separate and distinguish the injurious effects of other factors from the injurious effects of dumped imports. Japan acknowledges that the AD Agreement does not set out

[973] European Union, second written submission, para. 228.
[974] European Union, second written submission, paras. 232 and 234.
[975] Brazil, oral statement, paras. 10-12, quoting Appellate Body Report, *US – Hot-Rolled Steel*, paras. 228 and 226.
[976] Colombia, third party written submission, paras. 87-88 and 90. Colombia refers to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 222-223.

any particular methods or approaches for how investigating authorities should separate and distinguish such injurious effects. Nevertheless, Japan contends that "[i]n order for the Panel to examine whether the authority's explanation on the causation is reasoned and adequate, therefore, the Panel must review the adequacy of the authority's analysis of the non-attribution issue upon an examination of the particular facts of this case." Japan argues that, while in some cases it might be sufficient for the investigating authority to make a qualitative analysis of the injurious effects of dumped imports and those of other factors, in other cases it might be necessary for the investigating authority to conduct a quantitative analysis separating and distinguishing the different injurious effects in order to reach a reasoned and adequate conclusion. Japan also states that the AD Agreement neither mandates nor exempts investigating authorities from undertaking a quantitative analysis, but at a minimum an investigating authority must do more than simply list other known factors and then dismiss such factors with bare qualitative assertions.[977]

(iv) United States

7.480 The United States disagrees with China's suggestion that an investigating authority must attempt to measure the "magnitude" of injury attributable to every known factor causing injury. The United States maintains that the language of Article 3.5 of the AD Agreement and the interpretation of this provision by the Appellate Body make it clear that the AD Agreement does not prescribe any methodology by which an investigating authority must avoid attributing injuries caused by other factors to dumped imports. In addition, the United States argues that, as the AD Agreement does not require any quantitative measurement of the magnitude of either the overall injury to the domestic industry or the injury caused by dumped imports, beyond the finding that injury is "material", the AD Agreement "necessarily does not require measures of the magnitude of injury caused by factors other than dumped imports." Thus, the United States concludes that there is no legal basis for China's suggestion that investigating authority must provide a "good-faith estimate" of the magnitude of the injury caused by factors other than dumped imports.[978]

(c) Evaluation by the Panel

7.481 China's claims with respect to the consideration of causation in both the expiry review and the original investigation are brought under Articles 3.1, 3.5, and 17.6(i) of the AD Agreement.[979]

7.482 Article 3.5 of the AD Agreement, which is most directly relevant to our analysis of China's claims, provides:

> "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices,

[977] Japan, oral statement, paras. 11-14.

[978] United States, third party written submission, paras. 37-40. The United States refers to Appellate Body Reports, *US – Hot-Rolled Steel*, para. 224, and *EC – Tube or Pipe Fittings*, para. 189.

[979] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

> contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

It is clear that, pursuant to Article 3.5, a causal link between dumped imports and injury to the domestic industry must be established for the imposition and maintenance of an anti-dumping duty under the AD Agreement.[980] In addition, through the use of the word "injuries" in the plural, this provision makes it clear that many factors may be injuring the domestic industry at the same time, and investigating authorities are not permitted to attribute to dumped imports injuries caused by other factors.[981] Previous panel and Appellate Body reports make it clear that while an investigating authority is required to consider the effects of other factors known to the investigating authority which may be causing injury to the domestic industry, there is no required method of analysis in undertaking that examination.[982] The issue for us is whether the consideration of the injurious effects of "known factors other than dumped imports" by the Commission, and the explanations given in light of the facts, in the Review and Definitive Regulations, fall short of the requirements of Article 3.5 of the AD Agreement.

7.483 In this context, we recall that Article 3.5 contains no guidance on the assessment of other factors, and the reports of the Appellate Body concerning the need to "separate and distinguish" the effects of dumped imports from those of other factors causing injury similarly do not provide any direction to investigating authorities as to how this is to be done. We consider that, in reviewing the Commission's determinations in this respect, it is appropriate for us to undertake a careful and in depth scrutiny of those determinations, in order to evaluate whether the explanations given by the Commission as to why the effects of certain factors did not break the causal link between dumped imports and material injury, and why certain other factors were not a source of injury, are such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given. However, we recall that we are not to substitute our judgment for that of the Commission.[983]

7.484 In our view, it is also clear that there is no requirement under Article 3.5 that investigating authorities seek out and examine in each case, on their own initiative, the effects of all possible factors other than imports that may be causing injury to the domestic industry.[984] The Appellate Body has clarified that

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[980] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 117.

[981] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

[982] Appellate Body Report, *US – Hot-Rolled Steel*, para. 178; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189; Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU ("US – Softwood Lumber IV (Article 21.5 – Canada)")*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357, para. 154.

[983] Moreover, the Appellate Body has made it clear that a

> "prima facie case must be based on "evidence and legal argument" put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."

Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("*US – Gambling*"), WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475), para. 140 (footnotes omitted).

[984] Panel Report, *Thailand – H-Beams*, para. 7.273.

> "[i]n order for this obligation to be triggered, Article 3.5 requires that the factor at issue:
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> (a) be "known" to the investigating authority;
>
> (b) be a factor "other than dumped imports"; and
>
> (c) be injuring the domestic industry at the same time as the dumped imports."[985]

Although the AD Agreement does not indicate how other factors might become "known" to the investigating authority, or how they should be raised by interested parties in order to become "known",[986] we consider that "known" other factors would, at a minimum, include factors allegedly causing injury that are clearly raised by interested parties during the course of the anti-dumping investigation.[987] However, in our view, even though a factor is alleged by an interested party to be a "known factor other than the dumped imports … injuring the domestic industry," an investigating authority may nonetheless conclude that the allegation is unfounded, and conclude that the factor in question does not in fact cause injury to the domestic industry at the same time as dumped imports. In such a case, it is in our view apparent that the investigating authority need not go on to consider it further.[988] Moreover, previous panel and Appellate Body reports make it clear that, while an investigating authority must consider the effects of other factors known to it which may be causing injury to the domestic industry, there is no required method of analysis in undertaking that examination.[989] We also recall that it is our task to undertake a careful scrutiny of the European Union's determinations to assess whether the conclusions therein could be reached by an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given. The task of the investigating authority is to weigh the evidence and make a reasoned judgement. This, of course, implies that there may well be evidence, and arguments, that detract from the conclusions reached.

7.485 We also recall that Article 17.6(i) of the AD Agreement requires us, on review, to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If we find this to be the case, we may not overturn the authorities' determination even if we would have reached a different conclusion. In our view, this means that, unless a complaining party in dispute settlement demonstrates that the evidence and arguments before the investigating authority were such that an unbiased and objective investigating authority could not reach a particular conclusion, we are obliged to sustain the investigating authority's judgment, even if we would not have reached that conclusion ourselves. In addition, we do not consider that a determination can only be sustained on review if every argument and conflict in the evidence was resolved by the investigating authority in favour of the determination made. That is, as long as the investigating authority's explanations are reasonable and supported by the evidence cited, merely that another overall conclusion might have been reached does not demonstrate that the investigating authorities' determination is inconsistent with either Article 3.1 or 3.5 of the AD Agreement.

7.486 China asserts that nothing in the text of Article 3.5 indicates that the degree or magnitude of injury to the domestic industry caused by other factors is relevant. According to China, "[t]he unambiguous rule is that if there is another known factor … then irrespective of the magnitude of such injury, the injury on account of this factor 'must' not be attributed to the allegedly 'dumped'

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[985] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.
[986] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 176.
[987] Panel Reports, *Thailand – H-Beams*, para. 7.273; and *EC – Tube or Pipe Fittings*, para. 7.359.
[988] See Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 177-178.
[989] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 178; *EC – Tube or Fittings*, para. 189; *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 154.

imports."[990] China argues that the European Union's methodology does not estimate the extent of the contribution of various known "other factors" to the injury suffered by the EU industry. China notes that "it may never be … 'precisely known' how much impact a given factor has on injury, but the *Anti-dumping Agreement*, as interpreted by the AB, has squarely placed the burden on investigating authorities to at least make a good-faith estimate."[991] The European Union argues that

> "estimations of extent are implicit in the methodology that the European Union refers to as breaking the causal link. If the European Union did not have an appreciation of the relative contribution of dumped imports (as manifested in volume and price factors), 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."[992]

7.487 We recall that the AD Agreement does not prescribe any methodology by which investigating authorities must undertake the non-attribution analysis required by Article 3.5.[993] We do not consider that it is either possible or appropriate for us to define a general rule regarding whether the investigating authority must estimate the extent of the contribution of various known "other factors". The question whether the determination is consistent with Article 3.5 can only be addressed upon an examination of the particular facts of each case.

7.488 China also argues that the European Union's "break the causal link" analysis does not comply with the requirements of Article 3.5 of the AD Agreement. China acknowledges that the AD Agreement does not prescribe any methodology to analyse known "other factors", but submits that the European Union's methodology necessarily precludes a collective assessment of known "other factors" causing injury.[994] The European Union argues that it considers first individually and then collectively whether "other factors" have broken the causal link.[995]

7.489 Nothing in Article 3.5 requires an investigating authority to examine the collective impact of known "other factors", as long it complies with the obligation to not attribute to dumped imports the injuries caused by "other factors".[996] In any event, we do not agree that the European Union's methodology *per se* precludes a collective assessment of known "other factors." We consider that it is neither possible nor appropriate for us to define general rules regarding the methodology applied by the European Union in this case, or indeed, concerning appropriate methodologies in general. Whether an investigating authority has satisfied the requirements of Article 3.5 of the AD Agreement with respect to non-attribution can only be resolved based on the particular facts of each case, including the particular explanations given by the investigating authority for how it conducted the required examination, the facts it considered, and its reasoning. Therefore, we will examine each "other factor" China alleges the European Union failed to consider, in order to evaluate whether the European Union satisfied the requirement of Article 3.5 to ensure that injuries caused by other known factors were not attributed to the dumped imports.

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[990] China, first written submission, para. 590.
[991] China, first written submission, para. 1243.
[992] European Union, second written submission, para. 253.
[993] Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 189; *US – Hot-Rolled Steel*, para. 224; and Panel Report, *EC – Salmon (Norway)*, para. 7.656.
[994] China, answer to Panel question 96, paras. 563-564.
[995] European Union, second written submission, para. 228.
[996] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* ("*US – Steel Safeguards*"), WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117, para. 490; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 190-192; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 154.

7.490 With these principles in mind, we turn to China's specific allegations in this dispute. With respect to each of the measures in dispute, we will first describe the relevant findings of the Commission, and then examine China's allegations with respect to that measure.

(i) Review Regulation

7.491 In the Review Regulation, the Commission noted that, during the period concerned, prices of Chinese imports remained stable while prices of Vietnamese imports decreased, and that the average import prices for China (8.60 Euros) and for Viet Nam (9.51 Euros) continued to cause a major concern to the EU producers, whose average sales prices were above 30 Euros. During this period, price undercutting by Chinese imports increased from 13.5 per cent to 31.9 per cent, and price undercutting by Vietnamese imports increased from 15.9 per cent to 38.9 per cent. The Commission concluded that imports from China and Viet Nam, both in terms of volume and price, continued to adversely affect the performance of EU producers. The Commission also examined the impact of other factors in order to ensure that possible injury caused by such factors was not attributed to the dumped imports, specifically: (i) lack of competition between the EU-produced shoes and those imported from China and Viet Nam; (ii) structural inefficiencies of the EU producers and the impact of globalization; (iii) imports from third countries; (iv) changes in consumption patterns and consumer preferences; and changes in the structure of the retail sector in the European Union, and (v) export performance of the EU industry.[997] The Commission concluded that "none of the other known factors in isolation or seen together would be such as to break the causal link between the dumped imports and the injury suffered by [European Union] producers".[998]

7.492 In addition, the Commission examined the likely effect of the following factors other than dumped imports that might bring into question the likely effect of continued dumped imports on the future situation of the EU industry: (i) market downturn; (ii) changes in consumption patterns; (iii) drop in export performance; (iv) structural inefficiencies of EU producers; (v) imports from third countries; and (vi) fluctuations in exchange rates. The Commission concluded that "while it cannot be ruled out that other factors including the economic downturn will have an effect on the financial situation of the [European] Union producers the investigation has not shown that on their own they would break the link between the dumped imports and the continued injury that the [European] Union industry would suffer."[999]

7.493 The European Union raises an issue whether a causation analysis is necessary at all in the context of an expiry review. The European Union argues that, unlike the conclusion of the Appellate Body's regarding the relevance of Article 2 of the AD Agreement in expiry reviews, it is not clear whether Article 3 of the AD Agreement applies to expiry review under Article 11.3 of the AD Agreement for two reasons.[1000] First, the European Union submits that the anti-dumping measure in force during the expiry review will at the same time reduce injury to the domestic industry and encourage the exporter to increase the dumping margin to off-set the duty. Thus, the European Union argues, in an expiry review, it is more likely dumping will be detected, but less likely that injury will be detected. Second, the European Union observes that although the calculation of a dumping margin is an essentially mathematical exercise, a finding of injury is a judgement process, involving the weighing up of multiple, and possibly contradictory, factors.[1001]

7.494 Article 11.3 of the AD Agreement does not address the question of the relevance of Article 3.5 in expiry reviews. In fact, the Appellate Body has stated that:

[997] Review Regulation, Exhibit CHN-2, recitals 262-283.
[998] Review Regulation, Exhibit CHN-2, recital 285.
[999] Review Regulation, Exhibit CHN-2, recitals 299-320.
[1000] European Union, second written submission, para. 160.
[1001] European Union, second written submission, paras. 161-162.

> "On its face, Article 11.3 does not require investigating authorities to establish the existence of a 'causal link' between likely dumping and likely injury. Instead, by its terms, Article 11.3 requires investigating authorities to determine whether the *expiry of the duty* would be likely to lead to *continuation or recurrence of dumping and injury*. Thus, in order to continue the duty, there must be a nexus between the 'expiry of the duty', on the one hand, and 'continuation or recurrence of dumping and injury', on the other hand, such that the former 'would be likely to lead to' the latter. This nexus must be clearly demonstrated."[1002]

In this same dispute, the Appellate Body concluded that "this does not mean that a causal link between dumping and injury is required to be established anew in a "review" conducted under Article 11.3 of the *Anti-Dumping Agreement*. This is because the 'review' contemplated in Article 11.3 is a 'distinct' process with a 'different' purpose from the original investigation."[1003]

7.495 We have concluded above that, if an investigating authority makes a determination of injury in the context of an expiry review that is inconsistent with Article 3, and relies on that injury determination in determining likelihood of continuation or recurrence of injury, the inconsistency with Article 3 taints the likelihood determination, because by relying upon the inconsistent determination of injury the investigating authority will have failed to make a likelihood determination based on a "sufficient factual basis" allowing it to draw "reasoned and adequate conclusions" concerning the likelihood of injury.[1004] We see no reason why the same result should not obtain with respect to an investigating authority's determination of causation, including its determination with respect to other factors allegedly causing injury, in the context of an injury determination in the context of an expiry review.

7.496 In this case, it is undisputed that the European Union in fact made a determination with respect to causation, including with respect to non-attribution under Article 3.5, in the context of its injury determination in the expiry review.[1005] We recall that the Review Regulation specifically addresses the question whether factors other than dumped imports would put into question the likely effect of dumped imports on the situation of the EU industry in the future, and refers in this regard to the discussion in the context of the injury determination.[1006] We will therefore examine each of China's allegations of error with respect to Article 3.5 in the context of the Review Regulation, in order to evaluate whether China has established that any inconsistencies with the AD Agreement in the Commission 's analysis and determination of causation demonstrate that the Commission failed to make a likelihood determination based on a "sufficient factual basis" allowing it to draw "reasoned and adequate conclusions" concerning the likelihood of continuation or recurrence of injury.

a. structural inefficiency of EU producers

7.497 China argues that the European Union failed to correctly evaluate and address the injurious effect of the structural inefficiency of the EU producers.[1007] China asserts that the European Union downplayed the injurious effect of this factor, did not individually and objectively separate and distinguish the injurious effects of this factor, and offered no factual support for its conclusion that "lack of efficiency and structural problems with the industry is not breaking the link between the

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[1002] Appellate Body *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 108 (footnote omitted).

[1003] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 118 (footnote omitted).

[1004] See paragraphs 7.329-7.338 above.

[1005] See paragraphs 7.491-7.492 above.

[1006] Definitive Regulation, Exhibit CHN-3, recitals 297-298.

[1007] China, first written submission, para. 577; second written submission, para. 768.

dumping and the injury sustained."[1008] China contends that interested parties provided substantiated evidence to the Commission that the EU industry is characterized by small-scale producers that lack the resources to produce mass-scale footwear, and by high labour costs that translate into high production costs as the footwear industry is labour intensive. China asserts that the Commission was itself aware that the EU industry's production structures are incapable of facing international competition and competing with imported footwear. This has led some EU producers to change their business models, resulting in changes in distribution policy, clustering of production, shifting to higher end product segments, and outsourcing of the entire production, or at least the labour-intensive parts.[1009] The European Union disputes China's view of the facts, asserting that Commission did not conclude in the Definitive Regulation, as China asserts, that EU producers are incapable of producing footwear on a mass scale, that those producers could not withstand competition from non-dumped imports, and that producers are being injured as a result of their inefficient production structures.[1010] The European Union contends that the Commission, in the Review Regulation, found that the EU industry as then structured could not match the prices of dumped imports from China and Viet Nam. The European Union asserts that China cannot transfer the injury caused by dumped imports to the structure of the EU industry simply because restructuring would reduce such injury.[1011]

7.498 There is no dispute that this factor was argued to the Commission as a factor other than dumped imports allegedly causing injury to the EU industry.[1012] The Commission addressed this factor, and the parties' arguments, in the Review Regulation, as follows:

> "Parts of the industry are producing unbranded footwear in the mid- to low-end of the product segment and are selling through wholesalers rather than directly to retail. But this does not mean that these companies are inefficient by nature. What is clear from the investigation is that, irrespective of their competitive position, their difficult situation is being materially caused by dumped imports. …
>
> Notwithstanding their marked improvement and adaptation of business model, those companies that have redefined business model do not reach the target profits of 6 % as established in the original investigation. This shows that also this group is affected by the overall downward pressure exerted across all segments as a consequence of the dumped imports. …
>
> The fact that even the companies that have moved to a new business model are still affected by the injurious dumping despite being highly efficient in terms of pooling of resources and specialisation, would suggest that lack of efficiency and structural problems within the industry is not breaking the link between the dumping and the injury sustained."[1013]

7.499 China argues that the European Union acknowledged that the economic crisis could further deteriorate the situation of the EU industry, even for those companies that specialized in the high/medium segment.[1014] China asserts that the European Union downplayed the injurious effect of

[1008] China, first written submission, paras. 583-584, citing Review Regulation, Exhibit CHN-2, recital 274. See also second written submission, paras. 773-782 and 786-787.
[1009] China, first written submission, paras. 577-581; second written submission, paras. 771-773.
[1010] European Union, first written submission, para. 319.
[1011] European Union, first written submission, para. 325.
[1012] EFA submission dated February 2009, Exhibit CHN-23, pp. 50-51; and EFA submission dated 12 November 2008, Exhibit CHN-34, pp. 60-67.
[1013] Review Regulation, Exhibit CHN-2, recitals 272-274.
[1014] China, first written submission, para. 582; second written submission, paras. 783-784.

this factor, and offered no factual support for its conclusion.[1015] The European Union contends that it found that the EU industry as then structured could not match the prices of dumped imports from China and Viet Nam. If it restructured, "it would be in a better position to meet this unfair competition, but even in its restructured state it had difficulty matching the prices of those imports."[1016] The European Union asserts that "China's argument appears to be that because the European Union industry could by restructuring reduce the injury resulting from the dumped imports, the state of that industry, rather than the dumped imports, is the cause of its injury."[1017]

7.500 We recall that it is not our role to review the evidence *de novo*, or to choose which of alternative interpretations of the facts would be most convincing to us were we to reach our own conclusion. Rather, as noted above, we are to undertake a careful scrutiny of the European Union's determination to assess whether the conclusions therein could be reached by an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given. In this regard, the Appellate Body has stated that:

> "a panel is not compelled under Article 11 to 'automatically reject' the explanation given by an investigating authority merely because a plausible alternative explanation has been proffered. At the same time, a panel may find the investigating authority's explanation inadequate when, even though that explanation seemed 'reasoned and adequate' at the outset, or in the abstract, it no longer seems so when viewed in the light of the plausible alternatives. In other words, it is not the mere existence of plausible alternatives that renders the investigating authority's explanation 'implausible'. Rather, in undertaking its review of a determination, including the authority's evaluation (or lack thereof) of alternative interpretations of the evidence, a panel may conclude that conclusions that initially, or in the abstract, seemed 'reasoned and adequate' can no longer be characterized as such.[176]

> [176] A panel's duty to consider whether the investigating authority's explanation is "reasoned and adequate" in the light of alternative plausible explanations should not be read as a requirement that panels must reject the authority's explanation if it does not rebut the alternatives. Rather, a panel must verify that the investigating authority has taken account of and responded to plausible alternative explanations that were raised before it and that, having done so, the explanations provided by it in support of its determination remain "reasoned and adequate".[1018]

7.501 In our view, the Review Regulation presents a reasonable conclusion, based on the facts, and one which could be reached by an unbiased and objective investigating authority on the basis of the information before it. The fact that the EU industry could restructure and thus reduce the injurious effects caused by dumped imports does not mean that the structure of the EU industry itself is causing injury. China argues that the European Union offered no factual support for its conclusion. However, we consider that a lack of direct evidence for such reasoning is not fatal, particularly where, as in this case, the reasoning itself is a rational explanation of the observed facts, and is not undermined by other evidence before the Commission. In this regard, we recall that China does not dispute the facts in connection with this aspect of its claim, and has referred to no other evidence that was not considered that would undermine the conclusions set out in the Review Regulation. We consider that China has not demonstrated a failure of reasoning or explanation in the European Union's

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[1015] China, first written submission, paras. 583 and 584. See also second written submission, paras. 773-782 and 786-787.
[1016] European Union, first written submission, para. 322.
[1017] European Union, first written submission, para. 325.
[1018] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 117.

determination, but has merely put forward an alternative interpretation of the relevant facts, which is not enough to demonstrate an inconsistency with Article 3.5 of the AD Agreement.

b. imports from third countries, notably India and Indonesia

7.502 First, China argues that the "European Union simply adopted a 'check the box' approach and failed to objectively separate and distinguish the injurious effects of this factor from those of the dumped imports."[1019] Second, China argues that imports from third countries, notably from India and Indonesia, were causing injury to the EU industry. China argues based on the Review Regulation that the European Union accepted that imports from India and Indonesia were large and increasing, and that it could not be precluded that market share lost by Chinese imports had been taken over by Indian and Indonesian footwear imports.[1020] China also asserts that the Review Regulation explicitly states that imports from third countries, and not imports from China, would be the "main cause of concern" to the European Union in the future.[1021] China contends that, in light of the above and because the price comparison between Chinese imports on the one hand, and Indian and Indonesian imports on the other hand was based on Eurostat import data which does not take into account product mix, the European Union had no basis to conclude that "higher prices of imports from other Asian countries" did not break the causal link between dumped Chinese imports and injury to domestic industry.[1022] Thus, according to China, the European Union's establishment of facts was neither objective nor based on positive evidence. The European Union acknowledges that imports from third countries with low prices, such as India and Indonesia, were large and increasing, and that other exporting countries, including India and Indonesia may have been taking market share from China and Viet Nam, but that the price levels were important. Nevertheless, the European Union asserts that it adequately assessed the significance of the injury caused by dumped imports from China and Viet Nam, after discounting any effects of non-dumped imports from third countries. The European Union asserts that it was appropriate to rely on the Eurostat data to compare the price of Chinese imports on the one hand, and Indian and Indonesian imports on the other hand in assessing whether those imports were a cause of injury.[1023]

7.503 Again, there is no dispute that this factor was argued to the Commission as a factor other than dumped imports allegedly causing injury to the EU industry.[1024] The Commission addressed this "other factor" as follows:

> "In terms of market share, the shares lost by China and Viet Nam may have been taken over by other exporting countries — in particular by India and Indonesia. However, the effect of their prices is not comparable to the effect of prices of imports from China and Viet Nam. While not taking into account differences in product mix the difference in price is particularly stark in the case of India, where the average export price is 25,8 % higher than the average export price of shoes imported from Viet Nam and 40,3 % higher than the average export price of shoes imported from China. Therefore their effect on the Union industry is significantly less pronounced. The average export price of shoes imported from Indonesia is 13,2 % higher than the average price of shoes imported from China and comparable to the average export price of shoes imported from Viet Nam. Nevertheless the volumes of Indonesian imports would still mean that their relative impact would be limited. Having regard to

[1019] China, second written submission, para. 788.
[1020] China, first written submission, para. 586-587; second written submission, para. 791.
[1021] China, first written submission, para. 591. See also second written submission, paras. 803-804.
[1022] China, first written submission, para. 588; second written submission, paras. 794-798.
[1023] European Union, first written submission, para. 328, 331 and 333.
[1024] EFA submission dated 12 November 2008, Exhibit CHN-34, pp. 68-69; and Comments by Chinese exporter Yue Yuen dated 3 November 2009, Exhibit CHN-46, pp. 10-11.

> the above, the relative volumes and higher prices of imports from other Asian countries do not allow to conclude that their effect would be sufficient to breach the link between the injury suffered by the Union industry and the large volumes of dumped imports from China and Viet Nam."[1025]

7.504 In light of this discussion, it is clear that the European Union did consider the effect of imports from third countries, but concluded that in light of the price levels, these did not break the link between dumped imports and injury. China does not dispute that third country imports were considered, but relies on the argument that the nature of the price information undermines the validity of the European Union's analysis, and proposes an alternative interpretation of the facts. Even though the Eurostat data does not take into account the product mix, we consider this data is an adequate basis on which to compare the general levels of prices of imports from different sources in the context of a consideration of the possibly injurious effect of imports from third countries. In our view, for purposes of examining causation, the Eurostat data relied on by the Commission were not inadequate to compare the price of Chinese imports on the one hand, and Indian and Indonesian imports on the other hand. Thus, we conclude that China has failed to demonstrate that the European Union did not make a reasonable analysis and interpretation of the facts, and that it reached a conclusion which could not have been reached by an unbiased and objective investigating authority, on the basis of the information before it. We therefore reject this aspect of China's claim.

c. contraction in demand and changes in consumption patterns

7.505 China asserts that the European Union did not correctly evaluate injury caused by contraction in demand and changes in consumption patterns, despite repeated references by interested parties and the European Union's own analysis showing that both factors affected production and sales of EU industry. China notes that the European Union found that consumption of the product under consideration decreased by 7 per cent between 2006 and the review investigation period, while consumption of other footwear types increased significantly during the same period, and that the ratio of decline in consumption correlates to the ratio of decline in production and sales of the EU industry during the review investigation period. However, China submits that the European Union, after acknowledging that the decline in production and sales mirrored the decrease in consumption, did not sufficiently explain or provide any analysis as to why changes in patterns of consumption and contraction in demand should not be considered the cause of injury to the domestic industry. In addition, China argues that the European Union's implication that 100 per cent substitutability would be necessary to prove the break in causal link is illogical, and while there cannot be 100 per cent substitutability between a textile/plastic shoe and a leather shoe, it is clear that there was a shift in demand from leather footwear to other kinds of footwear which affected the production and sales of the EU industry.[1026] With respect to the changes in consumption patterns, the European Union asserts that the Review Regulation clearly explained that "the growth in demand for non-leather footwear had not impinged significantly on that for leather footwear." European Union acknowledges that there was a contraction in demand. The European Union argues that China wishes to attribute the entire decline in EU production to a decline, in demand, noting that China compares the two declines in percentage terms. However, the European Union argues these declines cannot be compared as they represent very different numbers in absolute terms. The European Union explains that its methodology does not imply that 100 per cent substitutability would have been necessary to break the causal link, as argued by China. Rather, the European Union contends that "the relatively small degree of substitutability that was found to exist between leather and non-leather footwear did not have that consequence vis-à-vis the dumped imports from China and Viet Nam." The European Union argues that it distinguished the effects of contraction in demand and changes in

[1025] Review Regulation, Exhibit CHN-2, recitals 210 and 277.

[1026] China, first written submission, paras. 593, 595-596, 598-599; second written submission, paras. 809-810 and 817-820.

consumption patterns from those of the dumped imports in determining that the dumped imports caused material injury.[1027]

7.506 There is no dispute that contraction in demand and changes in consumption patterns was argued to the Commission as a factor other than dumped imports allegedly causing injury to the EU industry.[1028] In its analysis, the Commission stated:

> "The decrease in consumption has to be seen in conjunction with a parallel increase of consumption of other types of shoes outside the product scope (*e.g.*, textile, rubber & plastic). By reference, textile, rubber and plastic shoes consumption increased by 23% in the same period. This appears to point to some substitution amongst the two product categories, linked also to fashion trends (penetration of mixed synthetic/leather shoes, or synthetic shoes which resemble leather). Considering however, that the increase in consumption of other footwear is far higher (23%) than the decrease in consumption of leather footwear (7%), it can however not be concluded that textile and other materials have substituted leather footwear to more than a limited degree. Furthermore, average import prices of other footwear is half of that of leather footwear and this price difference makes it clear had there been large interchangeability between the two types, the far more expensive leather footwear segment would have been obliterated. …
>
> In this context the investigation has shown that there has been a decrease in consumption of product concerned. However, if there had been full substitutability between leather shoes and other materials, this decrease would have been much more pronounced. The decrease in consumption and changes in consumer preference would therefore not on its own appear to be a factor that would break the causal link."[1029]

The Commission also stated that "the relatively small degree of substitutability that was found to exist between leather and non-leather footwear did not have that consequence vis-à-vis the dumped imports from China and Viet Nam."[1030]

7.507 The Review Regulation clearly addresses the changing patterns of consumption, and the relative declines and increases between the product under consideration and other footwear. It notes the significance of prices in concluding that other footwear did not significantly affect the leather footwear segment of the market. Despite the fact that the Review Regulation refers to "full substitutability" and not to "relatively small degree of substitutability", we consider that the Review Regulation was simply providing an example of a situation in which the conclusion of the Commission might have been different. We consider this to be a reasonable interpretation of the facts concerning the decline in consumption of the product under consideration and the increased consumption of other footwear, and one which could be reached by an unbiased and objective investigating authority on the basis of the information before it. Once more, we note that China does not dispute the facts in question in connection with this aspect of its claim, but merely proffers an alternative interpretation. We therefore reject this aspect of China's claim.

[1027] European Union, first written submission, paras. 335-338 and 340, referring to China, first written submission, para. 595.

[1028] EFA submission dated 12 November 2008,, Exhibit CHN-34, pp. 69-71; and EFA submission dated February 2009, Exhibit CHN-23, p. 50.

[1029] Review Regulation, Exhibit CHN-2, recital 279.

[1030] European Union, first written submission, para. 340.

d. alleged failure to evaluate the impact of certain factors

7.508 China submits that the European Union did not even evaluate the impact of certain factors identified by interested parties as causes of injury to the EU industry.[1031] Specifically, China refers in this respect to (i) high labour costs in the European Union, (ii) increasing outsourcing by EU producers, and (iii) the impact of fluctuations in the Euro-U.S. dollar exchange rate. The European Union argues that the issues raised by China do not constitute "other factors" for purposes of Article 3.5 of the AD Agreement, and therefore the Commission was not obliged to separately consider them.[1032]

1. high labour costs

7.509 China argues that the European Union failed to analyse the effects of high labour costs in the European Union, despite the fact that interested parties provided detailed data and argument on this factor throughout the investigation.[1033] The European Union contends that "high labour costs" is essentially the same factor as the "structural inefficiency of the European Union production", which was appropriately considered by the Commission in the Review Regulation.[1034]

7.510 We note that this factor was argued to the Commission as a factor other than dumped imports allegedly causing injury to the domestic industry.[1035] The evidence shows that one interested party identified both "high labour costs" and "structural inefficiency" as relevant to the analysis of "other factors", but that it identified "high labour cost" in the context of its argument concerning the structural inefficiency of EU production.[1036] Thus, it seems to us that high labour costs were not identified as an independent factor allegedly causing injury, but rather as a part of the argument that structural inefficiency was causing injury. There is no dispute that the element of "high labour costs" was considered by the Commission in its discussion of the structural inefficiency of the EU industry,[1037] which, as noted above,[1038] was explicitly considered. In these circumstances, we consider that the European Union did not fail to consider the allegedly injurious effects of high labour costs merely because it did not explicitly address them separately as an "other factor" causing injury in that section of the Review Regulation. We therefore reject this aspect of China's claim.

2. outsourcing

7.511 China contends that the European Union did not analyse the effect of increasing outsourcing by EU producers, despite the arguments of interested parties, the then-Community interest questionnaire responses, and the fact that one sampled EU producer outsourced its entire production

[1031] China, first written submission, paras. 602, 604, 608 and 613; second written submission, para. 824.
[1032] European Union, first written submission, para. 352.
[1033] China, first written submission, para. 603; second written submission, para. 825.
[1034] See paragraph 7.497 above.
[1035] EFA submission dated 12 November 2008, Exhibit CHN-34, pp. 63-64. However, we do not agree with China that EFA submission dated February 2009, Exhibit CHN-23, pp. 50-51, identifies "high labour costs" as an "other factor" causing injury.
[1036] One interested party addressed, under the heading "Main challenges faced by the Community industry", the following factors: "fragmented Community industry", "high labour costs", "niche production" and "inherent incapability of the Complainants to compete under global competition conditions", in order to conclude that "the preceding sections demonstrates that the Community footwear industry suffers from inherent structural problems which cannot be overlooked or blamed on imports from the countries concerned." EFA submission dated 12 November 2008, Exhibit CHN-34, pp. 61-67.
[1037] Review Regulation, Exhibit CHN-2, recital 271.
[1038] See paragraphs 7.497-7.501 above.

of the like product to a third country during the review investigation period.[1039] China agrees with the European Union that outsourcing is a "symptom of injury", but submits that "the source of the injury is not the dumped imports but the high production costs and failure of the producers on that count to face international competition."[1040] China asserts that (i) the "Community interest questionnaire responses" from sampled companies, (ii) the fact that a sampled producer outsourced its entire production of the like product to outside the European Union during the review investigation period, and (iii) data of non-complainant producers that completed sampling forms are the basis for its assertion that outsourcing was an "other factor" causing injury and requiring consideration by the European Union.[1041] The European Union argues that the issue of outsourcing was addressed and analysed in the injury analysis in the context of sampling, where it was found that outsourcing had no impact on the injury assessment. In addition, the European Union argues that the reasonable assumption is that outsourcing results in an improvement of the condition of the companies, and it is therefore difficult to understand how outsourcing could be an "other cause" of injury. In fact, the European Union argues, "outsourcing is a symptom of injury, the source of the injury lies elsewhere."[1042]

7.512 We have reviewed the evidence relied upon by China in this regard.[1043] Although the Union interest questionnaires provide information with respect to "outsourcing", we see nothing in them that would identify "outsourcing" as an "other factor" allegedly causing injury. Indeed, it would in our view be somewhat surprising for the domestic industry, in responding to questionnaires seeking information as to whether imposition of an anti-dumping measure is in the interest of the European Union, to identify factors other than the dumped imports that are causing injury. Moreover, we agree with the parties that outsourcing may be a symptom of injury, and consider that in such a case, it is illogical to at the same time treat it as a factor in itself causing injury, particularly in the absence of specific assertions to that effect. We recall that there is no requirement under Article 3.5 that an investigating authority in each case seek out and examine on its own initiative the possibility that some factor other than dumped imports is causing injury to the domestic industry.[1044] Thus, merely because the Community interest questionnaires mention outsourcing is not sufficient to demonstrate that this was an "other factor" causing injury which the European Union was required to consider in its determination. We therefore reject this aspect of China's claim.

[1039] China, first written submission, paras. 605-607; second written submission, paras. 827-836.
[1040] China, second written submission, para. 835.
[1041] China, first written submission, para. 605; second written submission, para. 832.
[1042] European Union, first written submission, paras. 345-346.
[1043] China refers to Exhibits CHN-44 (Community interest questionnaire response of Company D dated 16 January 2009), CHN-45 (Community interest questionnaire response of Company F dated 15 January 2009), and CHN-49 (Community interest questionnaire responses of Companies E, G and H dated January 2009), and argues that the non-confidential versions of the "Community interest questionnaire responses" of five sampled EU producers (companies D, E, F, G and H) state that outsourcing increased during the period in question. China also refers to recital 401 of the Review Regulation itself to support its position. China, first written submission, paras. 606-607. In addition, China mentions the fact that a sampled producer outsourced its entire production and data of non-complainant producers that completed sampling forms, but does not refer to any specific evidence or exhibits. In the absence of evidence with respect to these two situations, we cannot conclude that interested parties raised outsourcing as an "other factor" during the course of the anti-dumping investigation. Even if we were to assume that China intended to refer to Exhibits CHN-21, Sampling form sent to non-complaining EU producers, or CHN-101, Questionnaire responses provided by the sampled EU producers (in particular to page 12 (Company 1), page 16 (Company 2), page 5 (Company 4), page 3 (Company 5), page 14 (Company 7), page 10 (Company 8), pages 11-12 (Company 9)), regarding the sampling form sent to non-complaining EU producers, we do not see in those forms any indication that any interested party informed the Commission that "outsourcing" was an "other factor" causing injury. Therefore, we limit our analysis to the specific "Community interest questionnaire responses" referred to by China.
[1044] Panel Report, *Thailand – H-Beams*, para. 7.273.

3. fluctuations in the Euro-U.S. dollar exchange rate

7.513 China contends that the European Union failed to analyse the impact of the Euro-U.S. dollar exchange rate fluctuation as a factor causing injury to the EU industry,[1045] despite the fact that Chinese exporters argued that changes in the exchange rate were relevant to the determination of injury and would directly affect the injury margin. China notes that an investigating authority should examine other "known" factors, and thus disagrees with the European Union's assertion that because fluctuation in exchange rates is not a factor explicitly mentioned in Article 3(7) of the Basic AD Regulation, which is similar to Article 3.5 of the AD Agreement, the European Union was not required to take it into account. Moreover, China notes, fluctuations in exchange rates was a factor considered relevant by the European Union in the context of the selection of the analogue country, despite not being considered an "other cause" of injury in the causation context.[1046] China argues that this was an "other factor" causing injury identified by interested parties, and that simply because fluctuation in exchange rates is not a factor explicitly mentioned in either the EU regulation or Article 3.5 of the AD Agreement, the European Union is not allowed to ignore this factor. The European Union contends that such exchange rate fluctuations do not qualify as an "other factor" within the meaning of Article 3.5, contending that, as the Commission had found in the original investigation, exporters cannot escape responsibility for dumping by blaming movements of exchanges rates.[1047]

7.514 We agree that the list of factors set out in Article 3.5 is illustrative,[1048] and that investigating authorities must examine all "known" other factors causing injury to the domestic industry at the same time as dumped imports, whether or not identified in that provision.[1049] We note that the "Euro-U.S. dollar exchange rate fluctuation" was indeed argued to the Commission.[1050] The European Union suggests that this issue was raised in the context of whether a lesser duty would be sufficient to prevent injury.[1051] We do not agree. The submission in question states:

> "[e]xchange rates were a major cause of injury in the original investigation. The impact of exchange rates was wrongly rejected by the Commission. … Exchange rates are now critical in this review. The reverse in exchange rate rends since last year (i.e. increasing US$ against Euro) means that import prices, predominantly denominated in US$, will be increasing. … Further, the RMB is appreciating against the US$, further emphasising this trend. These exchange rates developments are therefore highly relevant when considering the likelihood of continuation or recurrence of injury. In fact, exchange rate developments now make it highly unlikely that Chinese/Vietnamese imports could cause injury if the measure was removed."[1052]

The European Union also asserts that the argument that exchange rate fluctuations constituted an "other factor" was rejected in the Provisional Regulation in the original investigation, and contends that that analysis is equally applicable in the present context, and should be taken in to account in

[1045] China, first written submission, para. 609; second written submission, paras. 837-839 and 841.
[1046] China, first written submission, paras. 610-612.
[1047] European Union, first written submission, paras. 347-348.
[1048] Panel Reports, *Egypt – Steel Rebar*, para. 7.115; *Thailand – H-Beams*, paras. 7.231 and 7.274; and *EC – Tube or Pipe Fittings*, para. 7.359.
[1049] Whether or not an "other factor" is identified in domestic legislation is not relevant to our analysis, as our jurisdiction does not extend to questions of whether the European Union complied with EU law.
[1050] Hearing submission and comments of Chinese Footwear Coalition and China Leather Association dated 24 March 2009, Exhibit CHN-10, pp. 18-19 (second document).
[1051] European Union, first written submission, para. 350.
[1052] Hearing submission and comments of Chinese Footwear Coalition and China Leather Association dated 24 March 2009, Exhibit CHN-10, p. 18 (second document).

considering China's claim. [1053] However, while we agree that the Provisional Regulation is relevant for our consideration of the consistency of the Definitive Determination in the original investigation, we do not accept that the European Union can rely on a decision in a different proceeding in order to support the Review Regulation. Nothing in the Review Regulation refers to the Provisional Regulation with respect to this question, and thus the Provisional Regulation is not relevant to our analysis here.

7.515 However, the Review Regulation does address the "likely impact of fluctuations in exchange rates,"[1054] in the section headed "likelihood of continuation of injury". Despite its location in the Review Regulation, we consider it appropriate to take this discussion into account. Although it might have been clearer if the Commission had made a reference in the sub-section on "impact of other factors" to its analysis of exchange rate fluctuations analysis in the section of the Review Regulation entitled "likelihood of continuation of injury", we see no reason why our evaluation of the consistency of a Member's determination regarding the imposition or continuation of anti-dumping measures should be limited by the structure of the published notice of that determination, or by where in that notice various considerations are addressed. Rather, we consider it appropriate to review the substance of the determination as a whole, to determine whether the Member acted consistently with its obligations.

7.516 In this regard, we note that the Commission addressed the argument that "injury to the Union producers is likely to decrease as a result of the appreciation of the USD to the EURO." The Commission noted that it was not required to analyse factors affecting the levels of prices, as opposed to the differences between price levels, and considered it unlikely that importers buying from China and Viet Nam would be able to increase prices as a result of the USD appreciation. Finally, the Review Regulation states that "it cannot be concluded that the development of exchange rate could be another factor causing injury".[1055] To us, this clearly indicates that the Commission considered this question, and concluded that the "Euro-U.S. dollar exchange rate fluctuation" was not an "other factor" causing injury to the domestic industry. In this circumstance, we are of the view that there was no need for any further consideration. We therefore reject this aspect of China's claim.

7.517 Based on the foregoing, we consider that China has failed to demonstrate that the European Union acted inconsistently with Article 3.5 of the AD Agreement by failing to examine known factors other than the dumped imports which were at the same time causing injury to the domestic industry, or by attributing injuries caused by these other factors to the dumped imports. Having found no inconsistency with respect to Article 3.5, we further consider that China has failed to demonstrate any inconsistency with respect to Article 3.1 of the AD Agreement. We therefore conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 11.3 of the AD Agreement in concluding that there was a likelihood of continuation or recurrence of injury based, at least in part, on a determination that dumped imports caused the injury that continued during the review investigation period.[1056]

(ii) Definitive Regulation

7.518 In the original anti-dumping investigation, the Commission examined whether the material injury to the EU industry it had found was caused by dumped imports of the product under consideration originating in China and Viet Nam. In the Provisional Regulation, the Commission noted that the significant increase in volume of dumped imports coincided with the deterioration of

[1053] European Union, first written submission, para. 348.
[1054] Review Regulation, Exhibit CHN-2, recitals 314-319
[1055] Review Regulation, Exhibit CHN-2, recitals 314-319.
[1056] We recall in this regard our views concerning the consideration of alleged violations of Article 3 of the AD Agreement in the context of an expiry review, paragraphs 7.329-7.340 above.

the economic situation of the EU industry, which suffered a drop in production and sales volume of around 30 per cent during the period considered. In addition, the average price of the dumped imports declined by 30 per cent, depressing the EU industry prices, which decreased around 8 per cent.[1057] The Commission also found, in the Provisional Regulation. that the EU industry lost around 9 percentage points of market share between 2001 and the investigation period, 1 April 2004 to 31 March 2005, while the market shares of China and Viet Nam expanded by around 14 percentage points, during a period of relatively stable consumption. The Commission concluded that "the dumped imports played a determining role in the injurious situation of the [European Union] industry." The Commission went on to examine the effects of other factors allegedly causing injury: (i) the performance of other EU producers, (ii) the export performance of the EU industry, (iii) imports from third countries, (iv) changes in the patterns of consumption and decline in demand, (v) exchange rate fluctuations, (vi) lifting of the quota, (vii) structural inefficiencies of the EU industry and high labour costs, and (viii) outsourcing. The Commission concluded in the Provisional Regulation that "the effect of the other examined factors was practically non-existent and was therefore not such as to break the causal link between the dumped imports and the injurious situation of the [European Union] industry."[1058]

7.519 In the Definitive Regulation, the Commission confirmed the conclusion in the Provisional Regulation, finding that "the dumped imports played a determining role in the material injury suffered by the [EU] industry." The Commission noted that various interested parties argued that the material injury suffered was caused by other factors, but states that "[n]o new elements were however provided, and therefore the main conclusions set out in the [P]rovisional Regulation are clarified/expanded, where necessary below." The Commission then examined the effects of the following other factors: (i) export performance of the EU industry, (ii) imports from other third countries, (iii) exchange rate fluctuations, (iv) lifting of the quota, (v) structural inefficiencies of the EU industry and high labour costs, and (vi) outsourcing. The Commission rejected the arguments of the interested parties that these other factors were the cause of the material injury found, and confirmed the findings and conclusions of the Provisional Regulation.[1059]

a. export sales

7.520 China argues that the European Union failed to objectively assess the level, evolution and injury impact of export sales, in order to ensure this injury was not attributed to dumped imports.[1060] China argues that the European Union failed to correctly evaluate and address in an objective manner the injurious effects of loss of export sales and the comments and evidence submitted by interested parties, showing that the reduction in exports from the European Union reflected a long-term decline of the EU footwear industry's export performance.[1061] China disagrees with the European Union's statement that export performance does not have any impact on most injury indicators, since pursuant to China's understanding most of the injury factors do not distinguish between domestic sales and export sales, and export performance is one of the factors listed in Article 3.5 of the AD Agreement.[1062] China also argues that, based on information submitted by interested parties, around 30 per cent of total EU production is destined for export sales.[1063] The European Union asserts that the injury analysis took no account of the consequences of changes in the level of export sales, and thus any injury from a decline in export sales was necessarily distinguished from injury caused by the dumped imports. In addition, the European Union recalls that the Provisional Regulation

[1057] Provisional Regulation, Exhibit CHN-4, recitals 204-206.
[1058] Provisional Regulation, Exhibit CHN-4, recitals 208-232.
[1059] Definitive Regulation, Exhibit CHN-3, recitals 221-239.
[1060] China, first written submission, para. 1215.
[1061] China, first written submission, paras. 1202-1206.
[1062] China, first written submission, paras. 1208-1212.
[1063] China, first written submission, para. 1214.

observed that the vast majority of EU production was intended to be sold on the EU market, indicating that the majority of decrease in production is related to injury in the EU market, and not to a decrease in exports.[1064]

7.521 Several interested parties had argued that the "loss of export sales" was an "other factor" allegedly causing injury.[1065] The European Union addressed this question first in the Provisional Regulation:

> "In this context, it should firstly be noted that the injury analysis focuses on the situation of the Community industry on the Community market. Therefore a deterioration of the export performance, if any, does not have any impact on most of the indicators analysed above, such as sales volume, market share and prices. In terms of the overall production volume, where the distinction between Community and outside Community market cannot be made, since footwear is produced on order, a decrease of sales on the Community market will necessarily translate into a declining production. Since the vast majority of the production is intended to be sold on the Community market, and even though export sales also decreased during the period considered, it is concluded that the major part of the decrease in production is related to injury suffered on the Community market, and not to decreasing exports. Finally, the assertion made by the Community producers, in fact, merely refers to prevention of exploitation of their export potential, and should therefore be seen as the inability to compensate decreasing sales on the Community market, i.e. where injury is being suffered, by increasing exports.
>
> The claim was therefore rejected and it is concluded that the export performance of the Community industry did not cause any material injury."[1066]

7.522 We consider it appropriate to take into account the Provisional Regulation in reviewing the European Union's final determination, which is the measure before us.[1067] The Definitive Regulation also addressed the claims of parties that the "poor economic situation of the Community footwear industry was due to a deterioration of its export performance" and states:

> "alleged deterioration of the export performance, if any, does not have any impact on most of the indicators analysed above, such as sales volume, market shares and depression of prices, since those factors have been established at the level of sales in the Community….given that the vast majority of the production is intended to be sold on the Community market, the provisional conclusion that the major part of the

[1064] European Union, answer to Panel question 97, paras. 264-266.

[1065] Supplemental injury comments submitted by FESI [Federation of the European Sporting Goods Industry] dated 12 January 2006, Exhibit CHN-88, pp. 28-29; Coalition Submissions on Commission Provisional Regulation 553/2006, 8 May 2006, Exhibit CHN-91, pp. 38-40; FESI [Federation of the European Sporting Goods Industry] submission dated 23 August 2005, Exhibit CHN-93, pp. 55-57; Supplementary Coalition Submissions on Commission Provisional Regulation 553/2006: Leather Footwear from China & Vietnam, 20 June 2006, Exhibit CHN-102, pp. 20-21.

[1066] Provisional Regulation, Exhibit CHN-4, recitals 212-213.

[1067] We note in this regard that the Definitive Regulation clearly indicates that the findings in the Provisional Regulation are an integral part of the final determination:

> "Following the imposition of the provisional measures, various interested parties claimed that the material injury suffered was caused by other factors. Those parties referred to claims that were already made at an earlier stage, and duly addressed in the provisional Regulation. … No new elements were however provided, and therefore the main conclusions set out in the provisional Regulation are clarified/expanded, where necessary, below."

Definitive Regulation, Exhibit CHN-3, recital 222.

> decrease in production is related to injury suffered on the Community market is confirmed.
>
> As a matter of fact, during the period considered, the decrease in sales volume on the Community market (– 34 %) corresponds to the decrease of production during the same period (– 33 %).
>
> The claim was therefore rejected, and it is definitively concluded that the export performance of the Community industry did not cause any material injury."[1068]

Thus, the European Union argues, the injury analysis took no account of changes in the level of export sales, and any injury from declines in export sales was distinguished from injury caused by the dumped imports as it was never considered in determining that EU industry was materially injured.[1069] China disagrees with the European Union's position that export performance does not have any impact on most injury indicators, asserting that most of the injury factors do not distinguish between domestic sales and export sales, and reiterating that export performance is one of the factors listed in Article 3.5 of the AD Agreement.[1070] Moreover, China disagrees with the European Union's conclusion that the "vast majority" of production is for the EU market, arguing that information submitted by interested parties shows that "[i]n both 2001 and the IP, EU industry sales on the EU market accounted for around 70% of total production (a majority but not the 'vast majority'). This suggests that around 30% of production is exported."[1071]

7.523 In our view, China is simply disagreeing with the European Union's characterization of the facts. While China's characterization of the facts is not unreasonable, in order to establish a violation of Article 3.5 of the AD Agreement, it does not suffice to demonstrate that another conclusion could be reached by an unbiased and objective investigating authority on the basis of the facts before it and in light of the arguments. China does not dispute that the Commission based its conclusion of injury on the performance of the EU industry in the EU market, without taking into account the effect of exports. That China disagrees with the characterization of the proportion of production sold in the EU market as the "vast majority" does not detract from that analysis. China also asserts that the fact that production and sales in the European Union follow a similar decreasing trend does not necessarily mean that export sales cannot follow the same trend, and would thus have an effect on domestic industry performance.[1072] However, even assuming that were the case, and China has pointed to no evidence in this regard, we do not see how that undermines the European Union's conclusion. A proportionate decline in export performance would not demonstrate that any injury caused by that decline was wrongly attributed to the dumped imports. We therefore reject this aspect of China's claim.

b. import quotas

7.524 China argues that the European Union failed to adequately evaluate and address the injurious effect of the lifting of the quota on Chinese footwear on 1 January 2005.[1073] China submits that the European Union wrongly dismissed this factor out of hand, and asserts that the Panel need not make

[1068] Definitive Regulation, Exhibit CHN-3, recitals 223-226.
[1069] European Union, answer to Panel question 97, paras. 264-265, quoting the Provisional Regulation, Exhibit CHN-4, recital 212.
[1070] China, first written submission, paras. 1208-1212.
[1071] China, first written submission, para. 1214, referring to Submissions on Commission Disclosure of what it intends to recommend for Imposition of Definitive Anti-Dumping Measures in AD 499 – Leather Upper Footwear from China and Vietnam, Submitted on behalf of the Coalition of Chinese Shoes Manufactures Against EU Anti-Dumping Actions, 17 July 2007, Exhibit CHN-103, p. 14.
[1072] China, first written submission, para. 1215.
[1073] China, first written submission, para. 1216.

any conclusions as to the actual effect of lifting the quota in order to find that the European Union acted inconsistently with Article 3.5 in this regard.[1074] The European Union asserts that the fact that many of the dumped Chinese imports would not have been imported into the European Union if the quota had not been removed does not convert the removal of the quota into an "other factor" causing injury to the EU industry. The European Union considers that Chinese exporters cannot escape responsibility for engaging in dumping by identifying factors that had given them the opportunity to dump their products into the EU market, such as the removal of a quota.[1075]

7.525 With respect to the lifting of the quota on Chinese footwear, there is no dispute that this matter was raised by interested parties during the original investigation.[1076] With respect to these arguments, the Provisional Regulation states:

> "Certain parties claimed that the lifting of the import quotas at the beginning of 2005 was also a cause of injury to the Community industry. In this respect, it is recalled that the quotas only applied to one of the two countries concerned and not all the products covered by this proceeding. In addition, the injury analysis has been established over a longer period, in this case between 2001 and the end of the IP, and does therefore not only refer to the post quota period, i.e. the first quarter 2005. The claim was therefore rejected."[1077]

The Definitive Regulation adds that:

> "No new elements have been put forward in that respect. It should however be noted that given the acceleration of the imports during the last quarter of the IP, this may indeed have exacerbated the injurious effects of those dumped imports."[1078]

7.526 China notes that "the highest increase in imports occurred from China and that it took place during the first quarter of 2005."[1079] China argues that although the European Union explicitly admitted that the lifting of the quota was a factor that may have had an effect on injury, the European Union failed to separate and distinguish its injurious effects.[1080] The European Union recalls that Chinese imports were found to be dumped and caused material injury to the EU industry, and asserts that the "fact that many of these imports would not have taken place if the quota had not been removed does not convert the removal of the quota into an 'other factor' causing injury to the European Union industry." The European Union argues that Chinese exporters cannot escape responsibility for dumping by identifying factors that had given them the opportunity to dump their products into the EU market, such as the removal of a quota.[1081]

7.527 In our view, the Provisional Regulation sets forth a reasonable interpretation of the facts, and one which could be reached by an unbiased and objective investigating authority on the basis of the information before it. Indeed, we agree with the notion that an exogenous event, such as the lifting of

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[1074] China, answer to Panel question 95, para. 650.
[1075] European Union, first written submission, paras. 737-738.
[1076] Coalition Submissions on Commission Provisional Regulation 553/2006, 8 May 2006, Exhibit CHN-91, pp. 42-44; Supplementary Coalition Submissions on Commission Provisional Regulation 553/2006: Leather Footwear from China & Vietnam, 20 June 2006, Exhibit CHN-102, pp. 22-25; Submissions on Commission Disclosure of what it intends to recommend for Imposition of Definitive Anti-Dumping Measures in AD 499 – Leather Upper Footwear from China and Vietnam, Submitted on behalf of the Coalition of Chinese Shoes Manufactures Against EU Anti-Dumping Actions, 17 July 2007, Exhibit CHN-103, p. 16.
[1077] Provisional Regulation, Exhibit CHN-4, recital 226.
[1078] Definitive Regulation, Exhibit CHN-3, recital 233.
[1079] China, first written submission, para. 1217. See also answer to Panel question 94, para. 634.
[1080] China, first written submission, para. 1219.
[1081] European Union, first written submission, paras. 737-738.

an import quota, which allows for an increase in the volume of dumped imports, is not itself a factor causing injury. In addition, we note that China does not dispute the facts in question in connection with this aspect of its claim, and we consider that China has not demonstrated a failure of reasoning or explanation in the European Union's determination. We therefore reject this aspect of China's claim.

c. changes in patterns of consumption and decline in demand

7.528 China submits that the European Union did not adequately evaluate injury caused by changes in patterns of consumption and the decline in demand.[1082] China claims that the European Union accepted that changes in consumer preferences occurred, although not to such an extent as to break the causal link, but failed to provide any explanation as to the extent of this factor. China also argues that the European Union failed to objectively examine the issue of decline in demand, noting that the European Union's conclusion that demand remained relatively stable is incorrect.[1083] The European Union argues that the changes in fashion in question were entirely within the footwear market that was considered in this investigation, and thus any changes that would negatively affect producers of one type of footwear would be compensated by the benefits obtained by the producers of another type of footwear.[1084] Moreover, the European Union rejects China's view that the data showed a decline in demand and maintains its view that the figures for consumption are "relatively stable".[1085]

7.529 Concerning changes in patterns of consumption and decline in demand, there is again no dispute that this was argued to the Commission as an "other factor" allegedly causing injury.[1086] With respect to this factor, the Provisional Regulation states:

> "In this respect, reference is made to section 2 above where it was concluded that all types of the product concerned and the like product were regarded as forming one single product and that footwear produced in the countries concerned and in the Community compete at all levels of the market. Any claim regarding certain types is therefore not relevant and the analysis should be carried out at the level of the product concerned and the like product, i.e. all types of footwear with uppers of leather as described in the relevant paragraph above. As to the overall Community consumption for the footwear with uppers of leather, it remained relatively stable during the period considered. The claims were therefore rejected and it is concluded that injury was not caused by any decline of demand."[1087]

7.530 According to China, interested parties argued that consumer trends shifted from formal to casual, sport and fashionable footwear, and that consumers are not inclined to purchase formal, more expensive shoes, a market segment in which EU-produced shoes are concentrated.[1088] China claims that the European Union accepted that changes in consumer preferences occurred, although not to such an extent as to break the causal link, but failed to provide any explanation as to the extent of this factor.[1089] In fact, China argues that "[t]here is nothing in the Definitive Regulation addressing [consumer preferences]… or even incorporating by reference the discussion in the Provisional

[1082] China, first written submission, para. 1228. See also answer to Panel question 95, paras. 619-625.
[1083] China, first written submission, para. 1233.
[1084] European Union, first written submission, para. 741.
[1085] European Union, first written submission, paras. 742-743.
[1086] Supplemental injury comments submitted by FESI [Federation of the European Sporting Goods Industry] dated 12 January 2006, Exhibit CHN-88, p. 28; FESI [Federation of the European Sporting Goods Industry] submission dated 23 August 2005, Exhibit CHN-93, pp. 47-48.
[1087] Provisional Regulation, Exhibit CHN-4, recital 219.
[1088] China, first written submission, para. 1228, citing FESI [Federation of the European Sporting Goods Industry] submission dated 23 August 2005, page 47, Exhibit CHN-93.
[1089] China, first written submission, para. 1233.

Regulation, which seems to be a *prima facie* failure to provide a satisfactory explanation of the analysis."[1090] The European Union asserts that it did analyse the nature and extent of changes in consumer preferences, and it was by doing so that it was able to conclude that, taking into account the effects of such changes, it was still clear that dumped imports were a cause of injury.[1091]

7.531 We reject the view that we may only consider the Provisional Regulation in reviewing the European Union's final determination if the Definitive Regulation specifically incorporates the discussion of the same matter in the Provisional Regulation. In any event, we note that the Definitive Regulation does, in fact, specifically refer to the Provisional Regulation in general, stating:

> "Following the imposition of the provisional measures, various interested parties claimed that the material injury suffered was caused by other factors. Those parties referred to claims that were already made at an earlier stage, and duly addressed in the provisional Regulation. … No new elements were however provided, and therefore the main conclusions set out in the provisional Regulation are clarified/expanded, where necessary, below."[1092]

We consider this a sufficient basis to take into account all matters discussed in the Provisional Regulation in our consideration of the Definitive Regulation, even if that matter is not specifically addressed in the latter.[1093]

7.532 Second, China questions the European Union's dismissal of arguments concerning only certain types of footwear on the basis that all types of the product concerned and the like product were regarded as forming one single product. In China's view, this completely missed the point, as nothing in Article 3.5 of the AD Agreement implies that such arguments should be disregarded. China also contends that the Commission's conclusion that demand remained relatively stable represents a failure to objectively examine the issue of decline in demand, since consumption decreased by 10 per cent in 2002, and, according to China, only recovered to the level of 2001 by virtue of the lifting of the import quota in 2005.[1094] The European Union argues that the changes in fashion in question were entirely within the footwear market that was considered in this investigation, and thus "[p]roblems that might have been caused to producers of one type of footwear would be offset by benefits obtained by those producing another", a situation quite different from where all the products of an industry fall out of fashion. The European Union rejects China's view that the data showed a decline in demand and maintains its view that the figures for consumption are "relatively stable", noting that after an initial decline, the level steadily increased.[1095]

7.533 We agree that, in a situation where numerous different types of footwear constitute one like product, consideration of the performance of a particular type as opposed to other types within one like product is not necessarily relevant. We recall that the industry is defined as producers of the like product, and the determination to be made is whether the industry as a whole is materially injured by dumped imports.[1096] In this context, we consider that declining consumption in one market segment need not be analysed as an "other factor" causing injury to the industry of which that market segment is a part. We do not agree with China's view that the characterization of demand in the footwear

[1090] China, answer to Panel question 94, para. 620.
[1091] European Union, second written submission, para. 252.
[1092] Definitive Regulation, Exhibit CHN-3, recital 222.
[1093] See also paragraph 7.522 above.
[1094] China, first written submission, para. 1233.
[1095] European Union, first written submission, paras. 741-743.
[1096] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. While the Appellate Body in that report indicated that an analysis of market segments was permitted, it made clear that the analysis had to take account of all market segments in some way, to ensure that the determination of injury was with respect to the industry as a whole.

industry over the period of investigation as "relatively stable" is incorrect. We recall that, on an indexed basis, consumption declined from 100 in 2001 to 90 in 2002, then increased to 94 in 2003 and again to 99 in 2004, and was 101 during the investigation period.[1097] While these figures might be described differently, we do not consider that the European Union's characterization is unreasonable, particularly given that consumption at the end of the period considered was almost the same as at the beginning. Thus, in our view, the Provisional Regulation provides a reasonable interpretation of the facts, and a reasoned conclusion which could be reached by an unbiased and objective investigating authority on the basis of the information before it. We see nothing in China's arguments that either undermines the European Union's reasoning or the facts on which it is based. We therefore reject this aspect of China's claim.

d. fluctuations in the Euro-U.S. dollar exchange rate

7.534 China argues that the European Union failed to adequately evaluate and address the effects of the Euro-U.S. dollar exchange rate fluctuation. China argues that, as footwear originating in China is priced in U.S. dollars, the exchange rate itself, that is the appreciation of the Euro vis-à-vis the U.S. dollar, can make such footwear more attractive, regardless of whether the goods are being dumped in the European Union market.[1098] China submits that the European Union cannot ignore fluctuations in exchange rates simply because this factor is not explicitly mentioned in either Article 3.5 of the AD Agreement or the corresponding provisions in the EU regulation, namely Articles 3(6) and 3(7) of the Basic AD Regulation.[1099] The European Union argues that when exchange rate fluctuations result in exports priced in U.S. dollars becoming cheaper when priced in Euro, exporters may choose to maintain price levels, thereby retaining the price advantage, or they can raise their prices so that the products have the same price in Euro as before the rate change. In the European Union's view, if products are being dumped, and their low prices injure producers in the European Union, exporters cannot escape responsibility for that dumping by blaming movements of exchange rates.[1100]

7.535 With respect to the Euro-U.S. dollar exchange rate fluctuation, there is again no dispute that this was raised before the Commission as an "other factor" allegedly causing injury.[1101] We agree that the European Union cannot ignore fluctuations in exchange rates simply because this factor is not explicitly mentioned in either Article 3.5 of the AD Agreement or the corresponding provisions in the EU regulation, namely Articles 3(6) and 3(7) of the Basic AD Regulation. We recall in this regard our view that the list of factors set out in Article 3.5 is illustrative, and that investigating authorities must examine all "known" other factors causing injury to the domestic industry at the same time as dumped imports, whether or not identified in that provision.[1102] In this case, we note that the Provisional Regulation addressed this question at length: :

> "It is recalled that the investigation has to establish whether the dumped imports (in terms of prices and volume) have caused material injury to the Community industry or whether such material injury was due to other factors. In this respect, Article 3(6) of the basic Regulation states that it is necessary to show that the price level of the

[1097] Provisional Regulation, Exhibit CHN-4, recital 154.

[1098] China, first written submission, paras. 1235-1237. See also answer to Panel question 94, paras. 580-582 and 608-610.

[1099] China, first written submission, para. 1240.

[1100] European Union, first written submission, para. 746.

[1101] Coalition Submissions on Commission Provisional Regulation 553/2006, 8 May 2006, Exhibit CHN-91, pp. 44-46; FESI [Federation of the European Sporting Goods Industry] submission dated 23 August 2005, Exhibit CHN-93, pp. 51-55; China, first written submission, para. 1240.

[1102] See paragraph 7.514 above; Panel Reports, *Egypt – Steel Rebar*, para. 7.115; *Thailand – H-Beams*, paras. 7.231 and 7.274; and *EC – Tube or Pipe Fittings*, para. 7.359.

Whether or not an "other factor" is identified in domestic legislation is not relevant to our analysis, as our jurisdiction does not extend to questions of whether the European Union complied with EU law.

> dumped imports cause injury. It therefore merely refers to a difference between price levels, and there is thus no requirement to analyse the factors affecting the level of those prices.
>
> In practice, the effect of the dumped imports on the Community industry's prices is essentially examined by establishing price undercutting, price depression and price suppression. For this purpose, the dumped export prices and the Community industry's sales prices are compared, and export prices used for the injury calculations may sometimes need to be converted into another currency in order to have a comparable basis. Consequently, the use of exchange rates in this context only ensures that the price difference is established on a comparable basis. From this, it becomes obvious that the exchange rate can in principle not be another factor of the injury.
>
> The above is also confirmed by the wording of Article 3(7) of the basic Regulation, which refers to known factors other than dumped imports. The list of the other known factors in this Article does not make reference to any factor affecting the price level of the dumped imports. To summarise, if the exports are dumped, and even if they benefited from a favourable development of exchange rates, it is difficult to see how the development of such exchange rate could be another factor causing injury.
>
> Thus, the analysis of the factors affecting the level of the prices of the dumped imports, be it exchange rate fluctuations or something else, cannot be conclusive and such analysis would go beyond the requirements of the basic Regulation.
>
> In any event, and without prejudice of the above, even if exchange rate fluctuations had an effect on import prices, it would be impossible to separate and distinguish their impact since it is not precisely known to what extent imports from the countries concerned are traded in USD. In addition the biggest importers hedge their USD financial transactions and it is therefore very difficult to determine what would be the relevant exchange-rate to be examined."[1103]

The arguments that injury suffered by the EU industry was caused by the appreciation of the Euro against the U.S. dollar, leading to significant import price decreases, were reiterated in the final stage of the investigation. The Definitive Regulation addressed these arguments, referring expressly to the Provisional Regulation in this regard, as follows:

> "No new elements were given, and it is therefore referred to recitals 220 to 225 of the provisional Regulation. It is also to be noted that, even if one were to accept that exchange rate fluctuations had an effect on import prices, the volume alone of the imports concerned were of such a magnitude as to cause material injury to the Community industry."[1104]

7.536 China argues that the European Union is not allowed to use arguments of "administrative feasibility" in order not to "separate and distinguish the injurious effects of other known factors".[1105] With respect to the European Union's argument that even assuming exchange rate fluctuations had an effect on import prices, the volume of imports was of such a magnitude as to cause material injury to

[1103] Provisional Regulation, Exhibit CHN-4, recitals 221-225.
[1104] Definitive Regulation, Exhibit CHN-3, recital 232.
[1105] China, first written submission, para. 1240. See also answer to Panel question 94, paras. 606-607; second written submission, para. 852.

the EU industry,[1106] China recalls that when interested parties identified the exchange rate fluctuation as an "other known factor", the issue was not whether imports caused material injury, but the separate question of whether the exchange rate had an injurious effect on the domestic industry.[1107] China argues that the European Union's approach "renders the non-attribution analysis null with respect to many factors which are unrelated to the actual effects of dumping."[1108] China considers that in order to find that the European Union violated Article 3.5, "the Panel need not make any conclusions regarding actual effect of the currency appreciation in this case … but should simply determine that the logic regarding its status as a potential 'other' injurious factor is theoretically sound."[1109] The European Union argues that when exchange rate fluctuations result in exports priced in U.S. dollars becoming cheaper when priced in Euro, exporters may choose to maintain price levels, thereby retaining the price advantage, or they can raise their prices so that the products have the same price in Euro as before the rate change. In the European Union's view, if they choose to maintain price levels, and their low prices injure producers in the European Union, exporters cannot escape responsibility for that dumping by blaming movements of exchange rates. The European Union asserts that, as it did with regard to the effect of the removal of the quota, "China seeks to shift responsibility for the injury suffered by the EU producers away from the exporters and onto an extraneous event."[1110] The European Union clarifies that "[a]s long as an exporter is not dumping he is of course entitled to any advantage that might come his way from movements in exchange rates without incurring the risk of anti-dumping action."[1111]

7.537 In the original investigation, the Commission noted that it was not required to analyse factors affecting the levels of prices, as opposed to the differences between price levels. In addition, the Commission clarified that exchange rates were only used to ensure that the price difference between dumped imports and the EU industry's sales prices was established on a comparable basis, and concluded that the "Euro-U.S. dollar exchange rate fluctuation" was not an "other factor" causing injury to the domestic industry.[1112] We recall our findings concerning this issue in the context of the expiry review, and consider them equally applicable here.[1113] In our view, the Provisional Regulation sets out a reasonable interpretation of the facts, and a reasoned conclusion which could be reached by an unbiased and objective investigating authority on the basis of the information before it. Nothing in China's argument undermines the conclusion in the Provisional Regulation that "if the exports are dumped, and even if they benefited from a favourable development of exchange rates, it is difficult to see how the development of such exchange rate could be another factor causing injury."[1114] We therefore reject this aspect of China's claim.

e. alleged failure to address a known "other factor"

7.538 Finally, China asserts that one interested party explicitly identified non-tariff barriers in EU export markets preventing EU producers from exporting with their full capacity as an "other known factor" causing injury to EU producers, but the European Union failed to analyse this factor.[1115] The European Union argues that its investigation already took account of this factor, in so far as it relates

[1106] China, first written submission, para. 1241, citing Definitive Regulation, Exhibit CHN-3, recital 232. See also answer to Panel question 94, para. 588.
[1107] China, first written submission, para. 1242. See also answer to Panel question 94, paras. 598-599, answer to Panel question 96, para. 574.
[1108] China, answer to Panel question 94, para. 599.
[1109] China, answer to Panel question 94, para. 605
[1110] European Union, first written submission, paras. 745-746.
[1111] European Union, second written submission, para. 239.
[1112] Provisional Regulation, Exhibit CHN-4, recitals 221-225.
[1113] See paragraph 7.515 above.
[1114] Provisional Regulation, Exhibit CHN-4, recital 223.
[1115] China, first written submission, paras. 1245-1247.

to a loss of export sales, as it did not take lost export sales into account in assessing injury.[1116] Thus, according to the European Union, it was not necessary in the analysis of causation to separate out any "injury" caused by loss of export sales.

7.539 There is no dispute that one interested party argued this as an "other factor" allegedly causing injury during the original investigation.[1117] The European Union argues that its investigation already took account of this factor, "in so far as [this "other factor"] referred to loss of export sales, by simply not taking into account any injury that might have been attributed to that source."[1118] In addition, the European Union contends that the trade barriers referred to by China in this regard are of a long-term or permanent character, and as such could not have been the cause of injury to the EU industry, which had occurred recently.[1119] Finally, the European Union contends that it is not "enough for the investigating authorities to be told about some supposed 'other factor', without any supporting evidence being provided, in order for the factor to become 'known'."[1120]

7.540 We note that neither the Provisional Regulation nor the Definitive Regulation specifically addresses non-tariff barriers in European Union export markets as an "other factor" allegedly causing injury to the EU industry. However, as discussed above, the Provisional and Definitive Regulations conclude that the EU industry's export performance did not cause injury.[1121] We have rejected China's arguments that the Commission's conclusion of injury did not take account of the effects of declines in export sales.[1122] We also recall that an investigating authority may conclude, notwithstanding the arguments of an interested party, that an alleged "other factor" causing injury does not, in fact, cause injury to the domestic industry at the same time as dumped imports, in which case, it is in our view apparent that the investigating authority need not address it further.[1123] We have also found that while an investigating authority must consider the effects of other factors known to the investigating authority which may be causing injury to the domestic industry, there is no required method of analysis in undertaking that examination.[1124] Thus, despite the fact that it would have been clearer if the Commission had stated that non-tariff barriers were not a factor causing injury, we consider that this is implicit in the Commission's determination regarding loss of export sales. China has not explained how non-tariff barriers could be considered as an "other factor" causing injury other than in connection with their impact on export sales. Thus, we consider the Commission's conclusion to be sufficient, based on a reasonable interpretation of the facts, and one which could be reached by an unbiased and objective investigating authority on the basis of the information before it. We therefore reject this aspect of China's claim.

7.541 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union violated Article 3.5 of the AD Agreement in the Definitive Regulation by failing to examine known factors other than the dumped imports which were at the same time causing injury to the domestic industry, or by attributing injuries caused by these other factors to the dumped imports. Having found that there is no violation of Article 3.5, we consider that there is also no violation of Article 3.1 of the AD Agreement, and we therefore reject China's claim under that provision.

[1116] European Union, first written submission, para. 751.

[1117] FESI [Federation of the European Sporting Goods Industry] submission dated 23 August 2005, Exhibit CHN-93, p. 51.

[1118] European Union, first written submission, para. 751.

[1119] European Union, first written submission, para. 752.

[1120] European Union, first written submission, para. 752.

[1121] See paragraphs 7.521-7.522 above.

[1122] See paragraphs 7.520-7.523 above.

[1123] See paragraph 7.484 above.

[1124] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 178; *EC – Tube or Pipe Fittings*, para. 189; and *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 154.

7. Claims II.6, II.7, II.8, II.9, II.10, II.12, III.10, III.11, III.12, III.13, III.14 and III.19 – Procedural Issues

7.542 In this section of our report, we address China's claims of violations in the conduct of both the original investigation and the expiry review. While China argues these claims separately, there is a significant degree of overlap in its assertions, and in the factual situations underlying these claims. The specific provisions under which China asserts violations are Articles 6.1.1, 6.1.2, 6.2, 6.4, 6.5, 6.5.1, 6.5.2, 6.8, 6.9, and 12.2.2 of the AD Agreement. We examine each of China's claims below.

(a) Claim III.13 – Alleged violation of Article 6.1.1 of the AD Agreement and Paragraph 15(a)(i) of China's Accession Protocol – Failure to provide at least 30 days to reply to the MET/IT claim forms

7.543 In this section of our report, we address China's claim that the European Union acted inconsistently with Article 6.1.1 of the AD Agreement and Paragraph 15(a)(i) of China's Accession Protocol by failing to provide Chinese exporters with at least 30 days to reply to the MET/IT claim forms in the original investigation.

(i) Arguments of the parties

a. China

7.544 China asserts that the European Union violated Article 6.1.1 of the AD Agreement in the original investigation by providing less than 30 days for exporting producers to reply to the MET and/or IT questionnaires.[1125] According to China, the MET questionnaire is a questionnaire within the meaning of Article 6.1.1, because (i) it is the initial questionnaire for Chinese exporting producers; (ii) it explicitly provides that it may be subject to verification; and (iii) it does not constitute "any other request for information/clarification".[1126] In the alternative, China submits that the MET questionnaire is a part of the initial anti-dumping questionnaire, because provided the MET criteria are satisfied and an exporting producer obtains MET, through completion of the MET questionnaire, which in most cases is verified by the European Union, the Chinese exporting producers' data in the anti-dumping questionnaire is used by the European Union. Therefore, China contends 30 days for a reply should have been allowed.[1127] Furthermore, China claims that the European Union violated Paragraph 15(a) of China's Accession Protocol because the very short deadline granted precluded the exporters from fully exercising their rights of defence, as they were not granted a full opportunity to demonstrate that they operate under market economy conditions.[1128] In this regard, China points to Paragraph 151 of China's Accession Working Party Report and the chapeau of Article 6.1 of the

[1125] China, first written submission, para. 1346. China notes that the MET and IT "questionnaires" are a single document, but in its submission makes no specific reference to the IT aspect of these questionnaires. However, China notes that this should not be considered to imply that China has relinquished its claim concerning IT questionnaires. China, first written submission, fn. 865.

[1126] China, first written submission, paras. 1351-1352, citing Panel Report, *Egypt – Steel Rebar*, paras. 7.276-7.277. China submitted two such questionnaires to support its contentions concerning their significance, the level of information requested, and their alleged treatment by the European Union as the initial questionnaire in investigations concerning non-market economy countries. China, first written submission, paras. 1351-1352; MET and IT questionnaire, Exhibit CHN-77. China notes that the MET questionnaire states that where an interested party refuses access to, or otherwise does not provide, necessary information within the limits, or significantly impedes the investigation or supplies false or misleading information, claims for MET may be rejected, and asserts that this statement effectively implements Article 6.8 of the AD Agreement. China also argues that Annex I, paragraphs 6 and 7 of the AD Agreement provide contextual support for interpreting the term "questionnaire" as referring to questionnaires that may be subject to verification.

[1127] China, first written submission, para. 1359.

[1128] China, first written submission, para. 1347.

AD Agreement as support, arguing that, given the fundamental nature of the MET questionnaire for a Chinese exporting producer, 15 days for response to the detailed request for significant information in the MET questionnaire, to the extent and in the format and manner requested, does not provide Chinese exporters a full opportunity to defend their interests or to show that they operate under market economy conditions.[1129] China considers that the European Union's view that there is only one document that constitutes the questionnaire in an anti-dumping investigation is a false premise that rests on a restrictive reading of the report in *Egypt – Steel Rebar*.[1130] While it disagrees with the views of the panel in this regard in *US – Anti-Dumping and Countervailing Duties (China)*, China contends that this case, as well as the facts underlying the report in *Egypt – Steel Rebar*, are distinguishable.[1131] China notes the panel's conclusion in *US – Anti-Dumping and Countervailing Duties (China)* that the term "questionnaires", as used in Article 12.1.1 of the SCM Agreement, refers to the initial comprehensive questionnaire or set of questionnaires, [1132] and asserts in this regard that:

> "[i]f comprehensive questionnaires covering dumping (or subsidy), injury or causation are, even if sent separately, part of the same set of original questionnaires, then the MET questionnaire certainly is part of that same set of questionnaires, as it is a comprehensive questionnaire that concerns an important aspect of the investigation which is directly related to the dumping determination in case of non-market economy countries. As such, it should be seen as an extension of the "dumping" questionnaire in case of non-market economy countries."[1133]

China contends that all the relevant characteristics of a "questionnaire" are satisfied in the case of the MET questionnaire, asserting that it is a "comprehensive written enquiry carried out at the beginning of the investigation and backed up by a verification visit".[1134]

b. European Union

7.545 The European Union notes that the term "questionnaire" is not defined in Article 6.1.1, but considers that the panel in *Egypt – Steel Rebar* resolved this issue, and that there is only one document that constitutes the "questionnaire" in a dumping investigation, namely the initial questionnaire.[1135] The European Union notes that practical problems would arise were multiple documents subject to the 30 day response rule.[1136] In addition, the European Union contends that China does not articulate any claim based on China's Accession Protocol, noting, *inter alia*, that China's arguments in this regard refer to Paragraph 151 of China's Accession Working Party Report, which the European Union maintains does not impose any binding obligations on Members.[1137]

[1129] China, first written submission, paras. 1361-1363. In this regard, China points to the magnitude of the information solicited and the high burden of proof with respect to the MET criteria. China, first written submission, para. 1367.
[1130] China, second written submission, para. 1466.
[1131] China, answer to Panel question 100, referring to Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, and China, second written submission, para. 1467.
[1132] China, second written submission, para. 1469-1470.
[1133] China, second written submission, para. 1471.
[1134] China, second written submission, para. 1474.
[1135] European Union, first written submission, para. 801.
[1136] European Union, first written submission, paras. 803-805.
[1137] European Union, first written submission, paras. 808 and 810-813.

(ii) Arguments of third parties

a. United States

7.546 The United States considers that China's apparent assumption that the term "questionnaires" in Article 6.1.1 encompasses *any* request for information made by an investigating authority is inconsistent with the views of the panel in *Egypt – Steel Rebar*, which explained that the context of Article 6.1.1 reveals that the term "questionnaire" for purposes of the AD Agreement refers to one *particular* request for information made by the investigating authority, specifically, the original antidumping questionnaire in an investigation. The United States asserts that the opportunity provided by an investigating authority to permit Chinese companies to claim market economy treatment or individual treatment is a precursor to the issuance of the actual antidumping questionnaire, and therefore not subject to the obligations in Article 6.1.1.[1138] The United States notes that the panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected a similar claim by China under Article 12.1.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), a provision almost identical to Article 6.1.1 of the AD Agreement.[1139]

(iii) Evaluation by the Panel

7.547 Before addressing China's claims, we recall the facts pertinent to this aspect of the dispute, which we understand to be undisputed. The Notice of Initiation of the original investigation indicated that "Duly substantiated claims for market economy treatment (as mentioned in point 5.1(e)) and/or for individual treatment pursuant to Article 9(5) of the basic Regulation, must reach the Commission within 15 days of the publication" of the Notice.[1140] Forms for making such claims, entitled "Form for Companies Claiming Market Economy Status and/or Individual Treatment in Anti-Dumping Proceedings",[1141] were sent to Chinese exporting producers. Chinese exporting producers were given the 15 days mentioned in the Notice to respond.

7.548 Article 6.1.1 of the AD Agreement provides, in pertinent part:

> "6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.
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> [15] As a general rule, the time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory."

[1138] United States, third party written submission, paras. 50-52. The United States notes that in China's own practice in countervailing duty cases, where Article 12.1.1 of the SCM Agreement, similarly to Article 6.1.1 of the AD Agreement, establishes a minimum 30-day response period to questionnaires in CVD investigations, China's investigating authority appear to recognize that the 30-day time period for reply does not apply to every request for information made by an investigating authority. United States, third party written submission, para. 53.

[1139] United States, oral statement, para. 29.

[1140] Notice of Initiation, Exhibit CHN-6, recital 6(d).

[1141] MET and IT Questionnaire, Exhibit CHN-77.

The fundamental questions before us, therefore, are what is the meaning of "questionnaire" in this provision, and whether the MET/IT claim forms which are the subject of China's claim constitute such a "questionnaire".

7.549 These are not questions of first impression. In addition to the reports of the panels in *Egypt – Steel Rebar* and *US – Anti-Dumping and Countervailing Duties (China)*, referred to by the parties and third party as relevant in this regard, we note that the recent report of the panel in *EC – Fasteners (China)* addressed precisely these questions, under Article 6.1.1 of the AD Agreement, in a case involving the same parties, the European Union and China, concerning essentially the same document, that is, a form for claiming MET and/or IT status in anti-dumping investigations conducted by the Commission involving non-market economies, in that case, China.[1142] With the exception of China's reliance on Paragraph 15(a)(i) of its Protocol of Accession, which we address below, the arguments in *EC – Fasteners (China)* were substantially the same as those before us here. Nothing in China's arguments concerning the meaning of Article 6.1.1 in the context of the MET/IT claim forms in question in this dispute leads us to conclude that a different outcome from that reached by the panel in *EC – Fasteners (China)* is warranted in this case.

7.550 The panel in *EC – Fasteners (China)* considered the ordinary meaning of the term "questionnaire" as used in Article 6.1.1, in context, and in light of practical considerations in the conduct of anti-dumping investigations. That panel concluded that

> "the term "questionnaires" in Article 6.1.1 refers to one kind of document in an investigation. Turning to the question of what that document might be, we note that the considerations of context referred to above suggest that it refers to the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which questionnaire seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation)."[1143]

We agree with this conclusion, and the analysis on which it is based, and adopt them as our own.

7.551 China contends that the MET/IT claim form in question should be considered a "questionnaire" within the meaning of Article 6.1.1, given that it is sent at the outset of the investigation to obtain information from Chinese exporting producers concerning whether market economy conditions prevail for the producers with regard to the manufacture, production and sale of the product under investigation. China observes that this is the ""initial" questionnaire" received by those producers, and the "first questionnaire in an anti-dumping investigation concerning Chinese exporting producers".[1144] Moreover, China asserts that the MET/IT claim form is a "properly drafted, standard and detailed questionnaire requiring extremely detailed information on the MET criteria" and is, moreover, subject to verification.[1145] Alternatively, China asserts that, even if it is not considered a

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[1142] Panel Report, *EC – Fasteners (China)*, paras. 7.562-7.579.

[1143] Panel Report, *EC – Fasteners (China)*, para. 7.574 (footnote 1122 omitted). The panel noted that it "recognize[d] that there may be differences in the initial comprehensive questionnaires sent to the different interested parties, reflecting their different activities and interests in the investigation. Moreover, depending on how a Member organizes the conduct of anti-dumping investigations, there may be separate and distinct initial questionnaires concerning the issues of dumping and injury and causation. These circumstances do not affect our fundamental conclusion, that the initial comprehensive document, or set of documents, covering all of these issues are encompassed by the term "questionnaires" in Article 6.1.1."
Id., footnote 1123.

[1144] China first written submission, para. 1351.

[1145] China, first written submission, paras. 1352 and 1357.

questionnaire within the meaning of Article 6.1.1, the MET/IT claim form is a "part of the initial anti-dumping questionnaire to be completed by a Chinese exporting producer", and therefore the minimum 30 day period to respond should apply.[1146]

7.552 Similar arguments were rejected by the panel in *EC – Fasteners (China)*.[1147] Like that panel, we do not agree that the MET/IT claim form in question can be considered a "questionnaire" within the meaning of Article 6.1.1, as we understand that term. China refers to this document as a "questionnaire" throughout its arguments, while the European Union, referring to its title, contrasts it with the "main document sent to sampled exporters/producers [which is entitled] 'ANTI-DUMPING QUESTIONNAIRE'".[1148] While we have referred to the document by an abbreviation of its actual title, as a "MET/IT claim form", we give no significance to the title of the document in our analysis of China's claims.

7.553 We certainly do not agree with China's contention that the MET/IT claim form is the "original questionnaire". As the panel in *EC – Fasteners (China)* observed, in our view correctly, "merely that it is the first request for information sent to Chinese exporters does not, *ipso facto*, demonstrate that it is a questionnaire within the meaning of Article 6.1.1."[1149] Looking at the MET/IT claim form in question,[1150] we agree with the panel in *EC – Fasteners (China)* that it

> "clearly is not a comprehensive questionnaire seeking all the information on the issues of dumping, injury and causation that the investigating authority considers will be required, at least at the outset of the investigation, in order to make its determinations on those issues consistently with the requirements of the AD Agreement. Rather, it elicits information relevant to the market economy test and individual treatment test applied by the European Union in anti-dumping investigations involving certain non-market economies."[1151]

As the panel in *EC – Fasteners (China)* observed, these questions are not relevant in all investigations, and are not directly related to the determinations of dumping, injury and causation required by the AD Agreement. Rather, they are questions which are properly treated as preliminary requests for information, necessary for the investigating authority to determine, *inter alia*, which interested parties will receive the comprehensive questionnaires that are within the scope of Article 6.1.1.[1152] While we recognize that the resolution of MET and IT claims is important for the Chinese exporting producers in an anti-dumping investigation, we do not consider that this changes the nature of the MET/IT claim form, or brings it within the scope of Article 6.1.1. Finally, we also consider persuasive the point made by the panel in *EC – Fasteners (China)*, that, to treat the MET/IT claim form in question as a "questionnaire" within the meaning of Article 6.1.1

> "would mean that a subsequently issued comprehensive questionnaire seeking all the relevant information needed for the determinations of dumping, injury and causation would be something other than a "questionnaire" within the meaning of Article 6.1.1.

[1146] China, first written submission, para. 1359.
[1147] Panel Report, *EC – Fasteners (China)*, paras. 7.576-7.577.
[1148] European Union, first written submission, para. 806.
[1149] Panel Report, *EC – Fasteners (China)*, para. 7.576.
[1150] MET and IT Questionnaire, Exhibit CHN-77.
[1151] Panel Report, *EC – Fasteners (China)*, para. 7.577.
[1152] Panel Report, *EC – Fasteners (China)*, para. 7.577. Moreover, while China places considerable emphasis on the extent of information requested and the effort required to respond, in our view these considerations do not affect the nature of the documents in question. We note that China has made no claim independent of Article 6.1.1, with the exception of its claim under Paragraph 15(a)(i) of China's Accession Protocol, arguing that the 15-day period for response was unreasonably short.

> This would, in our view, deny exporters precisely the right that is afforded them by that provision, a result we find untenable."[1153]

7.554 We therefore conclude that the "Form for Companies Claiming Market Economy Status and/or Individual Treatment in Anti-Dumping Proceedings" at issue in this dispute is not a "questionnaire" within the meaning of Article 6.1.1,[1154] and that therefore, the European Union did not violate Article 6.1.1 of the AD Agreement by not providing Chinese exporters with 30 days to submit their responses.

7.555 Turning to China's claim that the European Union violated Paragraph 15(a)(i) of China's Accession Protocol, we note that beyond invoking this provision, China has presented no substantive arguments concerning its text, meaning or import. China asserts that:

> "through the terms of Paragraph 151 of the Working Party Report on the Accession of China to the WTO, all WTO Members including the European Union agreed that : "*in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members" ... "provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case."* [1155]

China then notes the chapeau of Article 6.1 of the AD Agreement, which provides that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in questions."[1156] China goes on to point out the importance of the MET/IT claim form for the determination whether a Chinese exporting producer will be considered for market economy treatment, and emphasizes the volume of detailed information required by the form, asserting that "in light of the burden of proof imposed on the Chinese exporting producers to be demonstrated within the extremely short 15 days deadline is extensive and effectively does not provide them a *'full opportunity to defend their interests'*, Chinese producers do not have ample opportunity to show that they operate under market economy conditions".[1157]

7.556 As we understand it, therefore, China's claim is that the extent and degree of detail and complexity of the information requested in the MET/IT claim form is such that a 15-day deadline to respond deprives Chinese exporting producers of a full opportunity to defend their interests, as provided for in Article 6.1 of the AD Agreement, and mentioned in Paragraph 151 of China's Accession Working Party Report, resulting in a violation of Paragraph 15(a)(i) of the Protocol.

7.557 The difficulty we have with China's claim is that we see nothing in the provision of China's Accession Protocol invoked by China which can serve as a legal basis for the claim asserted. Paragraph 15 of China's Accession Protocol reads, in pertinent part:

> "Price Comparability in Determining Subsidies and Dumping
>
> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

[1153] Panel Report, *EC – Fasteners (China)*, para. 7.578.

[1154] We emphasize that our conclusion is not based on the name of the document, but on our consideration of its substance and its purpose in anti-dumping investigations conducted by the European Union.

[1155] China, first written submission, para. 1361 (italics in original).

[1156] China, first written submission, para. 1361.

[1157] China, first written submission, para. 1363 (italics in original).

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

While this provision clearly gives Chinese producers under investigation a right to the use of Chinese prices or costs for the industry under investigation in determining price comparability **if** they can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, there is nothing in this provision concerning full or ample opportunity to defend their interests. Nor does this provision address anything about procedures or methodologies for making the necessary showing that market economy conditions prevail, or standards for judging whether the necessary showing has been made.

7.558 It is true that Article 6.1 of the AD Agreement provides that interested parties shall be given "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation". However, even assuming the information requested in the MET/IT claim forms constitutes "evidence ... relevant" to the investigation, a question we do not address, China has made no claim under Article 6.1 concerning the MET/IT claim forms, although its argument refers to this provision.

7.559 It is also true that Paragraph 151 of China's Accession Working Party Report states:

> "members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following: ...
>
> (d) The importing WTO Member should give notice of information which it required and provide Chinese producers and exporters ample opportunity to present evidence in writing in a particular case.
>
> (e) The importing WTO Member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case."

However, as discussed elsewhere in this report,[1158] this paragraph of China's Accession Working Party Report is not binding upon the European Union or other WTO Members. Paragraph 1.2 of China's Accession Protocol establishes that China's Accession Protocol is an integral part of the WTO Agreement, and thus establishes rights and obligations of WTO Members. However, the only commitments in China's Accession Working Party Report which are included in China's Accession Protocol, and thus constitute binding obligations, are those referred to in Paragraph 342 of China's Accession Working Party Report. These do not include Paragraph 151 of China's Accession Working Party Report. Therefore, Paragraph 151 does not establish any binding obligation on the European Union, or any other WTO Member. Moreover, subparagraphs (d) and (e) of that Paragraph, quoted above, essentially reiterate the requirements of Articles 6.1 and 6.2 of the AD Agreement, which already bind all WTO Members in the context of anti-dumping investigations of imports from

[1158] See paragraphs 7.180-7.185 above.

all WTO Members, including China. Thus, there would be no reason for Members to agree to additional binding provisions in this regard in the context of China's accession, and we cannot conclude that they did so. Moreover, even had they done so, China's claim purports to arise under Paragraph 15(a)(i) of the Protocol, and not Paragraph 151 of China's Accession Working Party Report, although China refers to the latter in its argument.

7.560 Based on the foregoing, we conclude that there is no legal basis for China's claim with respect to the 15-day deadline for submitting MET/IT claim forms under Paragraph 15(a)(i) of China's Accession Protocol, and therefore dismiss China's claim.

(b) Claim II.6 – Alleged violation of Article 6.1.2 – Failure to make evidence available promptly

7.561 In this section of our report, we address China's claim that the European Union acted inconsistently with Article 6.1.2 of the AD Agreement in the expiry review by not making certain evidence presented in writing available "promptly" to other interested parties.

(i) Arguments of the parties

a. China

7.562 China considers, consistent with the dictionary meaning of the term "prompt", that evidence presented in writing by an interested party should be made available to other interested parties "quickly" and "without delay".[1159] China argues that: (i) although companies C, B and G submitted non-confidential versions of their injury questionnaire responses and did not request confidential treatment, the Commission did not make these responses available "promptly" to interested parties, considering, on its own initiative, that some information in those responses was confidential; (ii) the revised questionnaire response of Company H, the original of which could not be printed or was not legible, was not made available promptly; and (iii) the Union Interest questionnaire responses of five sampled EU producers were not made available at all.[1160]

7.563 Relying on the views of the panel in *Guatemala – Cement II*, China argues that Article 6.1.2, read together with Article 6.5, makes clear that (i) an investigating authority may not delay making evidence available simply because of the possibility, unsubstantiated by any request for confidential treatment, that the evidence contains confidential information; (ii) it is not for an investigating authority, on its own, to speculate or judge whether there is confidential information or not in a document submitted by an interested party; and (iii) it is the party submitting the evidence that has to request confidential treatment and demonstrate "good cause" for confidentiality and in the absence thereof, the investigating authority's obligation is to promptly make available the evidence submitted by one interested party to all other interested parties.[1161] China disagrees with the European Union's contention that the "promptness" requirement in Article 6.1.2 starts running after the investigating authority has ensured that the non-confidential submission does not contain confidential information,

[1159] China, first written submission, para. 659; answer to Panel question 64.

[1160] China, first written submission, paras. 638, 645-656 and 662; answer to Panel question 65; second written submission, paras. 887, 894-902 and 905. Furthermore, concerning the questionnaire response of Company H, China argues that while this company's response was not made available to interested parties because it could not be printed/was not legible, the Commission did not make available the revised questionnaire response of this company promptly either. That revised response was made available 5 days after its submission. China considers this delay to have been in addition to the 15-days it took to obtain a legible response from the company. In China's view, this demonstrates the lack of promptness in making available the evidence submitted by interested parties. China, first written submission, paras. 654-655; answer to Panel question 64; second written submission, para. 905.

[1161] See, e.g. China, fist written submission, paras. 641-643; answer to Panel question 58; second written submission, para. 862.

which China considers to be an unjustified "checking action" in the absence of a request for confidential treatment and "good cause" showing by the submitter of the non-confidential version.[1162]

7.564 China asserts that the facts in this dispute are similar to those examined by the *Guatemala – Cement II* panel. In particular, China argues that the European Union has adduced no evidence to demonstrate that the sampled producers concerned requested confidentiality and showed "good cause" for confidential treatment of the parts of the questionnaire response which the European Union claims were confidential. China argues that in the expiry review there were no requests for confidential treatment other than for the names of the complainants and that the confidentiality granted to the names of these complainants could not be extended automatically to other information provided in the questionnaire responses.[1163]

7.565 China disagrees with the European Union's view that investigating authorities "are entitled, indeed they are bound" to ascertain the true confidential status of evidence before they make it available to interested parties. For China, investigating authorities receiving evidence labelled as "non-confidential" have an unambiguous obligation to make it promptly available to interested parties, without any consideration of whether or not the evidence is, in fact, properly labelled as "non-confidential". In this regard, China argues that a party submitting a non-confidential questionnaire response is fully cognizant of the fact that the information may be disclosed. In addition, China considers that the panel in *Guatemala – Cement II* made it clear that it is not for the investigating authorities to judge or speculate whether there is confidential information or not in a document submitted by an interested party. Consequently, China argues, it is not for the investigating authorities to identify concerns, explain their concerns to the interested party and seek the approval of the interested party as to whether or not there is confidential information in a non-confidential questionnaire response.[1164]

7.566 China further considers that the European Union's position, if accepted, would lead to a situation not foreseen in the AD Agreement: a process whereby investigating authorities would effectively take over the task of interested parties to judge what information is confidential and what information is submitted on a confidential basis. This, in China's view, is neither the object nor the purpose of Article 6.5 whether read in isolation or in the context of Article 6.1.2. China also considers that the European Union's interpretation could very well result in the situation the panel in *Guatemala – Cement II* expressly warned against: circumvention of the specific requirement of Article 6.1.2, undermining the purpose of that provision. In any event, China argues, that were the Panel to agree with the European Union's position, the European Union nonetheless violated Article 6.1.2 by not making the other parts of the questionnaire responses of companies C, B and G, which were clearly non-confidential, available "promptly".[1165]

b. European Union

7.567 The European Union submits that the Commission properly invoked confidentiality as a reason for delaying the release of information and disagrees that the panel report in *Guatemala – Cement II* precludes its actions in this respect. In that case, the European Union argues, there was no request for confidential treatment, and the Guatemalan investigating authority, acting on its own initiative, delayed the release of evidence simply because of the possibility that it might contain confidential information. The European Union contends that in the expiry review at issue here, justified requests for confidential treatment had been made and granted, and the Commission had very

[1162] China, first written submission, para. 659; answer to Panel question 64; second written submission, paras. 892-893, citing Panel Report, *Guatemala – Cement II*, paras. 8.135, 8.141-8.143 and 8.220.
[1163] China, second written submission, paras. 864-868, 881-882 and 884.
[1164] China, answer to Panel question 58; second written submission, paras. 869-874.
[1165] China, second written submission, paras. 876-877 and 904.

good reasons to believe that the questionnaire responses submitted as "non-confidential versions" contained information that the producers wanted to be covered by these prior requests for confidential treatment.[1166]

7.568 The European Union argues that the situation facing the Commission when it received the questionnaire responses from the sampled EU producers was that a request had been made for confidential treatment of the identities of the firms supporting the review request, and the Commission had concluded that there was good cause for this demand and decided to treat the information as confidential. However, despite the parties' request for confidential treatment, the Commission considered that certain information in the non-confidential versions of their questionnaire responses could, if made available to other interested parties, have disclosed the identities of the companies supplying the responses, the very information for which confidential treatment had been sought and granted. Given this apparently contradictory behaviour on the part of the companies, the Commission concluded that there was a serious possibility that they had not understood the nature of this aspect of the procedure, and therefore decided that there were serious doubts whether the companies actually intended the information in question to be released.[1167] The Commission therefore delayed the release of the non-confidential questionnaire responses until it had clarified the producers' intentions regarding confidential treatment of information.[1168]

7.569 The European Union argues that investigating authorities are entitled, indeed are bound, to ascertain the true status of information about which there is real uncertainty concerning its confidential status before they make it available to interested parties. The European Union relies on the text of Article 6.5 of the AD Agreement, which provides for the protection of confidential information. The European Union argues that in order to secure that protection it is the investigating authority's duty to clarify a party's intentions regarding confidentiality where the investigating authority is uncertain about them. The European Union further considers that the investigating authority's determination in this regard should also be guided by the requirement in Article 6.13 that investigating authorities "take due account of any difficulties experienced by interested parties in supplying information requested". In the European Union's view, the "information requested" includes information that was intended to justify claims for confidential treatment.[1169]

7.570 Furthermore, the European Union contends that the non-confidential versions of the responses were in any event made available to interested parties "promptly". The European Union considers that the period for assessing prompt availability runs from the time when the non-confidential status of evidence has been determined.[1170] The European Union is also of the view that whether information is made available "promptly" must be assessed by weighing up the reasons for delay, on the one hand, and the obligation of promptness, on the other hand. As regards the first factor, the European Union considers that account must be taken of the importance that the AD Agreement places on respect for confidentiality of information. With respect to the second factor, the European Union notes that the AD Agreement provides no guidance as to how much weight should be accorded to the "promptness" obligation where it is in conflict with the right to confidential treatment. The European Union considers that in this situation one element to be taken into account is the right of interested parties to defend their interests and the guidance provided in this context by Article 6.4. In

[1166] European Union, first written submission, paras. 357 and 360; answer to Panel question 61; opening oral statement at the second meeting with the Panel, fn. 230.

[1167] The European Union asserts that this conclusion was reinforced by the fact that the companies did not have legal assistance in completing the questionnaires. European Union, opening oral statement at the second meeting with the Panel, para. 236.

[1168] European Union, first written submission, para. 360; opening oral statement at the second meeting with the Panel, paras. 231-239.

[1169] European Union, first written submission, paras. 358-359; answer to Panel question 60; opening oral statement at the second meeting with the Panel, fn. 229.

[1170] European Union, first written submission, para. 370; answer to Panel question 64.

this case, the European Union notes that the non-confidential versions of the questionnaire responses were released in late 2008, i.e. one year before the Review Regulation was adopted, and therefore interested parties had many months in which to study and prepare their reactions to those responses.[1171]

7.571 With respect to the Union Interest questionnaire responses of five sampled EU producers, the European Union rejects China's claims as a matter of fact. It submits that, as stated during the first substantive meeting with the Panel, only three responses to the Union Interest questionnaires were received from the sampled EU producers, and all of these responses were made available to interested parties, a fact China does not dispute. The European Union also argues that, contrary to China's assertion, it is China as the complainant that bears the burden of proving the factual assertions underlying its claims.[1172]

(ii) Evaluation by the Panel

7.572 Article 6.1.2 of the AD Agreement provides:

> "6.1.2 **Subject to the requirement to protect confidential information**, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation." (emphasis added)

Article 6.1.2 thus imposes an obligation on investigating authorities to make evidence available promptly to other interested parties participating in the investigation. The text of Article 6.1.2 makes it clear, however, that this obligation is "subject to the requirement to protect confidential information".

7.573 China alleges that the European Union violated this provision in the Review Regulation by failing to make certain evidence available "promptly". We consider each of China's allegations of error below.

7.574 With respect to the facts, there is no dispute between the parties that the questionnaire responses at issue in this claim constitute "evidence presented in writing", and therefore are subject to the requirements of Article 6.1.2, to the extent they are not confidential. Nor is there any dispute that the evidence was made available to other interested parties.[1173] The issue in this claim concerns whether the European Union complied with the requirement to make the evidence available "promptly".

a. non-confidential injury questionnaire responses of four sampled EU producers

7.575 China claims that the European Union violated Article 6.1.2 (i) because the Commission delayed in making available, on the grounds that responses contained confidential information, the non-confidential injury questionnaire responses of company B, C and G, even though these producers did not request confidential treatment of information in those responses; and (ii) because the

[1171] By way of contrast, the European Union notes that the delay that was considered in *Guatemala – Cement II* was such that the period between the release of the information and the imposition of definitive measure was only nine days. European Union, opening oral statement at the second meeting with the Panel, paras. 240-244.

[1172] European Union, second written submission, para. 177; answer to Panel question 63; opening oral statement at the second meeting with the Panel, para. 228.

[1173] As discussed below, the European Union asserts that certain of the questionnaire responses at issue in this claim were not made available to interested parties because they were never in fact submitted to the Commission, but does not dispute that those that were submitted fall within the scope of Article 6.1.2.

Commission did not make available "promptly" to interested parties the injury questionnaire responses of company B, C, G and H.[1174]

7.576 With respect to the first aspect of China's claim, we note certain relevant facts. The evidence before us indicates, and the European Union itself acknowledges, that the Commission withheld the non-confidential injury questionnaire responses of companies B, C and G from the non-confidential file while it checked the confidential status of information in those responses with those producers.[1175] The European Union explained, in the course of this proceeding, that the Commission had received a request, which it considered justified and granted, for confidential treatment of the identities of the EU producers.[1176] Subsequently, the Commission received the "non-confidential" questionnaire responses of parties whose identities were confidential information, and which appeared to contain information which, if made available to other interested parties, would disclose that confidential information. As a result, the Commission sought to clarify the intentions of the producers regarding the confidentiality of certain information in their responses that could, if made available to other parties, have led to their identities being disclosed. In order to do so, the Commission, delayed the release of the non-confidential responses in question.[1177]

7.577 China does not dispute the European Union's explanation of the delay in releasing the non-confidential versions of the questionnaire responses in question. However, China asserts that the European Union provided no evidence demonstrating that the delay occurred because of the Commission's uncertainties with respect to the producers' intentions regarding confidentiality.[1178] Moreover, China asserts that it is for the submitter of information to decide whether information is confidential, and therefore investigating authorities receiving evidence labelled as "non-confidential" must make it available without any consideration as to whether or not the evidence is, in fact, properly treated as "non-confidential".[1179]

7.578 We note that it clear as a matter of fact that a request for confidential treatment of the identities of EU producers had been received by the Commission and granted. In this circumstance, we do not consider that evidence of the reason for the delay, that is evidence to support the European Union's explanation for that delay, which China does not dispute, is necessary in order for us to evaluate the parties' arguments with respect to the European Union's actions under Article 6.1.2.

7.579 We do agree with China that it is for the submitter of information to seek confidential treatment of information, as provided for in Article 6.5 of the AD Agreement. However, we note that Article 6.5 places an obligation on the investigating authority to not disclose confidential information, providing that "[s]uch [i.e. confidential] information **shall not be disclosed** without the specific permission of the party submitting it". We consider that Article 6.1.2 cannot be understood to require an investigating authority to make evidence available promptly in a situation where the investigating authority has a justified concern as to the possible disclosure of confidential information should it disclose the evidence in question.

7.580 We recall that the obligation to make evidence available "promptly" in Article 6.1.2 is "subject to" the requirement to protect confidential information. In this case, the European Union has explained that the Commission delayed the release of the "non-confidential" questionnaire responses of the producers concerned in order to ensure that it did not disclose information concerning their

[1174] China, first written submission, para. 643.
[1175] Response from European Commission to the EFA dated 8 May 2009, Exhibit CHN-51, pp. 5-6.
[1176] The Commission's grant of confidential treatment in this regard is the subject of China's claim under Article 6.5 of the AD Agreement, addressed below at paragraphs 7.667-7.807.
[1177] See, e.g. European Union, opening oral statement at the second meeting with the Panel, paras. 234-240.
[1178] China, second written submission, para. 903.
[1179] China, answer to Panel question 58; second written submission, para. 874.

identities which had been granted confidential treatment. We see nothing in the AD Agreement, including in Article 6.1.2, that would preclude an investigating authority from seeking to ascertain the confidential status of information submitted by an interested party in order to ensure that the investigating authority does not violate Article 6.5 by disclosing information it has a justified reason to believe may be confidential.[1180] In this case, we agree with the European Union that, having granted confidential treatment to the identities of EU producers, when the Commission received questionnaire responses which appeared to contain information which, if made available to interested parties, would disclose the identities of the producers submitting the information, the Commission was entitled to ascertain the facts to avoid itself violating Article 6.5. We note in this regard that we have found that the European Union's grant of confidential treatment to this information was not inconsistent with Article 6.5 of the AD Agreement.[1181] In these circumstances, we reject China's arguments in this regard.

7.581 Turning to the second aspect of China's claim, concerning the alleged failure of the Commission to make available "promptly" the questionnaire responses of Company B, C, G and H, we note the following facts. **Company B** submitted its non-confidential questionnaire response on 19 November 2008. The response was not made available because it contained information which had to be further discussed with the company, namely the information contained in table D of the questionnaire.[1182] On 28 November 2008, that is, nine days later, the non-confidential questionnaire response was added to the non-confidential file.[1183] **Company C** submitted its first non-confidential version of the questionnaire response on 20 November 2008. However, due to confidentiality issues, this response was not immediately added to the non-confidential file. The same was the case for

[1180] China's arguments are mainly premised on the panel report in *Guatemala – Cement II*. However, we do not consider that report to be pertinent to the issue before us. In that case, there was no request for confidential treatment of information by the submitter of the evidence in question. The investigating authority failed to make information available until shortly before the final determination based on a "possibility" that the evidence contained confidential information. Given that the asserted possibility was unsubstantiated by a request for confidential treatment from the submitter of the evidence, the panel concluded that the delay was inconsistent with Article 6.1.2. In this case, however, the facts are different, as the Commission's concern that the evidence in question contained confidential information is substantiated by a previous request for confidential treatment of information, which the Commission had deemed justified and granted.

[1181] See paragraph 7.762 below.

[1182] Response from European Commission to the EFA dated 8 May 2009, Exhibit CHN-51, p. 5; Letter of the DG Trade dated 21 September 2009, Exhibit EU-21, p. 5.

[1183] Letter of the DG Trade dated 21 September 2009, Exhibit EU-21, p. 5. China asserts that the non-confidential injury questionnaire response of Company B was only made available to interested parties around 12 December 2008. In support of its assertion, China provided, as an "additional issue" to its replies to Panel questions after the second substantive meeting, a copy of e-mail exchanges between the Commission and legal counsel for the European Footwear Alliance (EFA) concerning the questionnaire responses of the sampled producers at issue. China requests that the Panel consider this evidence, arguing that its delayed submission was due to technical issues on account of which the e-mails could not be retrieved earlier. China, replies to Panel questions after the second meeting, "additional issues" at pp. 31-33. We deny China's request. China's evidence was not submitted before or during our first substantive meeting with the parties, nor was it submitted in connection with China's rebuttal or questions from the Panel, as required by our working procedures. We do not consider China's justification to constitute "good cause" for an exception to those procedures. We agree with the European Union that China could have signalled that it was having technical problems in retrieving evidence it wished to submit at an earlier stage of the proceedings, rather than waiting to provide the evidence in its last submission to the Panel. European Union, Comments on China's responses to the second set of questions from the Panel, para. 4. In any event, the evidence does not, in our view, support China's assertion. The e-mails only indicate (i) that EFA, on 3 and 9 December 2008, requested information regarding whether the response of Company B had been received, and if so, whether EFA could schedule an appointment to copy this response; and (ii) that the Commission, in response, set 12 December 2008 for the parties to see the requested information. Exhibit CHN-135. However, this does not demonstrate that the injury questionnaire response of Company B was only added to the non-confidential file on 12 December 2008, as opposed to 28 November 2008 as asserted by the European Union.

Company C's second submission. The final non-confidential response of Company C was submitted on 15 December 2008, and was added to the non-confidential file, but the evidence does not make clear when this occurred.[1184] The European Union asserts that it was made available immediately, on 15 December 2008, that is, 25 days after the original submission, while China argues that it was made available after that date, but does not specify a date. **Company G** submitted its non-confidential questionnaire response on 17 November 2008. This response was withheld due to confidentiality issues. The revised version of Company G's non-confidential response, submitted on 26 November 2008, was added to the non-confidential file as of 27 November 2008, that is, 9 days after the original submission.[1185] **Company H** submitted its non-confidential questionnaire response on 19 November 2008, but due to a technical error it could not be read or printed. A printable version of the response was submitted on 5 December 2008.[1186] The evidence does not indicate when this version was added to the non-confidential file. China asserts, and the European Union does not dispute, that Company H's non-confidential questionnaire response was made available to interested parties around 9 December 2008.[1187]

7.582 We recall that we have concluded above that the European Union was entitled to delay making available the non-confidential questionnaire responses while it determined whether to do so would disclose information which could result in the disclosure of confidential information. Thus, the periods during which the Commission consulted with Companies B, C, and G in this regard do not, in our view, demonstrate a failure to make evidence available promptly to other interested parties within the meaning of Article 6.1.2. Consequently, the periods of delay which we must consider in determining whether the European Union acted inconsistently with Article 6.1.2 are as follows:

(a) **Company B** – some unspecified period less than 9 days

(b) **Company C –** either none, or some unspecified period

(c) **Company G** – 1 day

We do not consider that these periods constitute delays which establish that the European Union failed to make evidence available promptly to other interested parties. We recall that the expiry review was initiated on 3 October 2008, and the final determination was issued on 22 December 2009. As best we can determine from the evidence before us, the non-confidential versions of these three producers questionnaire responses were made available to interested parties no later than mid-December 2008, within a few days of the Commission ascertaining whether making them available to interested parties would disclose confidential information.

7.583 The word "promptly" is defined as "in a prompt manner, without delay"[1188] and "[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then".[1189] In our view, these definitions do not support the conclusion that information must be made available immediately in order to comply with Article 6.1.2. We consider that to make evidence available promptly must be understood **in the context of the proceeding in question**. In the context of a proceeding lasting months, where there are numerous opportunities for the parties to participate in the investigation after the evidence has been made available, we consider that the delays in this case do not establish a

[1184] Response from European Commission to the EFA dated 8 May 2009, Exhibit CHN-51, p. 5.
[1185] Response from European Commission to the EFA dated 8 May 2009, Exhibit CHN-51, p. 6.
[1186] Response from European Commission to the EFA dated 8 May 2009, Exhibit CHN-51, p. 6.
[1187] China, first written submission, paras. 654-655; European Union, first written submission, para. 368.
[1188] New Shorter Oxford English Dictionary, Clarendon Press, 1993.
[1189] Oxford English Dictionary, on-line edition, consulted 27 March 2011.

violation of Article 6.1.2, and we therefore reject China's claim with respect to Companies B, C and G.

7.584 **Company H** submitted its non-confidential questionnaire response on 19 November 2008, but due to a technical error it could not be read or printed. A printable version of the response was submitted on Friday, 5 December 2008.[1190] The evidence does not indicate when this version was added to the non-confidential file. China asserts, and the European Union does not dispute, that Company H's non-confidential questionnaire response was made available to interested parties around Tuesday, 9 December 2008.[1191]

7.585 China considers that the European Union should be held responsible for the entire delay, from the original date of submission of an unusable version of Company H's questionnaire response until 9 December 2009. We do not agree. We consider that Article 6.1.2 cannot be understood as requiring an investigating authority to make available evidence which it does not have in a usable form, as in this case, Company H's questionnaire response which could not be read or printed until 5 December 2008. Therefore, the only delay with respect to making Company H's questionnaire response available was from Friday, 5 December until Tuesday, 9 December, or 4 days, including a weekend. In the context of this proceeding, where there are numerous opportunities for the parties to participate in the investigation after the evidence has been made available, we consider that this 4-day delay does not establish a violation of Article 6.1.2, and we therefore reject China's claim with respect to Company H.

b. non-confidential Union Interest questionnaire responses of five sampled EU producers

7.586 China claims that while the eight sampled EU producers in the expiry review were required to complete the Union Interest questionnaire, only the responses of three producers were made available in the non-confidential file and therefore the European Union violated Article 6.1.2 of the AD Agreement by failing to make available the questionnaire responses of the remaining five sampled producers.

7.587 At the first meeting with the parties, the European Union indicated that only three responses to the Union Interest questionnaires were in fact received from the sampled EU producers, and that the non-confidential versions of these responses were made available in the non-confidential file.[1192] China does not dispute that three responses were made available promptly, but maintains that the European Union has provided no proof that the other five EU producers did not submit a response, and did not mention this in its first written submission, the Review Regulation, or any Note for the File during the investigation, , despite repeated requests of interested parties for clarification regarding the absence of the non-confidential Union interest questionnaire responses of these five producers. In particular, China argues that in the absence of any proof from the European Union establishing that the five sampled EU producers did not submit Union Interest questionnaire responses, its claim under Article 6.1.2 stands. China requests the Panel to ask the European Union to provide some correspondence or other proof to substantiate its assertion that the five sampled producers did not provide responses to the Union Interest questionnaire.[1193]

[1190] Response from European Commission to the EFA dated 8 May 2009, Exhibit CHN-51, p. 6.

[1191] China, first written submission, paras. 654-655; European Union, first written submission, para. 368.

[1192] In its subsequent submissions, the European Union restated its assertion that only three responses to the Union Interest questionnaires were received from the sampled EU producers. See, generally, European Union, answer to Panel question 63; second written submission, paras. 163-179.

[1193] See, e.g. China, answer to Panel question 57; second written submission, paras. 859-860; opening oral statement at the second meeting with the Panel, para. 62.

7.588 Despite China's suggestion that the European Union failed to engage in dispute settlement procedures in good faith by not indicating earlier that the five EU producers in question did not submit Union Interest questionnaire responses, when it would have known this since January 2009[1194], we accept the European Union's statement in this respect as a matter of fact.[1195] Thus, China's claim of violation rests on a flawed factual premise. Article 6.1.2 requires that "evidence presented in writing" shall be made available promptly to other interested parties. Where nothing has been presented to the investigating authority, as in this case, there is nothing to be made available, and therefore no violation of Article 6.1.2 can be found. We therefore reject China's claim under Article 6.1.2 with respect to the non-confidential Union Interest questionnaire responses of five sampled EU producers.

(c) Claims II.7 and III.10 – Alleged violation of Articles 6.4 and 6.2 of the AD Agreement – Failure to provide timely opportunities to see information

7.589 In this section of our report, we address China's claims that the European Union acted inconsistently with Article 6.4 of the AD Agreement by failing to provide timely opportunities for interested parties to see non-confidential information that was relevant to the presentation of their cases and was used by the Commission in the expiry review and original investigation at issue, and China's claims under Article 6.2 with respect to the same information.

7.590 Before addressing China's specific allegations, we note that in some instances, China has made a general claim of violation, indicating that its specific factual allegations are examples of the general violation claimed and/or only referring to specific factual allegations despite having asserted a general violation. However, we consider that a claim under any paragraph of Article 6 of the AD Agreement, including Articles 6.2 and 6.4, requires a careful examination of the specific facts alleged in order to evaluate whether a violation occurred. Thus, our analysis and conclusions are limited to the specific factual situations raised by China.

(i) Arguments of the parties

a. China

7.591 China claims that the European Union violated Article 6.4 by failing to provide timely opportunities for interested parties to see all non-confidential information that was relevant to the presentation of their case and was used by Commission in the original investigation and the expiry review.[1196] With respect to the original investigation, China's claim concerns the identities of the complainants, supporters, sampled EU producers and all the known EU producers.[1197] With respect to the names of all known producers, China claims that to the extent that this information was not made available to interested parties, the European Union also violated Article 6.2 of the AD Agreement.[1198] With respect to the expiry review, China's claim concerns certain information pertaining to: (i) the sample of the EU producers; (ii) revised production and sales data of the complainants and of the sampled EU producers following the discovery that one sampled producer had discontinued production of the like product during the review investigation period; (iii) the analogue country selection; and (iv) the Union Interest questionnaire responses of five sampled EU producers.[1199]

[1194] China, answer to Panel question 57.

[1195] We decline to require the European Union to provide proof to substantiate its assertions, as China has requested we do. China, answer to Panel question 57, para. 369. We can conceive of no proof of the non-submission of these questionnaire responses that could be forthcoming in response to a request for proof of a negative.

[1196] China, first written submission, paras. 666-667, 1288, 1297 and 1300.

[1197] China, first written submission, paras. 1288, 1297 and 1300.

[1198] China, first written submission, para. 1300.

[1199] China, first written submission, paras. 665-667.

China further claims that by failing to provide timely opportunities for interested parties to see this information, the European Union also violated Article 6.2 of the AD Agreement.[1200]

7.592 China argues, relying on prior panels' statements regarding the term "information", that information submitted by interested parties or collected by investigating authorities, or information that emanates from investigating authorities, such as the Commission's Notes for the File, all fall within the meaning of "information" as used in Article 6.4 of the AD Agreement.[1201] China asserts, relying on the panel report in *EC – Salmon (Norway)*, that "the dates of receipt of questionnaires" or "when an interested party responded to the questionnaire" is information relating to factual matters that investigating authorities consider in an investigation, and therefore constitutes "information used by investigating authorities" under Article 6.4.[1202]

7.593 Concerning the meaning of "timely", China argues that under Article 6.4, if an interested party requests information which is relevant to the presentation of its case and is used by the investigating authority, the latter is obliged to provide an opportunity to see, in a timely fashion, the information concerned. China submits that there are two relevant aspects of the meaning of "timely": first, whether interested parties were provided an opportunity to see the requested information in a timely manner; and second, whether the opportunity to see the information allowed interested parties sufficient time to make their presentations at the relevant point in the investigation with respect to the relevant issue to defend their interests.[1203]

7.594 China also claims that, by failing to provide timely opportunities to see the information at issue, the European Union prevented interested parties from fully exercising their rights of defence as provided for in Article 6.2 of the AD Agreement. In this regard, China submits that its claim under Article 6.2 is not consequential to its claim under Article 6.4. Thus, were the Panel to find no violation of Article 6.4, China asserts that the Panel would still be required to address its claim under Article 6.2.[1204]

b. European Union

7.595 The European Union disagrees with the broad interpretation of the term "information" in Article 6.4 proffered by China, which includes not only the substance of "information", but also details such as the date of receipt of information by the Commission. According to the European Union, the term "information" as used in Article 6.4, is narrower, and relates only to factual information either supplied by interested parties or coming from other sources, including factual information collected by investigating authorities. Moreover, the European Union notes that Article 6.4 applies to information "used by the authorities". In this regard, the European Union distinguishes between, for instance, the contents of questionnaire responses, and surrounding details such as the date of arrival, asserting that the latter is not the subject of Article 6.4 because it is not "used by the authorities".[1205]

[1200] China, first written submission, para. 668; second written submission, para. 909.

[1201] See, e.g. China, second written submission, paras. 915-918, referring to Panel Reports, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia* ("*Korea – Certain Paper (Article 21.5 – Indonesia)*"), WT/DS312/RW, adopted 22 October 2007, DSR 2007:VIII, 3369, para. 6.83; *EC – Salmon (Norway)*, para. 7.769; and *Guatemala – Cement II*, para. 8.148.

[1202] China, second written submission, paras. 922-925, citing Panel Report, *EC – Salmon (Norway)*, para. 7.769.

[1203] See, e.g. China, second written submission, paras. 928 and 931; answer to Panel question 66.

[1204] See, generally, China, first written submission, para. 668; answer to Panel question 68; second written submission, para. 909.

[1205] European Union, first written submission, paras. 379-385; second written submission, para. 185.

7.596 The European Union also contends, relying on previous panel reports, that neither the intentions nor the reasoning of investigating authorities fall within the scope of "information" within the meaning of Article 6.4.[1206] Thus, it argues, matters such as "whether or not the Indian producers would be contacted or whether or not other countries were being considered" do not constitute "information" within the meaning of Article 6.4 in the European Union's view. In this regard, the European Union adds that the AD Agreement, in particular Article 6.9, explicitly sets out those instances where the investigating authority is required to inform interested parties of its intentions, but that it does not oblige investigating authorities to keep parties informed of the development of its intentions during the course of the investigation.[1207]

7.597 The European Union also asserts that China's complaints concerning alleged delays in placing information in the non-confidential file, without explaining how these alleged delays prevented interested parties from having timely opportunities to see such information, are outside the scope of Article 6.4 of the AD Agreement. For the European Union, the term "timely" in Article 6.4 refers to the period that follows the provision of the opportunity to see relevant information and not to the period between information being submitted to the investigating authorities and that information being made available to interested parties, which it contends is addressed by Article 6.1.2 of the AD Agreement.[1208]

7.598 As regards China's claim under Article 6.2 of the AD Agreement, the European Union asserts that at no point in its first written submission did China invoke Article 6.2 independently. Thus, the European Union submits, China may not elaborate new bases for its Article 6.2 claim at a later stage of the proceedings, i.e. in its second written submission.[1209] In any event, the European Union submits that Article 6.2 is of limited application where individual rights are conferred by other specific provisions in Article 6 of the AD Agreement. Thus, for the European Union, where Article 6.4 puts limits on the scope of the obligation to make information available, those limits may not be by-passed by relying on Article 6.2.[1210]

(ii) Arguments of third parties

a. Japan

7.599 Japan considers that failure to meet the legal obligation to disclose information under Article 6.4 would result in the failure to afford interested parties "a full opportunity for the defence of their interests", and therefore, a "violation of Article 6.4 also constitutes the violation of Article 6.2". Japan also argues that provided that the information satisfies the conditions of Article 6.4, such information must be disclosed to interested parties, regardless of the source of the information. In

[1206] European Union, second written submission, para. 186, citing Panel Reports, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.83; and *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*"), WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609, paras. 7.214-7.216.

[1207] European Union, second written submission, paras. 186-189.

[1208] European Union, first written submission, paras. 388-389.

[1209] See, e.g. European Union, second written submission, paras. 201-203.

[1210] European Union, second written submission, para. 202. The European Union adds that there would be no point for the AD Agreement to have specific provisions dealing with the investigating authorities' obligation to provide information if Article 6.2 were intended to be applied to the same context but with a broader scope. This interpretation, in the European Union's view, would be contrary to the "general rule of interpretation" which requires that meaning and effect must be given to all the terms of a treaty and to the *lex specialis* principle which suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. European Union, opening oral statement at the second meeting with the Panel, para. 271.

addition, Japan submits that the use in Article 6.4 of the phrase "which is used", rather than the phrase "which form the basis for the decision" provided in Article 6.9, clarifies that information, on which an authority did not base its decision and thus was not required to disclose under Article 6.9, still falls within the disclosure requirement of Article 6.4. Thus, for Japan, the information to be disclosed under Article 6.4 could be broader than under Article 6.9. Finally, Japan is of the view that the determination whether the timing of disclosure provides a full opportunity for the defence would depend on the facts and circumstances of each case.[1211]

b. United States

7.600 The United States agrees with China that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation, and that failure to provide such access would not only be inconsistent with Article 6.4, but also with Article 6.2. In the United States' view, without access to information described in Article 6.4, an interested party is necessarily denied "a full opportunity for the defence of their interests".[1212]

(iii) Evaluation by the Panel

a. Overview

7.601 Article 6.4 of the AD Agreement provides:

> "The authorities shall **whenever practicable** provide **timely** opportunities for all interested parties to see **all information** that is **relevant** to the presentation of their cases, that is **not confidential** as defined in paragraph 5, and that is **used** by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information." (emphasis added)

Article 6.4 addresses the right of interested parties to see all the information used by investigating authorities in an anti-dumping investigation in a timely fashion. We note, however, that this right is not absolute. Rather, it is limited by the requirement that providing opportunities to see the information be "practicable" for the investigating authority. Moreover, it is limited to information that is "relevant" to the parties' presentation of their case, "used" by the investigating authority in the investigation, and "not confidential" within the meaning of Article 6.5.[1213] With respect to all information that satisfies these conditions, Article 6.4 requires the investigating authority to provide "timely opportunities" to "see" and "prepare presentations on the basis of" the information in question.

7.602 The panel in *EC – Salmon (Norway)* elaborated its understanding of these obligations as follows:

> "It seems clear to us that the **timeliness** of the opportunities must be assessed by reference to the right of the interested parties to prepare presentations on the basis of the information seen. It is similarly clear to us that whether particular information is **relevant** is not determined from the investigating authorities' perspective, but with reference to the issues to be considered by the investigating authority under the AD Agreement.[880] Thus, information which relates to issues which the investigating authority is required to consider under the AD Agreement, or which it does, in fact,

[1211] Japan, third party written submission, paras. 39, 41-43, 50 and 54.
[1212] Unites States, third party written submission, para. 46.
[1213] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 142; and Panel Reports, *EC – Fasteners (China)*, para. 7.479; and *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.82.

> consider, in the exercise of its discretion, during the course of an anti-dumping investigation, presumptively falls within the scope of Article 6.4.[881] Clearly, an investigating authority may not allow interested parties to see information which is properly treated as **confidential** under the AD Agreement.[882] Finally, the question of whether information is "**used**" by the investigating authority cannot, in our view, be assessed from the perspective of whether the information is specifically referred to or relied upon by the investigating authority in its determination. If the investigating authority evaluates a question of fact or an issue of law in the course of an antidumping investigation, then, in our view, all information relevant to that question or issue that is before the investigating authority must necessarily be considered by the investigating authority, in order to make an objective and unbiased decision. Consequently, it seems clear to us that whether information is "used" by the investigating authority must be assessed by reference to whether it forms part of the information relevant to a particular issue that is before the investigating authority at the time it makes its determination.[883]
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> [880] We find support for this conclusion in the views of the Appellate Body in *EC – Tube and Pipe Fittings*, paras. 145-146.
>
> [881] We thus reject the view of the EC that, in the context of whether information is relevant to the presentation of an interested party's case, "the investigating authority may decide on which information access should be granted". EC, FWS, para. 531.
>
> [882] Except to the extent that disclosure is made pursuant to protective orders, as provided for in footnote 17 of the AD Agreement.
>
> [883] We find support for this conclusion in the views of the *Appellate Body in EC – Tube and Pipe Fittings*, para. 147."[1214]

We agree with the views expressed by this panel, and will apply them in our evaluation of China's claims.

7.603 In addition, we agree with the view of the panel in *Korea – Certain Paper* that in order to establish a *prima facie* case of violation of Article 6.4, a complaining party must demonstrate that an interested party requested to see "information" within the meaning of Article 6.4, and that such request was rejected, or granted in an untimely fashion, by the investigating authority.[1215] In this regard, we consider that, unlike Article 6.9 of the AD Agreement, which requires investigating authorities to "inform all interested parties" of certain matters, and gives guidance regarding the timing of "[s]uch disclosure", Article 6.4 does not impose any obligation on investigating authorities to actively inform or disclose information to interested parties. The obligation in Article 6.4 is clearly stated, and is to make information available such that interested parties can "see" it in a timely fashion. Moreover, this obligation applies to the extent that interested parties request such an opportunity to see information.[1216] Finally, we consider that the text of Article 6.4 makes it clear that the obligation on investigating authorities applies to "information," and not to the methodologies, reasoning, analysis, and determinations of investigating authorities.[1217]

[1214] Panel Report, *EC – Salmon (Norway)*, para. 7.769 (emphasis added).

[1215] Panel Report, *Korea – Certain Paper*, paras. 7.196 and 7.300.

[1216] Panel Reports, *EC – Fasteners (China)*, paras. 7.480 and 7.497; and *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.87.

[1217] Panel Reports, *EC – Fasteners (China)*, para. 7.539; and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.124.

7.604 Article 6.2 of the AD Agreement, also the subject of China's claims, provides:

> "Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally."

Article 6.2 thus establishes a general due process right of interested parties to a "full opportunity" to defend their interests during the investigation. We note that while the Appellate Body has stated that Article 6.2 requires that interested parties be afforded "liberal opportunities" to defend their interests, it has also stated that it does not provide an "indefinite" right in this regard.[1218] Thus, this due process right does not extend so far "as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose".[1219] Moreover, the text of Article 6.2 makes it clear that the rights of interested parties established therein do not apply to information treated as confidential consistently with Article 6.5 of the AD Agreement. Finally, in our view, there is nothing in the text of Article 6.2 that would require investigating authorities to actively disclose information to interested parties.[1220] Indeed, there is nothing specific in the text of Article 6.2 that relates to "information" at all. The only specific proscription concerning the "full opportunity" for parties' defence of their interests is the obligation for investigating authorities to, on request, provide opportunities for parties to meet other parties with adverse interests. It is clear that the obligation to provide for such meetings does not exhaust the scope of parties' rights under Article 6.2.[1221] However, while a "full opportunity" for the defence of a party's interests may well include, conceptually, the notion of access to information, in our view, the more specific provisions of Article 6, including Articles 6.1.2, 6.4, and 6.9, establish the obligations on investigating authorities in this regard. In our view, Article 6.2 does not add anything specific to the obligations on investigating authorities with respect to interested parties' ability to see or receive information in the hands of the investigating authorities established in other provisions of Article 6. Thus, while a failure to comply with one of the more specific provisions of Article 6 concerning access to or disclosure of information may establish a violation of Article 6.2, we find it difficult to imagine a situation where the more specific provision is complied with, but Article 6.2 is nonetheless violated as a result of an investigating authority's actions in connection with access to or disclosure of information to interested parties.

7.605 With these considerations in mind, we examine below each of China's allegations of error.

b. Expiry Review

7.606 China claims that the European Union violated Article 6.4 of the AD Agreement by failing to provide timely opportunities during the expiry review for interested parties to see certain information with respect to: (i) the sample of the EU producers; (ii) the revised production and sales data of all the EU producers, the complainants, and the sampled EU producers following the discovery that one sampled producers had discontinued the production of the like product during the review investigation

[1218] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.
[1219] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.
[1220] Panel Report, *EC – Fasteners (China)*, para. 7.481.
[1221] As noted above, the Appellate Body has stated that Article 6.2 of the AD Agreement requires that interested parties be afforded "liberal" opportunities to defend their interests. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

period; (iii) the analogue country selection; and (iv) the Union Interest questionnaire responses of five sampled EU producers. China alleges that while this information was used by the Commission and was relevant for interested parties to defend their interests, the Commission did not provide them with timely opportunities to see and prepare presentations on the basis of such information. In addition, China claims that the European Union violated Article 6.2 of the AD Agreement because Chinese exporters were denied the opportunity to defend their interests due to the lack of this information.[1222]

1. certain information concerning the sample of the EU producers

7.607 China claims that the European Union failed to provide timely opportunities to see the following information concerning the sample of the EU producers: (i) information of the individual complainant producers submitted in the complaint, standing exercise, and CEC submissions; (ii) information that eight producers had been sampled and had accordingly been sent questionnaires; (iii) the number of EU member States and the production represented by the sampled producers; (iv) the names of the member States and the number of sampled companies from each member State; and (v) the revised information of the EU producer which discontinued production in the European Union during the review investigation period.

a) information in the complaint, standing exercise, and CEC submissions

7.608 China claims that despite several requests, interested parties were not provided any opportunity to see the information of the individual complainant producers available in the complaint, standing exercise, and CEC submissions, which allegedly formed the basis for the selection of the sample of the EU producers in the review at issue. In this regard, China argues that information for sampling provided by Chinese exporters, EU importers and non-complaining producers was added to the non-confidential file, and therefore, all information relevant for sampling pertaining to the individual complainant EU producers allegedly available to the European Union cannot be considered confidential. China also alleges that this information was used by the Commission to select the sample and was relevant for interested parties to make presentations on issues such as the alleged representativity of the sample.[1223] Thus, China argues, to extent the information contained in the complaint, standing exercise, and CEC submissions pertaining to the individual producers was not confidential, the European Union violated Article 6.4 by failing to provide any opportunity for interested parties to see such information. The European Union argues that in so far as China's claim concerns data in the complaint, the responses to the standing forms, and in the CEC submissions, the

[1222] In response to a question from the Panel following the first meeting, China clarified that its claim under Article 6.2 was an independent claim of violation and not consequential to its claim under Article 6.4. China, answer to Panel question 68. The European Union argues that China elaborated new bases for a claim under Article 6.2 later in the proceedings in its second written submission. In the European Union's view, China's claim in this regard was not eligible for inclusion in the "written rebuttal" as provided in the Working Procedures for the Panel. European Union, second written submission, paras. 200-202; opening oral statement at the second meeting with the Panel, para. 270. However, nothing in our Working Procedures precludes China from elaborating new bases for or arguments in support of its claims in its second written submission. Moreover, China's claim under Article 6.2 is clearly included in its panel request, and the European Union does not argue otherwise. In this regard, we note that a complaining party is not prevented from developing, in its second written submission, arguments supporting a claim that is within the terms of reference of the panel, even if it did not do so in its first written submission. See, e.g. Appellate Body Report, *EC – Bananas III*, paras. 141 and 145. We therefore will address China's claim of violation under Article 6.2 in conjunction with its claims under Article 6.4.

[1223] See, generally, China, first written submission, paras. 675-676; second written submission, paras. 940-949.

information was confidential; and in so far as it concerns other facts surrounding those communications, such facts are not "information" within the meaning of Article 6.4.[1224]

7.609 As we understand it, China's claim concerns the individual data of the complainants contained in the complaint, standing exercise, and CEC submissions, which allegedly formed the basis for the selection of the sample of the EU producers. China asserts that interested parties, namely the European Footwear Alliance ("EFA") and the Coalition of Chinese Producers, requested to see this information.[1225] The evidence before us, however, indicates that none of the requests cited by China refers to the information at issue. With respect to the two requests from the EFA referred to by China, the evidence shows that EFA, in its submission dated 12 November 2008, complained about the untimely opportunities to see the non-confidential version of the producers' sampling forms and that it requested to see "a non-confidential version of the extension request of the EU producers as well as the Commission's reply thereto, including the length of extension granted" and to be informed about "the sampling methodology" used by the Commission.[1226] In its submission dated February 2009, EFA comments with respect to the lack of clarity of the data used by Commission "to assess the 'representativeness in terms of product segment, geographical location and sales value and production volume' of the sampled EU producers".[1227] Thus, nothing in these requests indicates that EFA requested to see the information at issue, that is, the individual data of the complainants contained in the complaint, standing exercise, and CEC submissions.[1228] Similarly, with respect to the request from the Coalition of Chinese Producers, the evidence indicates that, in response to the confidential treatment granted by the Commission to the identity of the EU producers, these producers stated that "we expect that either identity of Community producers is disclosed, or a full disclosure of information and data without identifying Community producers are disclosed".[1229] Nothing in this alleged request indicates that the Coalition of Chinese Producers requested to see (and/or was concerned with) the information at issue in China's claim. We recall our view that Article 6.4 does not impose any affirmative obligation on investigating authorities to disclose information to interested parties, but only to make information available to the extent that an opportunity to see that information has been requested by interested parties.[1230] In this instance, China has failed to demonstrate that interested parties requested to see the information in question. We therefore reject China's claim under Article 6.4 with respect to this information.

7.610 With respect to China's claim under Article 6.2, we note that China has made no independent arguments in support of its claim under this provision and therefore consider that China has not established an independent violation of Article 6.2 with respect to this information. We also dismiss China's consequential claim of violation of Article 6.2, which is based on the same considerations we have rejected above with respect to Article 6.4, for the same reasons.

b) information that eight producers had been sampled and had accordingly been sent questionnaires

7.611 China asserts that the European Union failed to provide timely opportunities to see information concerning the fact that eight complainant producers had been selected to be in the

[1224] European Union, first written submission, para. 391; answer to Panel question 69; opening oral statement at the second meeting with the Panel, paras. 283-290.

[1225] China points specifically to (i) the EFA requests dated 12 November 2008 and February 2009, Exhibits CHN-34, pp. 29-31, and CHN-23, pp. 14-15, respectively; and (ii) the request from the Coalition of Chinese Producers dated 24 March 2009, Exhibit CHN-10, pp. 2-3.

[1226] EFA request dated 12 November 2008, Exhibit CHN -34, pp. 29-31.

[1227] EFA request dated February 2009, Exhibit CHN-23, pp. 14-15.

[1228] We recall, moreover, that as noted above in paragraph 7.603, the obligation set forth in Article 6.4 applies to "information", and not to the "methodology" used by the investigating authorities.

[1229] Exhibit CHN -10, pp. 2-3.

[1230] See paragraph 7.603 above.

sample before 10 October 2008 and the fact that they had been sent the anti-dumping questionnaire on 10 October 2008.[1231] China argues that the fact that eight complainant producers had been sent the anti-dumping questionnaire on 10 October 2008 implies that they were selected to be in the sample before 10 October 2008, and clearly relates to the assessment of the legal and factual issues considered by Commission in its sampling determination and therefore constitutes information "used by investigating authorities".[1232] The European Union submits that information regarding the "sending" of anti-dumping questionnaires to the eight producers is not "information" within the meaning of Article 6.4.[1233]

7.612 We recall that whether information is "used" by an investigating authority is assessed by reference to whether it forms part of the information "relevant" to a particular issue that is before the investigating authority at the time it makes its determination. China's argument that the information at issue constitutes information "used by investigating authorities" is based on the contention that the information "related" to the Commission's sampling determination. In our view, however, the mere fact that information "relates" to a particular issue that is before the investigating authority does not establish that the information was "used" by the authority in making its determination. In this instance, moreover, we fail to see how the "sending of the questionnaires" or "requests to complete questionnaire responses" could have constituted information *per se* that was "used" by Commission in the selection of the sample, which we understand to be the relevant determination. We do not see the relevance of the dates on which questionnaires were sent to the substantive issues involved in selecting the sample. Indeed, we see nothing in the evidence before us that would indicate that the Commission "used" the fact that the anti-dumping questionnaires were sent to the sampled EU producers on 10 October 2008 in any way in the sample determination. Moreover, in our view, the fact that eight producers had been sent questionnaires on that date at most suggests that they had been, at least preliminarily, selected for the sample, and thus would be a preliminary conclusion reached by the Commission with respect to the sample selection, rather than information *per se*. We recall that Article 6.4 requires "timely opportunities" to see "information", and not the analysis and conclusions of the investigating authority. Thus, we consider that the "information" at issue is not covered by the obligation in Article 6.4 and therefore reject China's arguments in this regard.

7.613 Turning to China's claim under Article 6.2, China alleges that because of the "excessive delay" in disclosing the information at issue, interested parties were prevented from fully exercising their rights of defence.[1234] China asserts that once the sample is established it is not changed, and therefore the delay in disclosing information regarding the alleged selection of the eight sampled producers before 10 October 2008, and the fact that they had been sent anti-dumping questionnaires on that date impinged on the rights of defence of interested parties. According to China, not only were they denied the opportunity to make comments at the relevant point in time, they were also denied any opportunity to do any background research and/or solicit further support from non-complainant producers when the sample selection was on-going.[1235] The European Union recalls its

[1231] In response to a question from the Panel, China clarified that its claim with regard to Article 6.4 in this context pertains to the information that eight complainant producers had been selected to be in the sample before 10 October 2008 and had accordingly been sent the anti-dumping questionnaires on 10 October 2008. China, answer to Panel question 113.

[1232] China, second written submission, para. 950.

[1233] European Union, first written submission, para. 392.

[1234] We note that China has framed its argument in terms of alleged delay in "disclosing" information here, and at other points in its arguments under Articles 6.2 and 6.4. We recall that, in our view, neither Article 6.2 nor Article 6.4 imposes obligations with respect to disclosure of information. Nonetheless, we address each of China's claims.

[1235] China, second written submission, para. 962.

position that Article 6.2 does not include the matters referred to by China in this aspect of its claim.[1236]

7.614 China's argument, as we understand it, is premised on the contention that, when the information at issue was made available to interested parties, the sample of the EU producers had already been established, and that once a sample has been established it is not changed. Therefore, China asserts that interested parties were denied the opportunity to make comments at the relevant point in time and to do any background research and/or solicit further support from non-complainant producers when the sample selection was on-going, in violation of Article 6.2.

7.615 We note, as China acknowledges[1237], that the information at issue was made available to interested parties in a Note for the File dated 29 October 2008. This Note states, in relevant part:

> "[*w]ithout prejudice to the final selection of the sample* the Commission Services have sent on 10 October 2008 the full questionnaire to eight large producers in order to ensure an as expeditious procedure as possible, should any or all of these companies finally be selected in the sample … In addition, five other producers have requested to be part of the sampling and have been sent the sampling form. Two replies were received … *The analysis needed for the selection of the sample is ongoing*."[1238] (emphasis added)

Thus, the Note explicitly indicates that when the information about which China complains became available to interested parties, the sample of the EU producers had not yet been definitively selected. As the Note makes clear, the Commission's analysis in this regard was still on-going. This is confirmed by other Notes for the File, made available to interested parties, which indicate that the sample of EU producers was not selected until sometime in December 2008.[1239] In light of this evidence, China's contention that the Commission disclosed the information at issue in a delayed manner because it was disclosed after the sample had been established cannot be substantiated as a matter of fact.[1240]

7.616 Moreover, we note that the facts demonstrate that interested parties had the opportunity to make comments and to do research and/or solicit further support while the sample selection was on-going. Indeed, the evidence before us shows that some interested parties *did* make comments to the Commission during the process of selection of the sample.[1241] Moreover, it is clear that the Commission considered comments received in this regard.[1242] Thus, we reject China's contention that,

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[1236] European Union, opening oral statement at the second meeting with the Panel, para. 294.

[1237] See, e.g. China, first written submission, para. 677; second written submission, para. 962.

[1238] Note for the file date 29 October 2008, Exhibit CHN-25.

[1239] In this regard, we note that the Note for the File dated 9 December 2008 clearly states that no decision had been taken on the selection of the sample. Note for the File dated 9 December 2008, Exhibit CHN-26. Moreover, we note that in a subsequent communication from the Commission, dated 23 December 2008, the parties were informed of the final selection of the sample. Communication from the Commission, dated 23 December 2008, Exhibit CHN-33.

[1240] We note that in the context of its claim under Article 6.4, China asserts that "by the end of October 2008 the sample would have been definitely selected as no additional information was collected pursuant to the submission of the sampling forms by the two non-complainant producers on 22 October 2008 and considering that the eight complainants had already been selected." We are not persuaded by these arguments. China has provided no evidence to substantiate this assertion. Indeed, the evidence before us is to the contrary, and clearly shows that the sample was not established until December 2008.

[1241] Submission of the EFA dated 12 November 2008, Exhibit CHN-34, pp. 30-31; Letter from the European Outdoor Group, the Federation of the European Sporting Goods Industry, and the European Branded Footwear Coalition, dated 20 December 2008, Exhibit CHN-134, pp. 1-2.

[1242] Definitive Regulation, Exhibit CHN-2, recitals 25-33.

as a result of delay in disclosing the information at issue, interested parties were deprived of a full opportunity for the defence of their interests, and therefore reject China's claim under Article 6.2.

c) number of member States and production represented by the sampled producers

7.617 China asserts that information regarding the number of member States and the production represented by the sampled producers from each member State was disclosed five months after the initial selection of the sample and two and half months after the finalization of the sample, through a Note for the File dated 9 March 2009. China argues that it was relevant for interested parties to see this information early in the expiry review so that they could make meaningful comments regarding the selection of the sample.[1243] The European Union submits that China's allegations are outside the scope of Article 6.4. The European Union argues that the term "timely" in Article 6.4 refers to the period that follows the provision of the opportunity to see relevant information, while China's claim concerns delays in placing information in the non-confidential file, thus providing the opportunity to see the information. Furthermore, the European Union asserts that the information at issue concerns the methodology adopted by the Commission, and thus does not fall within the scope of Article 6.4. The European Union argues that, in any event, the date on which this information was released to interested parties allowed them sufficient time to make presentations.[1244]

7.618 The Note for the File dated 9 March 2009 referred to by China explains, *inter alia*, that based on the methodology applied by the Commission, eight companies located in four different EU member States were selected for the sample of EU producers.[1245] It goes on to explain that these companies were chosen on the basis of production, sales, location and sector segment, and provides the total production of the sampled companies for each country.[1246] It seems clear to us that the information in this Note concerns the methodology adopted by the Commission in its determination of the sample of the EU producers for the injury aspect of the investigation. We recall our view that Article 6.4 does not apply to the methodology used by or determinations of the investigating authorities, and does not require investigating authorities to provide opportunities for interested parties to "see" such methodologies and determinations. We therefore reject China's arguments in this regard under Article 6.4.

7.619 With respect to Article 6.2, China relies on the same arguments it raised in connection with its claim concerning the information that eight producers had been selected for the sample and sent questionnaires in October 2008. Essentially, China argues that the European Union violated Article 6.2 because the information regarding the number of member States and production represented by the sampled producers from each member State was disclosed after the sample was selected. China again asserts that once the sample is established it is not changed, and therefore the rights of defence of interested parties were denied, as they did not have the opportunity to make comments and to do any background research and/or solicit further support from non-complainant producers at a relevant point in time.[1247]

[1243] China, first written submission, para. 677; second written submission, paras. 955-956. While China suggests that its claim concerns all the information relevant to the presentation of their cases with respect to sampling, including the Note for the File dated 9 March 2009, China second written submission, para. 956, our analysis and conclusions are limited to the instances for which China has submitted specific arguments, i.e. the number of member States represented and the production represented by the eight sampled EU producers.

[1244] European Union, first written submission, para. 388; opening oral statement at the second meeting with the Panel, para. 292.

[1245] Note for the File dated 9 March 2009, Exhibit CHN-27.

[1246] Note for the File dated 9 March 2009, Exhibit CHN-27.

[1247] China, second written submission, para. 962.

7.620 We recall that the information regarding the number of EU member States and production represented by the sampled producers from each member State was made available to interested parties through the Note for the File dated 9 March 2009, while the sample of the EU producers was selected sometime in December 2008. Thus, the principal question for us in resolving China's claim is whether, by making available the information at issue after the sample of the EU producers had already been established, the European Union failed to ensure that interested parties had a full opportunity for the defence of their interests under Article 6.2 of the AD Agreement.

7.621 We recall our view that Article 6.2 does not establish any specific obligations with respect to disclosure of or access to information. Thus, to the extent China is asserting a delay in "disclosure" of information, we see no basis for its claim in Article 6.2 and reject it. Moreover, while China has presented as an uncontested fact that the Commission's selection of the sample of EU producers was irrevocable, the European Union refutes China's assertion,[1248] and China has provided no evidence in support of it. We therefore reject China's contention that interested parties were precluded from exercising their rights of defence because "once the sample is established it is not changed". Furthermore, we recall that while interested parties should be given liberal opportunities to defend their interests, this right is not "indefinite", and does not allow parties to participate in the inquiry as and when they choose.[1249] In this case, the evidence before us demonstrates that, even after the selection of the sample, interested parties had opportunities to comment with respect to the Commission's sample selection, and did so in submissions to the Commission.[1250] In our view, this demonstrates that interested parties indeed had opportunities to defend their interests in this regard. We therefore reject China's contentions that due to the alleged delay at issue interested parties were deprived of a full opportunity for the defence of their interests and therefore reject China's claim under Article 6.2.

d) <u>names of the member States and the number of the sampled companies</u>

7.622 China asserts that the European Union failed to provide any opportunity to Chinese exporting producers to see information regarding (i) the number of companies in the sample from each of the member States from which these companies were selected and (ii) the names of these member States. China argues that this information was taken into consideration by the Commission in its sampling assessment.[1251] Furthermore, China considers that the names of member States are information "used by the authorities," since it was information submitted by the complainants and was considered by the Commission to establish the member States represented in the sample as well as in concluding that the sample was representative of EU production.[1252] The European Union submits that the real nature of China's claim is the failure of the Commission to inform interested parties of the names of the member States and the number of companies from each member State that the Commission "intended" to include in the sample. The European Union argues that the scope of the obligation in Article 6.4 does not extend to the intentions of the investigating authorities since they do not

[1248] See, e.g. European Union, opening oral statement at the second meeting with the Panel, para. 279 and fn. 276.

[1249] See paragraph 7.604 above.

[1250] In this regard, we note the hearing submission and comments submissions of the Chinese Footwear Coalition and China Leather Association, dated 6 April 2009, Exhibit CHN-18, pp. 2-10 (second document). Moreover, after the disclosure of essential facts under Article 6.9 of the AD Agreement, we note the submission by the Chinese exporter Yue Yuen, dated 3 November 2009, Exhibit CHN-46, p. 2; the submission by the EFA, dated 3 November 2009, Exhibit CHN-35, pp. 16-22; and the submission of the Chinese Footwear Coalition and China Leather Association, dated 3 November 2009, Exhibit CHN-14, pp. 12-17. Merely that the Commission did not alter its conclusions as a result of these submissions does not demonstrate that parties did not have a full opportunity for the defence of their interests.

[1251] China, first written submission, paras. 678-679.

[1252] China, second written submission, para. 957.

constitute "information that is used by the authorities". Furthermore, the European Union notes that the names of the member States in which the individual producers were located were treated as confidential since their disclosure could have led to the identification of the complainants.[1253]

7.623 With respect to the first aspect of China's claim, concerning the number of the sampled companies from each member State, we recall that whether information is "used" by an investigating authority must be assessed by reference to whether it forms part of the information "relevant" to the particular issue that is before the investigating authority. China asserts that the information at issue was information which was taken into consideration by the Commission in its sampling assessment.[1254] China does not explain, however, how this information may have been relevant to or considered by the Commission in its selection of the sample. Nor do we consider that the mere fact that information was before the investigating authority at a point in time demonstrates that the information was relevant to the particular issues being evaluated by an investigating authority at that time. On the other hand, we recall our view that Article 6.4 does not impose any affirmative obligation on investigating authorities to disclose information to interested parties, but only to make information available to the extent that an opportunity to see that information has been requested by interested parties.[1255] In this case, China has provided no evidence, or even argued, that interested parties requested to see the information at issue. We therefore reject this aspect of China's claim under Article 6.4.

7.624 Turning to the second aspect of China's claim, with respect to the names of the member States represented in the sample, Article 6.4 clearly states that the right to see information is limited to information that is not confidential. In this regard, we note that we have found that the European Union did not err in granting confidential treatment to the names of the countries of the complainants, which included the eight sampled EU producers.[1256] We therefore reject this aspect of China's claim under Article 6.4.

7.625 With respect to China's claim under Article 6.2, China has provided no specific arguments in support of an independent claim under this provision. We therefore consider that China has not established a *prima facie* case of violation of Article 6.2 with respect to the number of companies in the sample from each of the member States and the names of the member States independent of its claim in this respect under Article 6.4.[1257] Having rejected China's claim under Article 6.4, we also reject China's consequential claim of violation of Article 6.2.

e) <u>revised information of the EU producer which discontinued production in the European Union during the review investigation period</u>

7.626 China asserts that "revised information" of the sampled EU producer which discontinued production of the like product in the European Union during the review investigation period was made available to interested parties on 6 May 2009, although this information was available to the Commission by March 2009 and was used by the Commission in its injury analysis.[1258] China acknowledges that Chinese exporters could have made comments regarding this issue after 6 May 2009, as the European Union contends, but argues that those comments would have been

[1253] European Union, first written submission, para. 394; opening oral statement at the second meeting with the Panel, para. 286 and fn. 275.
[1254] China, first written submission, para. 679.
[1255] See paragraph 7.603 above.
[1256] See paragraph 7.770 below.
[1257] Moreover, with respect to the names of the member States, we note that we have found that the confidential treatment accorded to this information is consistent with Article 6.5 and that Article 6.2 does not apply to confidential information. See paragraph 7.770 below.
[1258] China, first written submission, para. 680.

rejected by the Commission as untimely since the verifications had already been completed.[1259] The European Union does not consider that the release of the information at issue on 6 May 2009 limited the opportunities of interested parties to make presentations with respect to that information. The European Union argues that there was considerable time available for interested parties to make presentations after the date on which this information was released and before the EU authorities made their final decisions. In this regard, the European Union notes that the definitive disclosure of "essential facts and considerations" was made on 12 October 2009, and that even that date did not represent the final conclusion of the matter, as there was an opportunity for comments thereafter.[1260]

7.627 We recall our view that Article 6.4 does not require active disclosure of information by investigating authorities, and that in order for a claim to prevail under this provision, a complaining party must show that an interested party requested to see information and that its request was rejected, or granted in an untimely manner, by the investigating authority. In this case, China merely contends that because of an alleged delay in providing the revised information of the EU producer at issue, interested parties were prevented from making presentations on the basis of this information.[1261] However, China has not demonstrated, or even argued, that interested parties requested to see this information and were denied an opportunity to do so. Moreover, as China itself acknowledges, there was time, after the information became available, for interested parties to prepare and submit presentations on the basis of the information. China's assertion that such comments would have been rejected is speculation, and insufficient to demonstrate a violation of Article 6.4.[1262] In light of the foregoing, we reject China's arguments in this regard.

7.628 With respect to China's claim under Article 6.2, China has provided no specific arguments in support of an independent claim under this provision. We therefore consider that China has not established a *prima facie* case of violation of Article 6.2 with respect to the alleged delay in making revised information concerning the EU producer in question available independent of its claim in this respect under Article 6.4. Having rejected China's claim under Article 6.4, we also reject China's consequential claim of violation of Article 6.2.

2. information concerning the revised production and sales data of all EU producers, complainants, and sampled EU producers following the discovery that one sampled producer had discontinued the production of the like product during the review investigation period

7.629 China alleges that despite several requests, interested parties were never provided an opportunity to see the revised production and sales data of all the EU producers, the complainants, and the sampled EU producers. China argues that this information was used by the Commission and was relevant to interested parties in order to make comments on issues such as the changes in the revised representativeness of the sample of the EU producers.[1263] The European Union submits that an initial estimation of the production of the eight sampled EU producers was made available on 8 November 2008, and that it was followed by a notification from the Commission on 9 March 2009 that the actual figures "could be more than 10% lower". The more precise overall information, the European Union states, was provided in the General Disclosure document, and in addition, the adjustment made to the response of the sampled producer that had discontinued production was

[1259] China, second written submission, para. 960.
[1260] European Union, first written submission, paras. 396.
[1261] China, first written submission, para. 680.
[1262] Moreover, we decline to make a finding of violation on the premise that, had interested parties submitted comments, the Commission would have ignored them. To accept China's assertion would require us to conclude that the investigating authority would have acted inconsistently with its obligations under AD Agreement, without a shred of evidence to support such a conclusion.
[1263] China, first written submission, paras. 681-683; second written submission, paras. 965 and 968.

evident in the revised version of that company's non-confidential data which were made available to interested parties on 6 May 2009.[1264]

7.630 As we understand it, China argues that the Commission used information concerning the revised production and sales data of the EU producers, the complainants, and the sampled EU producers to determine the total production of the sampled producers after the discovery that one sampled producer had discontinued production of the like product during the review investigation period, but that this information was not made available to interested parties. It is not clear to us that the Commission did, as China suggests, use the revised production and sales data of all the EU producers, the complainants, and all the sampled EU producers to determine the total production represented by the sample after the discovery that one sampled producer had discontinued production during the review investigation period. China notes that before it was discovered that this producer had discontinued production, the Commission had made available the sales and production data of all EU producers, the complainants, and sampled producers, and assumes that the Commission used revised production and sales data of these producers in order to determine the total production represented by the sample after the discovery that one sampled producer had discontinued production. However, China provides no evidence to substantiate its factual assertion. Nor does the evidence before us indicate that the Commission revised the production and sales data of all the EU producers in question in order to determine the total production represented by the sample of the EU producers after the discovery that one of them had discontinued production. The Note for the File, dated 9 March 2009, by which the Commission informed interested parties that "one of the sampled companies had discontinued production of the product concerned", states:

> "[t]his could imply that total EC production of the sampled companies could be more than 10% lower than previously thought. We are now proceeding to analyse whether this has an effect on the calculation of production for Community industry as a whole. This matter will be further examined in the light of the information available to the Commission services and further checks on the production level in the Community will be undertaken, such as with associations of shoe manufacturers."[1265]

Thus, nothing in the Note suggests that the Commission intended to or in fact did use revised production and sales data of all the EU producers in question to determine the total production of the sampled EU companies after the discovery that one producer had discontinued its production in the Union.

7.631 Moreover, even assuming that the Commission did base its determination with respect to production on the data referred to by China, we note that this information would have constituted part of the methodology used by Commission in its overall determination of the sample of the EU producers for the injury aspects of the investigation. In this respect, we recall that Article 6.4 does not apply to the analysis or determinations of investigating authorities, nor does it requires investigating authorities to provide opportunities for interested parties to "see" such analysis and determinations. Furthermore, we recall that in order to establish a *prima facie* case of violation of Article 6.4, a complaining party must demonstrate that an interested party requested to see information within the meaning scope of this provision. However, China has not demonstrated that interested parties requested to see the information at issue.[1266] We therefore reject China's claim under Article 6.4 in this regard.

[1264] European Union, opening oral statement at the second meeting with the Panel, para. 295.

[1265] Note for the file dated 9 March 2009, Exhibit CHN-27, p. 2.

[1266] The evidence referred to by China in this regard does not demonstrate that interested parties requested to see the revised production and sales data of all the EU producers, the complainants, and all the sampled producers which allegedly formed the basis of the Commission's determination with respect to the

7.632 With respect to China's claim under Article 6.2, China asserts that the European Union denied interested parties the right to defend their interests by providing the revised production volume of the European Union and the production represented by the sampled EU producers only in the Definitive disclosure. In particular China argues that interested parties could not cross-check the viability of the sample, understand the data taken into account by the European Union, or evaluate the basis of its decision and calculation.[1267] The European Union, on the other hand, asserts that these data were "essential facts under consideration which [formed] the basis for the decision" whether to extend the measures and therefore fell within the scope of Article 6.9 and were as a consequence included in the Definitive disclosure.[1268]

7.633 We recall our view that Article 6.2 does not require investigating authorities to disclose information to interested parties. Thus, to the extent China is asserting a delay in "disclosure" of information, we see no basis for its claim in Article 6.2, and reject it. Furthermore, we recall that while Article 6.2 requires that interested parties be provided with liberal opportunities to defend their interests, this due process right is not "indefinite", that is, it does not allow parties to participate in the inquiry as and when they choose.[1269] In this case, even after the disclosure of the information at issue, evidence before us demonstrates that interested parties had opportunities to defend their interests with respect to the Commission's sample determination, and did so in submissions to the Commission.[1270] We therefore reject China's contentions that due to the alleged delay at issue interested parties were precluded from defending their interests and reject China's claim under Article 6.2.

3. analogue country selection

7.634 China alleges that the European Union failed to provide timely opportunities to see certain information pertaining to the analogue country selection. Specifically, China's claim concerns (i) certain information concerning the analogue country selection procedure; and (ii) certain information in the questionnaire responses of the analogue country producers.

a) certain information concerning the analogue country selection procedure

7.635 China asserts that the Commission did not provide timely opportunities for interested parties to see information regarding: (a) whether or not all the Indian and Indonesian producers were contacted and/or sent questionnaires; (b) when Indian and Indonesian producers were contacted, if at all; (c) whether all the analogue country producers were given equal time to respond to the questionnaires; (d) whether extensions of time to respond were granted to these producers; and (e) whether any analogue country producer responded to the questionnaire. China asserts that despite several requests, this information was provided to interested parties only four months after the initiation of the expiry review. China argues that due to this delay, interested parties could not make timely submissions regarding, *inter alia*, the flexibility granted to the Brazilian producers in replying

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production represented by the sample of the EU producers after the discovery that one of these producers had discontinued production. See Hearing submission and comments of Chinese Footwear Coalition and China Leather Association dated 24 March 2009, Exhibit CHN-10, p.5; Comments of Chinese Footwear Coalition and China Leather Association dated 6 April 2009, Exhibit CHN-18, p.1; Comments of Chinese Footwear Coalition and China Leather Association dated 3 November 2009, Exhibit CHN-14, p. 14; EFA submission dated 3 November 2009, Exhibit CHN-35, p. 15; and Comments by Chinese exporter Yue Yuen dated 3 November 2009, Exhibit CHN-46, p.1.

[1267] China, second written submission, para. 969.

[1268] European Union, opening oral statement at the second meeting with the Panel, para. 296.

[1269] See paragraphs 7.604 and 7.621 above.

[1270] We note for instance the submission of the Chinese Footwear Coalition and China Leather Association, dated 3 November 2009, Exhibit CHN-14, pp. 13-14; and the submission of the EFA, dated 3 November 2009, Exhibit CHN-35, pp. 18-22.

to the questionnaires as well as the delay in sending the questionnaires to the Indonesian and Indian producers.[1271] In addition, China considers that this information constitutes information "used by the authorities" within the meaning of Article 6.4, asserting that it formed the factual basis for the Commission's decision to send analogue country questionnaires and to select the analogue country.[1272]

7.636 In response, the European Union argues that much of the information that was obtained from the various analogue country producers contacted was confidential. Moreover, in the European Union's view, matters such as whether or not all the Indian and Indonesian producers were contacted and if any analogue country producers responded to the questionnaires do not constitute "information that is used by the authorities", as neither the intentions nor the reasoning of the investigating authority falls within the meaning of "information" in Article 6.4. Furthermore, the European Union notes that interested parties not only were informed about the development of the selection process for analogue countries but also were provided with enough time to make presentations regarding this information. In this regard, the European Union notes that while the relevant information was made available on 6 February 2009, the comprehensive disclosure of the Commission was made in October 2009 and the Review Regulation was adopted on 22 December 2009.[1273]

7.637 China asserts that the information at issue in this aspect of its claim falls within the scope of information "used by the authorities" within the meaning of Article 6.4. China does not explain, however, how the information at issue was germane to the Commission's determination with regard to the selection of the analogue country. Indeed, China's arguments make clear that its concern is that various steps of the procedure of selecting the analogue country were not disclosed to interested parties as they were being taken. We recall that Article 6.4 requires the provision of timely opportunities to see information "used by the authorities", that is, information relevant to the issues before the investigating authority. In this case, we do not see how the fact that a particular producer has been contacted, and if so when it was contacted, or whether all producers were given an equal amount of time to respond to questionnaires, or if any of them were granted an extension of time to respond, or which of them, if any, responded to the questionnaire, is information relevant to the Commission's determination of the analogue country. Rather, if anything, we view these matters as aspects of the investigative process undertaken by the Commission in order to obtain information that will be analysed in making its determination with respect to the analogue country. However, in our view, nothing in Article 6.4 establishes an interested parties' right to, effectively, look over the investigating authority's shoulder and be kept apprised of various steps in the process of obtaining information and making determinations. Moreover, we recall our view that "information" within the meaning of Article 6.4 does not include the analysis and determinations made by investigating authorities. In light of the foregoing, we reject this aspect of China's claim.

7.638 China also asserts that the delayed disclosure of the analogue country selection procedure did not allow interested parties to duly defend their interests, contrary to Article 6.2. China notes that while interested parties submitted comments and proposed alternate analogue countries on 13 October 2008, it was only through the Note for the File dated 6 February 2009, i.e. four months later, that for the first time interested parties were informed that questionnaires had been sent to Brazilian producers on 21 November 2008, and to Indian and Indonesian producers on 23 and 22 December 2008, respectively. China alleges that during these four decisive months interested

[1271] China, first written submission, paras. 684-685; second written submission, para. 971.

[1272] See, e.g. China, second written submission, paras. 972-974; answer to Panel question 66. China adds that the European Union's interpretation of "information", if accepted, would preclude interested parties from challenging the lack of transparency in the investigation on account of the absence of information on issues such as the analogue country selection.

[1273] See, e.g. European Union, first written submission, paras. 402-403; second written submission, paras. 186-199.

parties could not comment on the analogue country selection and therefore interested parties did not have "full" opportunities to defend their interests "throughout the investigation". In addition, China argues that, by the time interested parties learned when the Indian and Indonesian producers were sent questionnaires, all deadlines had already passed and therefore interested parties in the defence of their interests could not even attempt to secure the cooperation of the Indian and Indonesian producers that they had proposed be considered.[1274]

7.639 Information concerning the process of selecting the analogue country was made available to interested parties in a Note for the File dated 6 February 2009.[1275] China alleges that by this date all deadlines had passed and therefore interested parties could no longer secure the cooperation of the Indian and Indonesian producers that they had been proposed. However, the Note for the File dated 6 February 2009 clearly indicates that the selection of the analogue country was still being analysed by the Commission.[1276]

7.640 Thus, given that at this point no final decision had yet been taken on the selection of the analogue country, we fail to see how interested parties were deprived of a full opportunity for the defence of their interests with regard to attempting to secure the cooperation of the analogue country producers in India and Indonesia that they had proposed. Moreover, we do not see any legal basis for China's contention that interested parties did not have a full opportunity to defend their interests during the investigation because they could not comment on the analogue country selection process prior to the issuance of the Note for the File in question. We recall that while interested parties must be provided with liberal opportunities to defend their interests, this right does not entitle them to participate in the investigation as and when they choose.[1277] We see no basis to conclude that interested parties were precluded from defending their interests in the context of the selection of the analogue country. Indeed, arguments in this regard were made by parties at subsequent stages of the expiry review.[1278] Merely that the Commission did not make the determination sought by interested parties does not demonstrate that they were deprived of a full opportunity for the defence of their interests. In light of the foregoing, we reject China's claim under Article 6.2 of the AD Agreement in this regard.

b) <u>certain information in the questionnaire responses of the analogue country producers</u>

7.641 China claims the European Union failed to provide Chinese exporters timely opportunities to see the non-confidential version of the questionnaire responses of some analogue country producers by either not placing them in the non-confidential file or by delays in doing so. China's claims concern: (i) the information contained in the questionnaire responses of two of the five Brazilian producers which replied to the questionnaire; (ii) the initial questionnaire response of one cooperating Brazilian producer (West Coast Group); and (iii) the questionnaire responses, as well as the PCN information, of two cooperating Brazilian producers (Werner Calçados LTDA and Henrichs & CIA LTDA) and of the cooperating Indian and Indonesian producers.[1279] China contends that this

[1274] China, answer to Panel question 68; second written submission, para. 977.
[1275] Note for the File, 6 February 2009, Exhibit CHN-8.
[1276] Note for the File, 6 February 2009, Exhibit CHN-8 (replies of Indonesian producers "are currently being analysed", one Indian producer "indicated it would send a reply", replies of Brazilian producers "are currently being analysed").
[1277] See paragraphs, 7.604, 7.621 and 7.633 above.
[1278] This is clearly reflected in the Review Regulation, Exhibit CHN-2, recitals 83-104. We also note the submission of the Chinese Footwear Coalition and China Leather Association, dated 24 March 2009, Exhibit CHN-10, pp. 1-2 and the submissions of the EFA, dated 23 February and 4 June 2009, Exhibits CHN-23, pp. 9-11and CHN-118, pp. 4-5, respectively.
[1279] See, generally, China, first written submission, paras. 683-692.

information was used by the Commission to select the analogue country and to calculate the dumping margin for Chinese exporters and was therefore relevant to the defence of their interests. In particular, China argues that the lack of timely, and in some cases any, opportunities to see these questionnaire responses or some of information therein precluded Chinese exporters from making any comparative evaluation of the cooperation of the analogue country producers as well as of the data provided by them. China asserts that by the time this information became available to Chinese exporters, the Commission had already selected Brazil as the analogue country.[1280]

7.642 The European Union contends that China's allegations regarding the delay and non-provision of the questionnaire responses of the Brazilian, Indian and Indonesian producers are outside the scope of Article 6.4 since "timeliness" in that provision relates to the period after release of information to interested parties, while China's allegations refer to the period between information being submitted to the Commission and the information being made available to interested parties. In any event, the European Union asserts that the replies of the analogue country producers were made available to interested parties in a timely manner so that they could prepare their presentations. In this regard, the European Union rejects China's contention that Brazil was selected as the analogue country at an early stage of the proceedings, noting that China relies in this regard on a Note for the file dated 7 April 2009, which clearly states that the consideration of the choice of the analogue country was continuing at that stage.[1281]

7.643 With respect to the questionnaire responses of two of the five Brazilian producers which replied to the questionnaires, China asserts that Chinese exporters were not provided any opportunity to see the information contained in these responses.[1282] The European Union submits that the responses of these producers revealed that they did not produce any of the types of shoes that were exported from China to the European Union and therefore their replies were rejected as irrelevant.[1283] China itself acknowledges that the data in these questionnaire responses was not used by the Commission in its analogue country analysis.[1284] However, China contends that the fact that the information at issue was not used does not justify a violation of Article 6.4. In support of its assertion, China relies on the report of the panel in *EC – Salmon (Norway)*, to assert that the information was "relevant" within the meaning of Article 6.4.[1285]

7.644 However, we recall that Article 6.4 only requires the provision of timely opportunities to see information which satisfies all of the conditions in that provision: it has to be "relevant" to the presentation of the interested parties' cases, "used" by the authorities, and "not confidential" within the meaning of Article 6.5. In this case, it is clear to us that the information in the questionnaire responses of the Brazilian producers in question was not used by the Commission in its determination with respect to the selection of the analogue country. We therefore reject this aspect of China's argument.[1286] With respect to China's claim under Article 6.2 in this regard, we note that China makes no independent argument in support of its claim and therefore consider that China has not established

[1280] See, e.g. China first written submission, para. 693.

[1281] European Union, first written submission, paras. 388, 404 and 406-408; second written submission, para. 196.

[1282] China, first written submission, para. 688.

[1283] European Union, opening oral statement at the second meeting with the Panel, para. 300.

[1284] China, first written submission, para. 688.

[1285] China, closing oral statement at the second meeting with the Panel, para. 80, citing Panel Report, *EC – Salmon (Norway)*, paras. 7.769 and 7.774.

[1286] In its first written submission, China also argued that no information was made available as to why the data of these producers was not used and who these two producers were. China, first written submission, para. 688. However, why information was not used is clearly an aspect of the Commission's reasoning, which is not within the scope of Article 6.4. With respect to the identities of the two producers, even assuming this information is not confidential, we fail to see, and China has not indicated, how this constitutes information "used" by investigating authorities.

an independent violation of this provision. Having rejected China's claim under Article 6.4, we also reject China's consequential claim of violation of Article 6.2.

7.645 With respect to the non-confidential version of the initial questionnaire response of the Brazilian cooperating producer West Coast Group, China asserts that this response was not made available to interested parties.[1287] The European Union contends that this information, which was later corrected by the producer concerned, cannot be considered "information used by the authorities".[1288] China disagrees, arguing that:

> "it was incumbent upon the European Union to provide interested parties the opportunity to see the initial non-confidential questionnaire response of that company even though subsequently the European Union did not rely upon the information in the initial confidential questionnaire response of that company after having assessed the need for additional/revised data."[1289]

7.646 We do not agree. China appears to acknowledge that the information in the initial questionnaire response of the producer concerned was not "used" by the Commission. Thus, it does not satisfy one of the prerequisites of Article 6.4. Nor has China demonstrated, or even argued, that the interested parties requested to see this information and were denied an opportunity to do so. We recall that Article 6.4 does not impose any affirmative obligation on investigating authorities to actively disclose information to interested parties. We therefore reject this aspect of China's arguments. With respect to China's claim under Article 6.2 in this regard, we note that China makes no independent argument in support of its claim and therefore consider that China has not established an independent violation of this provision. Having rejected China's claim under Article 6.4, we also reject China's consequential claim of violation of Article 6.2.

7.647 With respect to the two Brazilian producers Werner Calçados LTDA and Henrichs & CIA LTDA, one Indian producer, and five Indonesian producers, China asserts that (i) the PCN information of these producers was not made available at all, and (ii) the relevant questionnaire responses of these producers were made available only after delays of several months.[1290]

7.648 With regard to the first aspect of China's allegations, China argues that the European Union used the PCN information of all these producers and that information was relevant for Chinese exporters to make their arguments regarding the suitability of the analogue country selected.[1291] We recall that Article 6.4 does not obligate investigating authorities to actively disclose information to interested parties. We also recall in this context that, in order for a claim to prevail under this provision, it must be shown that an interested party requested to see information and that its request was rejected, or granted in an untimely manner, by the investigating authority. In this case, China has not demonstrated, or even argued, that interested parties requested to see the PCN information of the producers at issue and were denied an opportunity to do so. We therefore consider that China has failed to make a *prima facie* case of violation of Article 6.4 with respect to the PCN information in the questionnaire responses of the two Brazilian producers Werner Calçados LTDA and Henrichs & CIA LTDA, one Indian producer, and five Indonesian producers. In addition, we note that China presented no independent argument in support of a claim under Article 6.2, and we therefore consider that China

[1287] China, first written submission, 689.
[1288] European Union, first written submission, para. 405; opening oral statement at the second meeting with the Panel, para. 302.
[1289] China, second written submission, paras. 981-982.
[1290] China, first written submission, paras. 688 and 690-692; second written submission, paras. 980 and 983.
[1291] China, first written submission, para. 692.

has not established an independent case of violation of this provision. Thus, having rejected China's claim under Article 6.4, we also reject China's consequential claim of violation of Article 6.2.

7.649 Turning to the second aspect of China's allegations, concerning the alleged delay in providing the non-confidential versions of the questionnaire responses of the producers at issue, China argues that these questionnaire responses were not made available to interested parties in a timely manner, as they were made available between two and three months after the producers had submitted their responses.[1292]

7.650 We have noted above that in order to establish a *prima facie* case of violation of Article 6.4, a complaining party must demonstrate that an interested party requested to see information within the scope of this provision and that its request was denied, or not timely granted, by the investigating authority. China has cited no evidence indicating, or even argued, that any interested party made a request to the Commission to see this information. We note that, in any event, the information was disclosed to the parties well before any final determination was made by the Commission. China's claim relates to delays between the receipt of the information and when it was placed in the non-confidential file. We recall, however, our view that the timeliness of opportunities to see information under Article 6.4 is judged from the perspective of the ability of interested parties to prepare presentations based on that information. China has made no allegation that parties were not able to do so with respect to the information in question. We therefore consider that China has failed to make a *prima facie* case of violation of Article 6.4 with respect to the questionnaire responses of the two Brazilian producers Werner Calçados LTDA and Henrichs & CIA LTDA, one Indian producer, and five Indonesian producers.

7.651 With respect to China's claim under Article 6.2 in this regard, China argues that due to the Commission's delayed disclosure of the information in question, interested parties could not make comments or evaluate the substantive basis of the appropriateness of using the data of the Brazilian producers as compared to that of the Indonesian producers, and therefore they did not have a full opportunity to defend their interests at all points in time of the investigation.[1293] China also argues that the Note for the File dated 7 April 2009 makes clear that by that date Brazil had already been selected by the European Union as the analogue country.[1294]

7.652 The questionnaire responses at issue were made available to interested parties by the end of March and/or mid-April 2009.[1295] China asserts that the delay in making available the questionnaire responses of the producers concerned precluded interested parties from having a full opportunity to

[1292] In particular, China alleges that (i) the questionnaire responses of the two Brazilian producers, Werner Calçados LTDA and Henrichs & CIA LTDA, were added to the non-confidential file by the end of March or mid-April 2009, respectively, while they had submitted their responses on 22 January 2009; (ii) the questionnaire responses of the Indonesian producers were added to the non-confidential file between end of March or mid-April 2009, while they had submitted their responses on 30 January 2009; and (iii) the questionnaire response of the sole cooperating Indian producer was added to the non-confidential file between mid-end April 2009, while it had submitted its response by post on 4 February 2009 and the date of registration of response is 2 March 2009. China, first written submission, paras. 688-691.

[1293] We note that the scope of China's claim is not entirely clear. China generally refers to "two Brazilian producers" without specifying to which Brazilian producers it refers. China, second written submission, para. 985. We recall that in the context of its claim under Article 6.4, China challenged the "delayed disclosure" of the questionnaire responses of the two Brazilian producers, Werner Calçados LTDA and Henrichs & CIA LTDA, while it asserted the "non-disclosure" of information with respect to the rest of the Brazilian producers. Given that China's claim under Article 6.2 concerns the "delayed disclosure" of information in the non-confidential questionnaire responses, we understand that the two producers to which China refers in the present claim are Werner Calçados LTDA and Henrichs & CIA LTDA.

[1294] China, second written submission, para. 985.

[1295] China, first written submission, paras. 690-691.

defend their interests in the expiry review. As we understand it, China alleges that the Commission had already selected Brazil as the analogue country when it disclosed the questionnaire responses in question to interested parties, relying on a Note for the File dated 7 April 2009, which reads, in relevant part:

> "Analysis on the selection of analogue country
>
> **This note sets out the current state of play on the choice of analogue country**, in view of the facts collected with respect to Brazil, India and Indonesia ...
>
> Brazil
>
> Brazil was the analogue country chosen in the original investigation. On-spot verifications were carried out in three Brazilian companies in February 2009. Domestic sales for the three companies amount to a total of between 1,600,000 and 2,000,000 pairs in the IP, which represent more than 5% of exports of the sampled exporters in China and Viet Nam respectively. These sales cover a wide range of footwear, which correspond largely to those exported by the sampled Chinese and Vietnamese companies.
>
> The method applied for comparing Brazilian and Chinese Vietnamese products was the same as in the original investigation, i.e. comparison of exports by PCN with matching or most resembling PCN in Brazil. …
>
> India
>
> One Indian producer replied to the questionnaire, reporting domestic sales of (confidential) pairs. These sales concerned, according to this producer, only one PCN. In terms of quantity this represents (confidential) exports and (confidential) of the exports of the Vietnamese companies that were sampled *id est* less that 5% respectively.
>
> These data were not considered workable, since they are very little representative in terms of product range (1 PCN), of quantity sold domestically as compared to exported volumes and number of producers (1). India is therefore no longer considered an appropriate analogue market.
>
> Indonesia
>
> A desk analysis was carried out regarding the five Indonesian companies who replied to the questionnaire. These companies have total domestic sales of between 150,000 and 200,000 pairs, which represent far less than 5% of exports of the Chinese and Vietnamese sampled companies. Although this quantity is very low, **Indonesia is still being examined as a possible analogue market** in view of the wide range of footwear types produced by the five companies concerned. The method applied for comparing Indonesia and Chinese/Vietnamese products was the same' as in Brazil and the original investigation."[1296]

The Note for the File does not suggest, as China implies, that Brazil had already been selected as the analogue country when the information in question was made available to interested parties. Rather,

[1296] Note for File dated 7 April 2009, Exhibit CHN-60 (bold emphasis added).

this document clearly indicates that the selection of the analogue country was still in progress.[1297] We can therefore see no factual basis for China's assertion that parties were denied a full opportunity for the defence of their interests, since it seems clear to us that, following receipt of this Note, parties could have made submissions to the Commission concerning the appropriateness of using the data of the Brazilian producers as compared to that of the Indonesia producers. Indeed, certain interested parties *did* make subsequent presentations asserting that Indonesia was a more appropriate analogue country as opposed to Brazil.[1298] In our view, there thus is no basis in fact to conclude that interested parties were deprived of a full opportunity for the defence of their interests with respect to the analogue country selection in the expiry review.[1299] We therefore reject China's claim under Article 6.2 in this regard.

4. Union Interest questionnaire responses of five sampled EU producers

7.653 China claims that the European Union did not provide timely opportunities for interested parties to see the Union Interest questionnaire responses of five of the eight sampled EU producers in the expiry review, as these five questionnaire responses were never added to the non-confidential file. In the absence of such information, China argues that Chinese exporters were denied the opportunity to defend their interests by making presentations/submissions on the basis of such information, in violation of Articles 6.4 and 6.2.[1300] China notes that at the first meeting with the Panel, the European Union stated that the five sampled producers in question did not in fact submit replies to the Union Interest questionnaire. Nonetheless, China maintains its claim under Article 6.2 despite this disclosure.[1301] China argues that the European Union's failure to confirm that no responses were received from these five producers, in response to the repeated questions of interested parties regarding the absence of their non-confidential and confidential Union Interest questionnaire responses, precluded interested parties from commenting on several aspects of the investigation and therefore they were deprived of their right to defend their interests.[1302]

7.654 Notwithstanding China's suggestion that the European Community failed to engage in dispute settlement procedures in good faith by not indicating earlier that the five EU producers in question did not submit Union Interest questionnaire responses, when it would have known this since January 2009, we accept the European Union's statement in this respect as a matter of fact.[1303] It is not clear whether China maintains its claim under Article 6.4 in this respect, but in our view, the European Union cannot be found to have violated Article 6.4 by failing to provide timely

[1297] China asserts that the Note for the File supports its view that Brazil had already been selected because, as it shows that (i) verifications at the premises of Brazilian producers had been conducted; (ii) the normal value for footwear types including children's shoes had been established; (iii) for the Indonesian producers only a desk check was conducted; and (iv) a detailed comparison of the data for the three countries was provided specifically with the objective of demonstrating the appropriateness of selection of Brazil as the analogue country. While we would not disagree that the Note suggests that the Commission was leaning toward selection of Brazil as the analogue country, the wording of the Note referring to the "current state of play" and that "Indonesia is still being examined" in our view clearly indicates an on-going process of analysis, not a fixed determination, and we decline to conclude otherwise.

[1298] We note for example the submission of the EFA, dated, 4 May 2009, where it states that based on the information provided by the Commission in the Note for the File, dated 7 April 2009, Indonesia was a more appropriate analogue country than Brazil. Submission of the EFA, dated, 4 May 2009, Exhibit CHN-19, p. 1.

[1299] See footnote 1278 above.

[1300] China, first written submission, paras. 696-697.

[1301] China, second written submission, para. 992.

[1302] China, answer to Panel question 57.

[1303] China, answer to Panel question 57, para. 368. We decline to require the European Union to provide proof to substantiate its assertions, as China has requested we do. China, answer to Panel question 57, para. 369. We can conceive of no proof of the non-submission of these questionnaire responses that could be forthcoming in response to a request for proof of a negative.

opportunities to see information which it did not possess. Moreover, while China asserts that the EFA noted the absence of the non-confidential Union interest questionnaire responses several times during the expiry review, without receiving a response from the Commission, we do not consider that this demonstrates that it requested to see "information" within the meaning of Article 6.4, and that its request was denied.[1304]

7.655 With respect to China's claim under Article 6.2, as we understand it, China considers that by not informing interested parties that five EU producers had failed to submit responses to the Union Interest questionnaires, the Commission deprived interested parties of a full opportunity for the defence of their interests, as it deprived them of their "right to comment on several aspects of the investigation as well as on the European Union's investigatory process," referring specifically in this regard to the lack of cooperation of the five producers in question, alleged bias in the failure of the Commission to apply facts available or require a response from the five producers, lack of objectivity in the assessment of the Union interest, aspects concerning outsourcing by sampled producers, etc.[1305]

7.656 We recall that the right of parties to defend their interests accorded by Article 6.2 is not indefinite. While it certainly extends to ensure that interested parties have a full opportunity to defend their interests with respect to substantive matters in the course of an anti-dumping investigation, it is less than clear to us that it also includes a right to comment on the investigatory process and each of the elements referred to by China in its arguments in this respect. Certainly, one can posit that any failure to provide information to interested parties means that certain arguments may not be made. This does not, however, in our view mean that any failure in this regard establishes a violation of Article 6.2. To so conclude would be to impose on investigating authorities a standard of perfection in the conduct of investigations that we consider unwarranted. In our view, China has failed to demonstrate that the fact that the Commission did not inform interested parties that five producers had not submitted responses to the Union Interest questionnaire responses deprived interested parties of a full opportunity for the defence of their interest in any meaningful sense, and we therefore reject China's claim under Article 6.2 of the AD Agreement in this regard.

7.657 In light of the foregoing, we reject China's claim that the European Union failed to provide timely opportunities to see information in violation of Article 6.4 of the AD Agreement in the expiry review. We further reject China's consequential claim of violation of Article 6.2 of the AD Agreement with regard to the same information. Finally, we reject China's independent claim of violation of Article 6.2 with respect to the same information.

c. Original Investigation

1. information regarding the identities of the complainants, supporters, sampled EU producers, and all known EU producers

7.658 China claims that the European Union did not disclose the identities of the complainants, supporters, sampled EU producers, and all known EU producers, and therefore failed to provide interested parties timely opportunities to see such information, in violation of Article 6.4 of the AD Agreement. In addition, with respect to the names of all known producers, China also claims that to the extent that this information was not made available to interested parties, the European Union violated Article 6.2 of the AD Agreement.[1306] China argues that this information is not confidential since "names" cannot be considered "information" within the meaning of Article 6.5 of the

[1304] Indeed, the submission of the EFA dated 4 June 2009 refers to the delay in filing the responses, "assuming that all eight sampled producers in fact filed a confidential questionnaire response" by the deadline. Submission of the EFA dated 4 June 2009, Exhibit CHN-118.

[1305] China, answer to Panel question 57, para. 374.

[1306] China, first written submission, paras. 1288, 1297 and 1300.

AD Agreement and therefore cannot be granted confidential treatment.[1307] Furthermore, China alleges that the identities of the producers was information relevant to interested parties, and non-disclosure of this information prevented them from commenting on many aspects of the investigation, and restricted their opportunities to defend their interests.[1308] China also asserts that this information was used by the Commission since without this information the Commission would have been unable to (a) select the sample, (b) analyse injury at the macro- and microeconomic levels, (c) calculate price undercutting and underselling, and (d) perform the causation analysis.[1309] Finally, China considers that the partial release of this information by the Commission – a document listing 1531 "all known producers" – does not constitute the information that interested parties requested, nor a disclosure of the identities of the producers. Specifically, China argues that since the list did not indicate whether the companies were involved in the investigation, the names of the EU producers were not disclosed at all.[1310] In any event, China contends that this information was not provided in a "timely" manner.[1311]

7.659 The European Union argues that China has not substantiated its claim as it has failed to establish that the information at issue was not entitled to confidential treatment.[1312]

7.660 We note that we have found that the European Union did not err in according confidential treatment to this information.[1313] Article 6.4 makes it clear that the right to see information is limited to information that is not confidential. We therefore reject this aspect of China's claim that the European Union failed to provide timely opportunities to see information in violation of Article 6.4 of the AD Agreement in the original investigation. China's claim of violation of Article 6.2 of the AD Agreement with respect to the names of all known producers is dependent on its claim of violation of Article 6.4. Having found no violation of Article 6.4 with respect to this information, we find no violation of Article 6.2 in this regard.[1314]

(d) Claims II.8, II.9, III.10, III.11, and III.12 - Alleged violations of Articles 6.5, 6.5.1, 6.5.2, and 6.2 of the AD Agreement – Confidential treatment of information

7.661 In this section of our report, we address China's claims that the European Union acted inconsistently with Article 6.5 of the AD Agreement in both the expiry review and the original investigation by wrongly treating certain information as confidential. We also address China's claims that the European Union acted inconsistently with Article 6.5.1 of the AD Agreement in both the expiry review and the original investigation by failing, with respect to some of the information at issue that was treated as confidential, to require adequate non-confidential summaries thereof, or an explanation as to why such summarization was not possible. Finally, we address China's claims that, with respect to some of the information at issue in both the expiry review and the original investigation, the European Union acted inconsistently with Article 6.5.2 of the AD Agreement, by

[1307] See, e.g. China, first written submission, para. 1273.

[1308] For instance, China argues that Chinese exporters could not comment on the selection of the sample; any potential relationships between complainants and exporters; the level of outsourcing by the complainants and sampled companies; the existence of any injury at the macro- or microeconomic levels; the levels of undercutting and underselling, and the causation analysis. China, first written submission, para. 1272.

[1309] China, first written submission, para. 1274.

[1310] China, first written submission, paras. 1268-1269 and 1286.

[1311] China notes that this information was provided the day after the publication of the provisional measures, thus, after the sample of EU producers had already been selected and a provisional affirmative determination of injury and causation had already been taken. China, first written submission, para. 1286.

[1312] European Union, first written submission, paras. 768 and 796.

[1313] See paragraph 7.699 below.

[1314] We recall, in addition, that the obligations under Article 6.2 do not apply to confidential information.

failing to disregard certain information because confidential treatment of that information was not warranted.

(i) Arguments of the parties

a. China

7.662 With respect to the original investigation, China's claim under Article 6.5 specifically challenges the confidential treatment of the following information: (i) the names of complainant EU producers and other EU producers of the like product; (ii) information pertaining to the selection of the sample of the domestic industry, adjustments for differences affecting price comparability, the non-confidential questionnaire response of one sampled EU producer, and missing declarations of support; (iii) certain information in the complaint and in a Note for the File dated 6 July 2005; and (iv) certain information in the non-confidential versions of the questionnaire responses of the sampled EU producers. With respect to this information, except for the names of producers, China also claims that the European Union violated Article 6.5.1 of the AD Agreement by failing to require an adequate non-confidential summary of confidential information or an explanation why summarization was not possible. Concerning the information in the injury questionnaire responses of the sampled EU producers, China claims that the European Union also violated Article 6.5.2. Also, to the extent that all the information listed above was not properly treated as confidential, and/or to the extent that it was, but adequate non-confidential summaries were not provided, China claims that the European Union violated Article 6.2 of the AD Agreement as a consequence of the violations of Articles 6.5, 6.5.1 and 6.5.2.[1315]

7.663 With respect to the expiry review, China's claim under Article 6.5 specifically challenges the confidential treatment of the following information: (i) the names of the EU producers of the like product, i.e. the complainants, the supporters and the sampled producers, as well as the sampled producers in the original investigation that completed the Union Interest questionnaire in the expiry review; (ii) certain information in the expiry review request; (iii) the information which formed the basis for the selection of the EU producers included in the sample of the domestic industry; (iv) the volume of production of the like product for 2007 and January 2008 by the EU producers supporting the request; (v) certain information in the injury questionnaire responses of the sampled EU producers; (vi) the information in the Union Interest questionnaire responses of certain sampled EU producers; and (vii) certain information in the analogue country questionnaire responses of producers in the potential analogue countries. With respect to this information, China also claims that the European Union violated Article 6.5.1 of the AD Agreement by failing to require an adequate non-confidential summary of confidential information or an explanation why summarization was not possible. Finally, with respect to the confidential treatment of the names of the EU producers and the injury questionnaires responses of the sampled EU producers, China claims that the European Union also violated Article 6.5.2, and as a consequence, violated Article 6.2 of the AD Agreement.[1316]

b. European Union

7.664 The European Union rejects all China's claims under Articles 6.5, 6.5.1, 6.5.2, and 6.2 of the AD Agreement.[1317]

[1315] See, generally, China, first written submission, paras. 1260-1341.
[1316] See, generally, China, first written submission, paras. 699-771.
[1317] See, generally, European Union, first written submission, paras. 455, 459 and 796.

(ii) Arguments of third parties

a. Colombia

7.665 Colombia considers that, consistent with the rulings of previous panels, both information by nature confidential and information generally public can be treated as confidential only if there is "good cause" for such treatment. Thus, argues Colombia, investigating authorities must assure the showing of good cause regardless the nature of the information for which confidentiality is sought.[1318]

b. United States

7.666 The United States is of the view that, consistently with the findings of prior panels, it is neither useful nor appropriate to attempt to articulate a categorical standard concerning what constitutes "good cause". Furthermore, the United States considers the "good cause" for confidential treatment of information which is asserted to be "by nature confidential" is demonstrated by the inherently confidential nature of this information, while for other type of information, the submitter will need to provide a particularized explanation of why confidential treatment is warranted for the information in question. In the case of potential commercial retaliation asserted as good cause for confidential treatment, the United States considers that where a submitter asserts in good faith that disclosure of information it provides could cause customers to retaliate against it, there may well be sufficient grounds for an authority to conclude that disclosure of the information would cause the submitter substantial competitive harm and to find "good cause" for the information to be treated as confidential.[1319]

(iii) Evaluation by the Panel

a. Overview

7.667 Article 6.5 of the AD Agreement provides:

> "Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]
>
> 6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.
>
> 6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can

[1318] Colombia, answer to Panel question 15.
[1319] United States, answer to Panel question 16.

> be demonstrated to their satisfaction from appropriate sources that the information is correct.[18]
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>
> [17] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.
>
> [18] Members agree that requests for confidentiality should not be arbitrarily rejected."

Article 6.5 thus establishes the criteria for deciding whether or not information may be treated as confidential in the course of an anti-dumping investigation. It specifies that information which is "by nature" confidential, and information submitted on a confidential basis, shall be treated as confidential by investigating authorities, provided that good cause for such treatment is shown. Moreover, the last sentence of Article 6.5 requires that confidential information not be disclosed without the specific permission of the party submitting it.[1320] Article 6.5.1, in turn, obliges investigating authorities to require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries must permit a reasonable understanding of the substance of the confidential information. However, such non-confidential summaries need not be furnished when, in exceptional circumstances, the information is not susceptible of summarization. In such cases, Article 6.5.1 requires interested parties instead to indicate the reasons why summarization is not possible. Finally, Article 6.5.2 provides that an investigating authority may disregard information if it concludes that a request for confidential treatment is not warranted and the supplier is unwilling to make the information public or authorize its disclosure in generalized or summary form, unless it is demonstrated to the satisfaction of the investigating authority that the information is correct.

7.668 China's claims under Article 6.5 raise questions concerning the nature of information which may be treated as confidential, as well as the parameters of the requirement to show good cause for confidential treatment. China's claims under Article 6.5.1 raise questions of the sufficiency of non-confidential summaries provided, as well as scope of the obligations of the investigating authority with respect to ensuring compliance with this provision. Before turning to the specific arguments in this dispute, we discuss below several general issues raised by China's claims, the resolution of which informs our understanding of Article 6.5 as a whole, and will be relevant in our consideration of the issues before us in evaluating these claims.

7.669 While the first sentence of Article 6.5 on its face makes it clear that "information" which is by nature confidential or which is submitted on a confidential basis by parties to an investigation, must be treated as confidential, it does not define the term "information". Nor does any other provision of the AD Agreement define this term. China considers that the European Union treated as confidential matters that do not constitute "information" within the meaning of Article 6.5, specifically, the names of producers. In support of its position, China refers to the following dictionary definition of the word "information": "communication of the knowledge of some fact or occurrence; knowledge or facts communicated about a particular subject, event, etc.; news; intelligence".[1321] For China, since this definition does not refer to names in defining the term "information", it excludes "names" from the scope of the term "information". China also contends that the use of the term "information" in other provisions of Article 6 of the AD Agreement, notably Articles 6.2, 6.3, 6.4, 6.6, 6.7 and 6.8, supports its view that this term does not include the name of a company. China argues, for instance, that with respect to Article 6.6, names cannot be "information" on which findings are based, while with respect

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[1320] The European Union does not disclose information pursuant to protective order, and therefore footnote 17 of the AD Agreement is irrelevant in this case.

[1321] China, first written submission, para. 713, citing Shorter Oxford English Dictionary, (Oxford University Press, 2007), p. 1379, Exhibit CHN-62.

to Article 6.8, information as used in this provision implies knowledge concerning facts, situations, figures or data of a company, but not its name. Further, China asserts that Article 6.7 differentiates between the firms whose information is verified, and the names of those firms. Thus, China argues, the name of a producer/company cannot be considered "information" to which confidential treatment can be accorded.[1322]

7.670 The European Union asserts that China's argument is flawed, contending that when the Commission granted confidential treatment to the names of companies making or supporting the original application for anti-dumping relief or the expiry review request, what it was doing was granting confidential treatment to the information that the particular company was one that was making or supporting the request. The European Union considers that this factual information may be treated as confidential. The European Union also argues that China's contextual arguments fail, noting for instance that an investigating authority can satisfy itself as to the accuracy of this information or verify it under Articles 6.6 and 6.7. The European Union recognizes that a grant of confidential treatment creates problems for other interested parties, but considers that where the conditions set out in the AD Agreement are satisfied, such treatment may clearly be granted. Nor is there any requirement to weigh the relative importance of the information granted confidential treatment against the difficulties such treatment might cause other parties. Finally, the European Union contends that China's assertion that the names of companies are "by nature public information" both recognizes that names are information, and fails to recognise that what is being treated as confidential is the fact that the particular companies in question made or supported the application or request, which the European Union asserts clearly is not public information.[1323]

7.671 While we find the dictionary definition of the term "information" to be useful, we do not consider it dispositive of the question before us. Moreover, we do not consider that the dictionary definition of the term is so limited as to exclude, *a priori*, names from the scope of "information" that may be treated as confidential under Article 6.5. The definition of information is without limitation or qualification, and thus does not suffice to demonstrate that the name or identity of a producer in an anti-dumping investigation cannot be considered "information". In our view, the term "information" may encompass names, particularly where, as here, to identify the names of companies is to identify their status as a complainant or supporter of the complaint in the original investigation or the expiry review request. We see no reason why the identity of a company in this context cannot be considered "knowledge or facts communicated about a particular subject". Moreover, we consider it highly relevant that in Article 6.5 itself, the term "information" is modified by the word "any". In our view, this clearly indicates the term "information" should be given a broad meaning. Article 6.5 contains only one limitation on the treatment of "any information" as confidential – the requirement of a showing of good cause. It certainly does not explicitly limit the type or nature of information that may be treated as confidential – the use of the word "any" to modify information leads to precisely the opposite conclusion. Thus, we see no basis in the text of Article 6.5 for the *a priori* exclusion of certain types of information, the names of companies in this case, from being treated as confidential. In our view, a restrictive interpretation such as proposed by China could undermine the purpose of Article 6.5, which is intended, in our view, to encourage parties to provide information to investigating authorities by ensuring that the information provided will, if good cause is shown, be treated as confidential.

[1322] China, first written submission, paras. 713-715, 1263 and 1273; second written submission, para. 1446.

[1323] European Union, first written submission, paras. 416-420.

7.672 In any event, we recall that a treaty term can only be properly understood in its context and in the light of the object and purpose of the agreement in question.[1324] Concerning context, China argues that the use of the term "information" in Articles 6.6, 6.8 and 6.7 of the AD Agreement supports its view that "information" in Article 6.5 cannot be considered to include the name of a company. Specifically, China argues that: (i) the term "information" in Article 6.6 does not include a company's name as it cannot be the basis of the findings of an investigating authority; (ii) the term "information" in Article 6.8 implies the knowledge of, *inter alia*, the data of a company but not its name; and (iii) Article 6.7 clearly establishes a difference between "information" and "interested parties' names" as it differentiates between the firms concerned and the information pertaining to those firms.

7.673 We do not agree with China's arguments in this respect. In our view, even assuming China were correct, and the use of the term "information" in these provisions excluded the names of companies, a question which we need not and do not resolve, we note that in the provisions cited by China, the term "information" is not modified by the term "any". Rather, in each of those provisions, the term "information" is modified or qualified by other phrases, referring to, for instance, "information supplied by interested parties" (Article 6.6), verification of "information provided" (Article 6.7), and refusal or failure to provide "necessary information" (Article 6.8). These modifiers imply limitations on the term information, while the modifier "any" in Article 6.5 implies breadth of scope. Thus, we do not consider the meaning of the term "information" in these other provisions to be particularly informative, and certainly not controlling, for our understanding of the meaning of the term "information" as used in Article 6.5. Accordingly, based on the foregoing, we consider that, provided good cause is shown, there is no limit on the type or nature of information may be treated as confidential in an anti-dumping investigation.

7.674 With respect to Article 6.5.1 of the AD Agreement, we are of the view that, although not explicitly provided for in the text, this provision imposes an obligation on investigating authorities to require interested parties to provide a statement of the reasons why summarization of confidential information is not possible. In our view, this interpretation is consistent with the balance that Article 6.5.1 seeks to strike between confidential treatment of information and the transparency of the investigation and proceedings.[1325] Therefore, we consider that pursuant to Article 6.5.1, investigating

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[1324] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products ("China – Publications and Audiovisual Products")*, WT/DS363/AB/R, adopted 19 January 2010, para. 348.

[1325] We find support for this view in the following statement by the panel in *EC – Fasteners (China)*:

> "In our view, Article 6.5.1 serves to balance the goal of ensuring that the availability of confidential treatment does not undermine the transparency of the investigative process, with recognition of the importance of maintaining the confidentiality of information where appropriate. We consider that it is the investigating authorities' obligation to ensure that all the requirements of Article 6.5.1 are respected by interested parties. That is, we consider that the investigating authority must ensure that an appropriate non-confidential summary is provided, or in exceptional circumstances, if that is not possible, that an appropriate statement of reasons why summarization is not possible is given. Clearly, in the absence of scrutiny of the non-confidential summaries or stated reason why summarization is not possible by the investigating authority, the potential for abuse of confidential treatment by interesting parties would be unchecked unless and until the matter were reviewed by a panel. This would obviously defeat the goal of maintaining transparency during the course of the investigation itself that is one of the purposes of Article 6.5. Thus, in our view, the investigating authorities must ensure that where an interested party asserts that a particular piece of confidential information is not susceptible of summary, the reasons for that assertion are appropriately explained."

Panel Report, *EC – Fasteners (China)*, para. 7.515 (footnotes omitted), citing Panel Reports, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala* ("*Mexico – Steel Pipes and Tubes*"), WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207, para. 7.379; *Guatemala – Cement II*, para. 8.213; and *Mexico – Olive Oil*, para. 7.89.

authorities are obliged to ensure that a party submitting confidential information also furnishes an appropriate non-confidential summary, or in exceptional circumstances, where the information is not susceptible of summary, that the party provides an appropriate statement of the reasons why summarization is not possible.

7.675 With respect to Article 6.5.2 of the AD Agreement, as we understand it, China argues that the Commission was obligated to determine that confidential treatment of certain information was not warranted, and should have disregarded the information on that basis. However, in our view, Article 6.5.2 does not impose any affirmative obligation on investigating authorities to examine whether or not confidential treatment is warranted. The determination of whether information may be treated as confidential falls under Article 6.5 chapeau. Article 6.5.2 addresses what actions investigating authorities may take if they "find that a request for confidentiality is not warranted".[1326] Thus, there is, in our view, no basis for a claim of violation of Article 6.5.2 in a situation where a request for confidential treatment was granted by the investigating authority – that is, in a case where it finds that the request for confidentiality **is** warranted.

7.676 Having established our general understanding of the provisions of Article 6.5, we address each aspect of China's claims, with respect to each item of information concerned, below. We note in this regard that in some instances, China has made a general claim of violation, and indicates that the specific factual allegations it addresses in its submissions are examples of the general violation claimed. However, in our view, a claim under Article 6.5 of the AD Agreement, or any of its subparagraphs, requires a careful examination of the specific facts at issue in order to evaluate whether a violation occurred.[1327] Thus, our analysis and conclusions are explicitly limited to the specific factual situations raised by China.

b. Original Investigation

1. <u>confidential treatment of the names of complainant EU producers and other EU producers of the like product</u>

7.677 China claims that the European Union violated Article 6.5 by treating as confidential the names of EU producers, including the complainants, supporters, and sampled producers and all the known producers.[1328] China argues first, that the names of the producers were not "information" eligible for confidential treatment,[1329] and second, that the producers whose names were treated as confidential did not show "good cause" for such treatment. China further claims that, to the extent this information was not confidential, the European Union also violated Article 6.2 of the AD Agreement because a non-confidential summary of the information was not provided to the interested parties.[1330]

[1326] We note that previous panels have also concluded that the obligation on investigating authorities to determine whether a request for confidential treatment is warranted is addressed by Article 6.5 of the AD Agreement. Panel Reports, *Guatemala – Cement II*, para. 8.209, and *Mexico – Steel Pipes and Tubes*, para. 7.381.

[1327] See paragraph 7.590 above.

[1328] See, e.g. China first written submission, paras. 1288, 1297 and 1300. China also made a claim under Articles 6.2 and 6.4 with respect to this category of information. China's claim in this regard is addressed in paragraphs 7.658-7.660 above.

[1329] China, first written submission, paras. 713-715, 1263 and 1273; second written submission, para. 1446.

[1330] China, first written submission, para. 1297. With respect to the names of the complainants and sampled producers, China further claims that even if this information was not confidential, the European Union also violated Article 6.2 of the AD Agreement because a non-confidential summary of the information was not provided to the interested parties. *Id.* China, however, has made no claim under Article 6.5.1 in this regard.

7.678 With respect to the alleged lack of a showing of good cause, China submits that the European Union treated as confidential the names of the complainants and sampled producers on the basis of a generic request made by the CEC, despite that good cause was not shown by each of these producers.[1331] Furthermore, China argues that the 36 non-complainant producers who supported the complaint did not request confidential treatment of their identities, and did not show good cause as to why their names should be treated as confidential.[1332] China also contends that the complainants did not show good cause as to why the names of producers on the list of "other producers" should be treated as confidential.[1333] Finally, China contends that the alleged "risk for retaliation," asserted in support of the request for confidential treatment of the names in question, cannot, in the absence of any proof, be considered "good cause" for confidential treatment within the meaning of Article 6.5 of the AD Agreement. China also asserts in this regard that, after the imposition of provisional measures, seventeen Italian producers disclosed their names when they filed an application for annulment of the Provisional Regulation, and also disclosed their names when they intervened in various European court proceedings filed by Chinese exporters following the imposition of the definitive measure. This, in China's view, demonstrates that there was in fact no real risk of retaliation.[1334]

7.679 The European Union submits that China has failed to establish that the information at issue was not properly treated as confidential.[1335] In addition to arguing that the names of companies may be treated as confidential in order to not disclose whether they were complainants or supporters of the complaint, the European Union argues that all the producers concerned showed good cause for confidential treatment.[1336] The European Union contends that although the 36 producers who gave their support but were not themselves complainants expressed their support separately, that support was for the complaint, which in turn requested confidential treatment for the identities of "supporters". Thus, the European Union argues, the support given by these producers included endorsing the request for confidential treatment in the complaint.[1337] The European Union argues that, in light of the request for confidential treatment of the identities of complainants and supporters, and the stated fear of retaliation, the confidential treatment accorded to the "list of other producers" was entirely reasonable. The European Union asserts that, had it published this list, it would have in effect revealed the names of those companies who were supporting the complaint, since the names of all producers were in large part public knowledge.[1338] Finally, concerning China's allegations with respect to the disclosure of the names of Italian producers in European court proceedings, the

[1331] China, first written submission, para. 1277.

[1332] China asserts that although CEC's request mentions "complainants and supporters", the CEC was acting only on behalf of the former. In fact, China argues, while the letters from each complainant stated that it "supports the complaint as a complainant", the declarations of support did not contain such a statement. China, first written submission, paras. 1290-1292; second written submission, paras. 1447-1450.

[1333] China submits that the names of these producers could not be considered confidential information since the inclusion of a producer's name on that list could not necessarily reveal whether the producer was a complainant. China, first written submission, para. 1299; second written submission, paras. 1453-1454.

[1334] China, first written submission, paras. 1279 and 1281-1282; second written submission, paras. 1441-1443. According to China, it can be assumed that the seventeen Italian producers were among the complainants since their reason to file a court case was to have children's shoes included in the product scope following the imposition of provisional measures.

[1335] European Union, first written submission, para. 796.

[1336] The European Union notes in this regard that the complainants and other producers made requests for confidentiality at various times, noting for instance Annex I of the complaint and attached letter from CEC. European Union, first written submission, paras. 754-756.

[1337] The European Union adds that its interpretation is confirmed by the supporters' actions: they removed their names and addresses from the declarations of support. European Union, opening oral statement at the second meeting with the Panel, para. 413.

[1338] European Union, first written submission, paras. 769-770; opening oral statement at the second meeting with the Panel, para. 414.

European Union submits that even assuming that these producers were among the complainants or supporters, the proceeding filed by these producers after the imposition of the provisional measures would have not provided a basis for modifying the confidentiality accorded to the information in question.[1339] The European Union notes that the other legal proceedings referred to by China were commenced after the adoption of the Definitive Regulation and therefore have no bearing on the actions taken by the Commission during the investigation.[1340]

7.680 This aspect of China's claim raises two main issues. The first is whether the name of a producer/company can be considered "information" within the meaning of Article 6.5 of the AD Agreement. As we concluded above,[1341] in our view, provided good cause is shown, "any" information may be treated as confidential in an anti-dumping investigation, including, in this case, the names of producers. We therefore reject China's contention that the names of producers are not "information" which may be treated as confidential.[1342]

7.681 The second issue raised by this aspect of China's claim is whether "good cause" was shown for justifying the treatment of the producers' and supporters' identities as confidential. China advances two main arguments in support of its assertion that the producers whose names were treated as confidential did not show "good cause". China argues first, that the risk of retaliation by customers for acting as a complainant or supporting the complaint cannot be considered "good cause" within the meaning of Article 6.5 in the absence of any proof, and second, that the producers concerned did not themselves show good cause for the confidential treatment of their names.

a) alleged risk of retaliation as "good cause" for confidential treatment

7.682 Turning first to the relevant facts, which we understand to be undisputed, we note that the complaint in the original investigation was submitted by the CEC on behalf of EU producers. The complaint requests confidential treatment of "the names and countries of the individual complaining producers, together with the powers of attorney and support forms".[1343] A letter from CEC accompanying the complaint states that:

> "The disclosure of the names of the complainants and supporters of this application would have a significantly adverse effect upon them, in terms of being subject to retaliatory actions.
>
> The footwear market structure … has the perfect conditions for retaliation: huge business interests at stake and unequal negotiation power for the parties involved, i.e. on one side, a fragmented Community industry that in some cases import raw materials from the countries concerned, and on the other, very big distributors.

[1339] In this regard, the European Union notes that the report of the case to which China refers merely states that the applicants had "revealed their concerns to the staff of the Member of the Commission responsible for trade during the administrative procedure", and that the action of the producers was dismissed on the basis that the measure was of insufficient individual concern to them, whereas under European Union law companies that launch complaints would normally qualify in this respect. European Union, first written submission, para. 759.

[1340] European Union, first written submission, para. 761.

[1341] See paragraphs 7.671-7.673 above.

[1342] We note that the panel in *EC – Fasteners (China)* considered a similar claim and, after having determined that good cause had been shown, concluded that the Commission did not err in granting confidential treatment to the names of the complainants and supporters. Panel Report, *EC – Fasteners (China)*, paras. 7.453-7.455.

[1343] Anti-dumping complaint lodged by CEC, Exhibit CHN-76, Annex 1.

> In fact, in the previous case concerning footwear, this problem was already rampant, as acknowledged by the Commission and the Council. At that time … The investigation confirmed that certain Community producers had been subjected to severe commercial pressure to stop cooperating in the investigation and withdraw their support for the complaint. Accordingly, it was considered appropriate not to disclosure [sic] the names of these 15 Community producers'.
>
> Such pressures have already been suffered in this case.
>
> Therefore, it is absolutely necessary that the names and countries of the companies involved in this application are kept strictly confidential."[1344]

In addition, the Provisional Regulation states that sampled EU producers and other cooperating producers requested that their identities be kept confidential, specifically asserting a risk of retaliation by some of their clients, including the possible termination of their business relationships. These producers noted that certain complainant producers supplied EU customers who also sourced products from China and Viet Nam, thus benefiting directly from the allegedly dumped imports. These complainants were thus in a sensitive position, since some of their clients might have not been satisfied with their lodging or supporting a complaint against the alleged injurious dumping, and therefore there was a risk of retaliation by some of their clients, including the possible termination of their business relationships.[1345] The Provisional Regulation notes that the request was granted as it was considered "sufficiently substantiated".[1346]

7.683 China does not dispute that an alleged risk of retaliation could *per se* constitute good cause for confidential treatment.[1347] Rather, China asserts that the alleged risk of retaliation stated in the complaint, in the absence of any evidence substantiating the severity of the risk, could not be considered "good cause" within the meaning of Article 6.5.[1348]

7.684 While Article 6.5 requires that good cause be shown in order for information to be granted confidential treatment, it contains no guidance as to what might constitute good cause, or how it should be established. We see nothing in Article 6.5 which would require any particular form or means of showing good cause, or any particular type or degree of supporting evidence which must be provided. In our view, the adequacy of a showing of good cause must be assessed in light of the circumstances of each investigation and each request for confidential treatment.[1349] What constitutes "good cause" will depend on the nature of the information for which confidential treatment is sought.[1350] The nature of the good cause alleged to exist, in turn, will determine the kind of evidence that may be needed to demonstrate the existence of such good cause.[1351] In our view, these are matters for investigating authority to consider and resolve in the first instance, on the basis of the facts of each investigation, subject, of course, to review by a panel.

7.685 In this case, the complaint asserted a risk of retaliation if the names of the complainants and supporters of the complaint were disclosed. There is no indication on the evidence before us, nor does the European Union argue, that specific evidence to support the alleged risk of retaliation was

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[1344] Anti-dumping complaint lodged by CEC, Exhibit CHN-76.
[1345] Provisional Regulation, Exhibit CHN-4, recital 8.
[1346] Provisional Regulation, Exhibit CHN-4, recital 8.
[1347] China refers to "unsubstantiated statements in the absence of any proof supporting the claims of risk of retaliation". China, first written submission, para. 1279 (footnote omitted).
[1348] China, first written submission, para. 1279; answer to Panel question 75(b).
[1349] Panel Report, *EC – Fasteners (China)*, para. 7.451.
[1350] Panel Reports, *EC – Fasteners (China)*, para. 7.451; *Korea – Certain Paper*, para. 7.335; and *Mexico – Steel Pipes and Tubes*, para. 7.378.
[1351] Panel Report, *EC – Fasteners (China)*, para. 7.451.

submitted. In our view, however, this lack of evidence does not preclude the alleged fear of retaliation from constituting good cause for the treatment of the identities of the producers concerned as confidential. As discussed above, the nature of the good cause alleged is relevant in determining the kind of evidence that will be sufficient to demonstrate its existence. In this regard, we consider that direct or concrete evidence substantiating concerns about potential retaliatory actions by customers is not likely to be obtainable. Thus, these concerns may well be evidenced only by the testimony of the submitter of the information for which confidential treatment is sought. Therefore, in our view, unless there is some reason to believe that the alleged risk of retaliation was unreasonable, unfounded, or untrue, the absence of more concrete evidence supporting the alleged risk of retaliation does not, by itself, preclude the concern for possible retaliation from being good cause within the meaning of Article 6.5.[1352]

7.686 Moreover, we consider that the risk of retaliation alleged in the complaint was not mere assertions based on conjectures, as China contends. The CEC's letter asserted that, during a previous anti-dumping investigation concerning footwear imports, it was "confirmed that certain Community producers had been subjected to severe commercial pressure to stop cooperating in that investigation and withdraw their support for the complaint, and that this pressure had already been suffered in the investigation at issue."[1353] In our view, this assertion of fact, which China does not dispute, directly supports the fear of retaliation asserted as good cause for confidential treatment of the identities of complainants and supporters.

7.687 China asserts that after the imposition of provisional measures, seventeen Italian producers disclosed their names when they filed an application for annulment of the Provisional Regulation and also when they intervened in various European court proceedings filed by Chinese exporters following the imposition of the definitive measures. This, in China's view, demonstrates that the alleged risk of retaliation was untrue.[1354]

7.688 We are not persuaded by this argument. China has not demonstrated that these seventeen producers were among the producers whose identities were treated as confidential in the investigation – rather, China argues that it can reasonably be "assumed" that these seventeen producers were complainants in the original investigation, since their reason to file a court case was to have children's shoes included in the product scope following the imposition of provisional measures.[1355] However, the mere fact that a producer of footwear in the European Union would seek to have a category of

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[1352] We find support for this view in the reasoning of the panel in *EC – Fasteners (China)*. That panel, which addressed an issue similar to the one before us in the present dispute, concluded that concerns about potential retaliation may constitute good cause for confidential treatment. The panel stated that:

> "'potential commercial retaliation' is not a sufficiently concrete phenomenon that evidence of its existence is likely to be obtainable. Thus, unless there is some reason to believe that the fear of retaliation is unreasonable, unfounded, or untrue ... we consider that the allegation of the complainants in this case is a sufficient basis for the Commission's conclusion. [938]

> [938] We do not exclude the possibility of there being some situation in which such an allegation can be substantiated by some more concrete evidence than the testimony of the party seeking confidential treatment for the information that it submits. However, it is difficult to conceive of what such evidence might be – the likelihood of complainants being able to produce a written document, or an audio recording, of a customer threatening commercial retaliation seems far-fetched, and yet in the absence of such evidence, we do not see what could be proffered as evidence to support a fear of such retaliation."

Panel Report, *EC – Fasteners (China)*, para. 7.453. We agree with the views expressed by the panel.

[1353] Anti-dumping complaint lodged by CEC, Exhibit CHN-76, Annex 1.

[1354] China, first written submission, para. 1281; second written submission, paras. 1441-1443.

[1355] China, second written submission, para. 1442.

shoes included in the scope of an anti-dumping measure does not, in our view, demonstrate that the producer was itself a complainant or supporter of the complaint who sought confidential treatment of its identity. It is entirely possible that a previously uninvolved producer might, once a provisional measure is in place, conclude that it is in its interest to broaden the scope of such a measure. The court case to which China refers does not identify these seventeen producers as complainants or supporters of the complaint in the original investigation. It merely states that these producers "might have revealed their concerns to the staff of the Members of the Commission responsible for trade during the administrative proceedings".[1356] Therefore, it is not, in our view, reasonable to assume that these seventeen producers were among the complainants whose identities were treated as confidential during the investigation. Moreover, even assuming, *arguendo*, that they were, we are of the view that the fact that the names of these producers were disclosed in European court proceedings does not affect our evaluation of the grant of confidential treatment of the names of producers in the original investigation, and particularly not with respect to the confidential treatment of the names of **other** EU producers. Finally, even assuming these seventeen producers had revealed to the court that they were complainants in the investigation, thus somehow waiving or rescinding the request for confidential treatment of their identities during the investigation, we fail to see how this affects whether or not the risk of retaliation asserted in the complaint was reasonable at the time it was made. We certainly do not see how this demonstrates that retaliation never occurred, as China argues.[1357]

7.689 With respect to the other court cases referred to by China, in which these seventeen producers intervened,[1358] we note that these proceedings were commenced, and the seventeen producers intervened, **after** the adoption of the Definitive Regulation. Thus, in our view, they are irrelevant to our evaluation of the confidential treatment of names in the original investigation, which we consider must be assessed as of the time it was granted, and not in light of later developments after the conclusion of the investigation. China has made no other arguments in support of the contention that the alleged risk of retaliation was not true.

7.690 We therefore reject China's contention that the risk of retaliation alleged in this investigation did not constitute good cause for confidential treatment of the names of EU producers within the meaning of Article 6.5 of the AD Agreement.

[1356] Paragraph 18 of the decision of the Court of Justice reads as follows:
"Dans leur demande, les requérantes font valoir que le recours au principal est recevable. Le règlement n° 553/2006 les affecterait directement et individuellement dans la mesure où, premièrement, toutes les requérantes seraient des producteurs de chaussures pour enfants, deuxièmement, les requérantes auraient exposé leurs préoccupations au cabinet du membre de la Commission en charge du commerce pendant la procédure administrative et, troisièmement, le règlement n° 553/2006 serait directement applicable."
Moreover, it appears that these producers did not, in fact, take part in the anti-dumping investigation at issue. In dismissing the application filed by the seventeen Italian producers, the court noted that:

> "28 En deuxième lieu, il ne ressort nullement de la demande, d'une part, qu'elles aient participé à la procédure administrative qui a abouti à l'adoption du règlement n° 553/2006 et, d'autre part, qu'elles aient été identifiées par les actes de la Commission ou concernées par les enquêtes préparatoires. À cet égard, les requérantes n'ont pas démontré à première vue que les contacts qu'elles avaient eus avec le cabinet du membre de la Commission en charge du commerce n'avaient pas été que des contacts informels, ne pouvant pas être caractérisés comme une participation à la procédure administrative."

Case T-163/06, BA.LA. di Lanciotti Vittorio & C. Sas, and others v. Commission, Order of 2 August 2006, paras. 18 and 28. Court of Justice of the European Union, (accessed 4 April 2011) <http://www.curia.europa.eu>). In our view, this statement suggests that these producers were not, in fact, active participants in the investigation.

[1357] China, second written submission, para. 1062.

[1358] Joined Cases T-407/06 and T-408/06 Zhejiang Aokang Shoes Co., Ltd and Wenzhou Taima Shoes Co., Ltd. v Council; Case T-409/06, Sun Sang Kong Yuen Shoes Factory (Hui Yang) Corp. Ltd. v. Council; and Case T-1/07 Apache footwear Ltd. v. Council.

b) whether good cause was shown by the EU producers and "other producers"

7.691 China's second argument, as we understand it, is that the EU producers and supporters whose names were granted confidential treatment did not themselves show good cause for the confidential treatment requested. In this regard, China raises three points: (i) that good cause was not shown individually by each of the complainants and sampled EU producers; (ii) that the 36 non-complainant producers who supported the complaint did not themselves specifically request confidential treatment of their names, nor did they themselves show good cause as to why their names should be treated as confidential; and (iii) that the complainants did not show good cause as to why the names of "other producers" listed in the complaint should be treated as confidential.

7.692 With respect to the first aspect of this argument, China contends that the European Union treated as confidential the identities of the complainants and sampled producers on the basis of a generic request made by CEC and that no good cause was shown by each of these producers.[1359] As we understand it, China's argument is that it was necessary for each producer individually to request confidential treatment of its identity and demonstrate good cause, and not for a third party, in this case, the CEC, to do so.[1360]

7.693 As noted above, in this investigation, the CEC, acting on behalf of EU producers of footwear, filed the complaint. That complaint, and the accompanying letter, requested that the names and countries of the complainants and supporters of the complaint be kept confidential, based on the asserted risk of retaliation.[1361] It is therefore clear, and we believe it to be undisputed, that the request for confidential treatment, as well as the demonstration of good cause, was made by the CEC on behalf of the complainants and supporters.

7.694 We recall that Article 6.5 of the AD Agreement provides, in pertinent part:

> "6.5 Any information which is by nature confidential … or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it."

We see nothing in the text of Article 6.5 which would preclude a party – in this case, a trade association, the CEC – from requesting confidential treatment of certain information in a complaint (or other submission) it files on behalf of another party or parties, in this case the complainants and supporters, and showing good cause for such treatment on behalf of that party or parties.[1362] We note that Article 6.5 does not refer to the "owner" of the information for which confidential treatment is sought requesting such treatment and showing good cause. Nor does it even specifically require that the provider or submitter of the information do so, although this is the most likely scenario.[1363] In this

[1359] China, first written submission, para. 1277.

[1360] In this regard, we note that China advances a similar argument with respect to the confidential treatment granted to the names of EU producers in the expiry review. In that context, China alleges that it is for the submitter of the information concerned, and not for a third party or association, to demonstrate "good cause". See. e.g. China, first written submission, para. 1299; second written submission, paras. 1453-1454.

[1361] Anti-dumping complaint lodged by CEC, Exhibit CHN-76.

[1362] We note in this regard that Article 6.11 of the AD Agreement provides that, for the purposes of the AD Agreement, "interested parties" include "trade and business associations". It is not disputed that the CEC was entitled to submit the complaint, and participate in the investigation.

[1363] We note that one basis for considering information to be "by nature confidential" is because its disclosure would have a significantly adverse effect upon a person from whom the person supplying the information obtained it. In this situation, good cause might be demonstrated by the person supplying the information indicating the nature of the significantly adverse effect disclosure would have on the person from

case, it seems to us that the CEC was actually the submitter of the information for which confidential treatment was sought, and was therefore certainly entitled to request that treatment, and make the requisite showing of good cause.

7.695 In addition, we note that the complaint includes specific authorizations from the individual complainants for the CEC to act on their behalf in filing the complaint.[1364] In our view, the notion that the individual complainants were somehow required to, in addition, individually request confidential treatment and show good cause therefor, is without basis in the AD Agreement.[1365] Thus, we consider that China's assertion that the producers whose names were treated as confidential did not show "good cause" for such treatment is unfounded as a matter of fact and without legal basis.[1366]

7.696 The second aspect of China's argument relates to the alleged failure of the 36 supporting producers to themselves request confidential treatment of their names and to show good cause for such treatment. There is no dispute that these producers declared their support for the complaint. The letter from CEC accompanying the complaint explicitly requested confidential treatment of the names and countries of "complainants and supporters". We see nothing in the evidence, and China has pointed to nothing, that would indicate that these 36 supporting producers, in separately declaring their support for the complaint, nonetheless were somehow disclaiming or rejecting the CEC's request for confidential treatment of the identities of complainants and supporters. Nor is there any indication that these 36 supporting producers subsequently, during the investigation, waived or disclaimed the confidential treatment that had been accorded. In our view, it is more reasonable to conclude that the support for the complaint expressed by these 36 supporting producers included support for the request for confidential treatment of the names of supporters asserted by the CEC in that complaint. As discussed above, we see no requirement, in the context of a complaint filed by a trade association on behalf of producers, for individual requests for confidential treatment and showings of good cause therefor.

7.697 China argues that while the CEC's request mentions "complainants and supporters", the CEC was acting only on behalf of the former. To support this view, China notes that the 36 supporting producers merely declared their support for the complaint, but did not provide powers of attorney authorizing CEC to act on their behalf.[1367] We recall our view that Article 6.5 does not establish any particular form or mechanism by which "good cause" must be shown. We see nothing in Article 6.5 that would require that a party's request for confidential treatment on behalf of other parties must be supported by a document or other statement specifically authorizing or granting legal authority to the representative to act on its behalf. In our view, these are procedural and methodological questions to be resolved by each investigating authority, consistent with the legal requirements of the WTO

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whom the information was obtained. In this scenario, the "owner" of the information may be entirely unconnected to the anti-dumping investigation.

[1364] Note for the file dated 6 July 2005 (Excerpts), Exhibit CHN-108, p. 3.

[1365] Moreover, we recall that, at verification, sampled producers requested confidential treatment of their names and asserted risk of retaliation as cause for the confidentiality.

[1366] We note that China's argument in this regard is limited to the alleged failure of the sampled producers to "themselves" show good cause for confidentiality of their names. China has made no argument concerning whether or not the risk of retaliation alleged by these producers constituted "good cause". In any event, we have concluded that the asserted risk of retaliation sufficed as good cause, and our views in that regard extend to the grant of confidential treatment of the identities of the sampled producers in question.

[1367] China, first written submission, paras. 1290-1292; second written submission, paras. 1447-1450; closing oral statement at the second meeting with the Panel, para. 111. We recall that the individual complainants' statements indicate that each company "supports the complaint as a complainant and authorizes CEC to act on its behalf in all matters concerning the anti-dumping proceeding." Note for the file dated 6 July 2005 (Excerpts), Exhibit CHN-108.

Member in which it is operating, and as always, subject to review by a panel.[1368] We therefore reject China's contention that the 36 supporting producers failed to request confidential treatment of their names and/or to show good cause for such treatment.

7.698 Moving to the third aspect of China's argument, concerning the list of "other producers", China argues that the complainants did not show good cause for confidential treatment of the names of these producers. In particular, China argues that if a producer's name was not included in the list of "other producers", it could not be concluded that this producer was necessarily a complainant, as it could also be the case that it was simply not known.[1369] We are not convinced by this argument. The evidence before us indicates that the complainant CEC requested confidential treatment of the identities of the "other producers" named in a list provided in the complaint, asserting that disclosure of those names could have led to the identification of the companies supporting the complaint.[1370] The European Union asserts, and China does not dispute, that the names of EU producers of footwear were in large part publicly known. Thus, it cannot be excluded that the disclosure of a list of the names of the "other producers" could have revealed, by elimination, the identities of the complainant producers and producers supporting the compliant. In such circumstances, the effectiveness of the confidential treatment of the latter's identities could be at risk, as knowing the names of "other producers" might well allow the identities of complainants and supporters to be deduced, thus rendering the confidential treatment of their identities a nullity. Thus, we reject China's contention that the complainants did not show good cause for the confidential treatment accorded to the list of the "other producers".

7.699 Based on all the foregoing, we conclude that China has not established that the European Union acted inconsistently with its obligations under Article 6.5 of the AD Agreement in treating as confidential the names of EU producers in the original anti-dumping investigation. As China's claim of violation of Article 6.2 of the AD Agreement is dependent on its claim of violation of Article 6.5, which we have rejected, we reject China's claim under Article 6.2 in this regard.

2. information with respect to the methodology and the data used for the selection of the Sample of EU producers, adjustments for differences affecting price comparability, non-confidential questionnaire response of one sampled EU producer, and missing declarations of support

7.700 China claims that the European Union violated Articles 6.5 and 6.5.1 of the AD Agreement by not disclosing information with respect to (i) the methodology and data used for the selection of the sample of EU producers; (ii) the adjustments for differences affecting price comparability made by the Commission; and (iii) the non-confidential questionnaire response of one sampled EU producer and missing declarations of support. China asserts that good cause was not shown for confidential treatment of this information, and no non-confidential summaries or explanations as to why summarization was not possible were provided. Furthermore, China claims that to the extent that this information was not confidential, and where it was but no non-confidential summaries were provided, the European Union also violated Article 6.2 of the AD Agreement.[1371]

7.701 The European Union submits that most of the information at issue is not information of the kind whose release is regulated by the provisions invoked by China. Furthermore, the

[1368] As a general matter, where there are no specific mechanisms or methodologies set out in the AD Agreement for how a particular provision is to be put into effect by an investigating authority, as is the case here, we would be extremely reluctant to require any specific procedures, as we could not be certain that these would be appropriate, legally and practically, for all WTO Members.

[1369] China, first written submission, para. 1299; second written submission, paras. 1453-1454.

[1370] Anti-dumping complaint lodged by CEC, Exhibit CHN-76, Annex 2.

[1371] China, first written submission, para. 1317; second written submission, paras. 1455-1457.

European Union alleges that China's claims are stated with insufficient precision for a proper defence to be attempted and therefore request the Panel not to consider them.[1372]

a) methodology and data used for the selection of the sample of EU producers

7.702 China argues that the European Union failed to (i) disclose how the methodology was applied, namely on the basis of which elements the geographical spread of the industry was considered; (ii) clarify why sales data were not used in the selection of the sample, as had been announced would be done in the Notice of Initiation of the original investigation; and (iii) disclose certain data used to select the sample, specifically the individual production figures of the domestic producers for the first quarter of 2005.[1373] China claims that this information was treated as confidential in the absence of good cause, and further claims that no non-confidential summary was provided with respect to this information, nor was there any explanation for the lack of such a summary.[1374]

7.703 With respect to the first two aspects of China's claim, we note that Article 6.5 of the AD Agreement addresses the confidential treatment of information submitted by interested parties. We see nothing in this provision that addresses the confidential treatment of the methodologies used and determinations made by investigating authorities during the investigation. Nor has China demonstrated otherwise. We agree in this regard with the panel in *EC – Fasteners (China)*, which concluded that the question whether an investigating authority's analysis and determinations are subject to confidential treatment or to disclosure does not fall within the subject matter of the obligations contained in Article 6.5, but rather within the scope of other provisions of the AD Agreement, for instance, Article 12.2.[1375] We therefore reject these two aspects of China's claim.

7.704 With respect to the third aspect of China's claim, concerning the individual production data of the domestic producers for the first quarter of 2005, China argues that no good cause was shown for the confidential treatment of this information.[1376] The European Union does not deny that the information at issue was treated as confidential and not made available to interested parties.[1377] Nor does the European Union argue that confidential treatment was specifically requested, or good cause for such treatment was specifically shown, by the submitters of this information. However, the European Union asserts that the protection accorded to the individual data of these producers was necessary in order to ensure respect for the confidential treatment of their identities.[1378] According to

[1372] European Union, first written submission, paras. 772-786.
[1373] China, first written submission, paras. 1301-1305; second written submission, para. 1455.
[1374] China, first written submission, para. 1317.
[1375] Panel Report, *EC – Fasteners (China)*, para. 7.530.
[1376] China, second written submission, para. 1455.
[1377] We note that here, and in other instance, China has phrased its arguments in terms of the European Union's alleged failure to "disclose" certain matters. However, we consider that Article 6.5 of the AD Agreement is not a provision that addresses disclosure of information, but rather, a provision that requires non-disclosure, that is, confidential treatment, of information, where warranted. Other provisions of the AD Agreement, which do require disclosure of information, or making information available to parties, such as Articles 6.4 and 6.9 of the AD Agreement, subject those requirements to the obligation to maintain the confidentiality of information treated as confidential under Article 6.5.
[1378] Specifically, the European Union argues that, in the circumstances of this investigation, the justified request for confidential treatment of the identities of the EU producers could not be properly respected merely by deleting their names, as their identities could be deduced from other information that they submitted. The European Union adds that the Commission's conclusion in this regard was based on oral communications from the producers concerned viewed in the light of the Commission's general knowledge of commercial affairs. European Union, oral statement at the second meeting with the Panel, para. 415; answer to Panel question 71.

the European Union, investigating authorities are obliged to take whatever steps are necessary to ensure that the right to confidentiality in Article 6.5 is respected.[1379]

7.705 We recall that Article 6.5 provides that information which is by nature confidential and information submitted on a confidential basis shall, upon good cause shown, be treated as confidential, and goes on to specify that "[s]uch information **shall not be disclosed** without specific permission of the party submitting it" (emphasis added). Thus, in our view, the plain language of Article 6.5 makes it clear that investigating authorities are obliged to preserve the confidentiality of information to which they have granted confidential treatment.[1380] It is also clear from the text of Article 6.5 that, unless the party submitting the confidential information authorizes its disclosure, the mandatory obligation to protect confidentiality permits no other derogation. In addition, there is nothing in Article 6.5 that qualifies or limits the obligation on investigating authorities to ensure that information accorded confidential treatment is not disclosed. In our view, Article 6.5 cannot be read in a way that would preclude investigating authorities from being able to ensure that they satisfy the obligations imposed on them with respect to ensuring the confidentiality of information.

7.706 In this case, the European Union argues that confidential treatment of the individual data of the domestic producers, specifically the production figures for the first quarter of 2005, was necessary because otherwise the identities of the producers could have been deduced. China has not adduced any evidence or argumentation to counter this assertion. Moreover, the evidence before us indicates that the individual production and economic data of at least some EU producers is in the public domain.[1381] In these circumstances, it seems clear to us that failure to keep confidential the individual production data of the producers concerned could have resulted in the disclosure of their identities by deduction. This would have rendered meaningless the confidential treatment given to the names of producers, which we have concluded above was not inconsistent with Article 6.5 of the AD Agreement, and may well have constituted a violation of the investigating authority's obligation under the second sentence of Article 6.5. We decline to read Article 6.5 in a way that could, require an investigating authority to indirectly disclose information it has itself decided to treat as confidential under that provision. Thus, in our view, the conclusion that the confidential treatment of the individual production data of the then-EC producers was necessary in order to ensure the confidential treatment of their identities is not unreasonable. We therefore reject China's contention that the European Union violated Article 6.5 by not disclosing the individual production data of the then-EC producers for the first quarter of 2005.[1382] As China's claim of violation of Article 6.2 of the AD Agreement is dependent on its claim of violation of Article 6.5, which we have rejected, we reject China's claim under Article 6.2 in this regard.

[1379] European Union, answer to Panel question 71.

[1380] We also note that this obligation applies in all phases of the investigation. We note in this regard, for instance, that Articles 6.1.2, 6.1.3, 6.2, 6.4 and 6.7, concerning evidentiary issues, and Article 12, concerning the requirements regarding the contents of public notices, require that due consideration must be given to the requirement for the protection confidential information.

[1381] For instance, the submission from an association of importers (EFA), dated 12 November 2008, shows that the economic indicators of leading footwear manufacturing companies in the then-European Communities, including their production data for the year concerned (2005), were in the public domain. Exhibit CHN-34, Annex 4. We do not consider that the fact that this document was submitted in the context of the expiry review affects our conclusion in this regard.

[1382] That said, however, we emphasize that our finding is limited to the circumstances of this investigation. Our reasoning here should not be understood to imply that an investigating authority's duty to protect the confidentiality of certain information granted confidential treatment gives it *carte blanche* to treat as confidential other information in an investigation. Our conclusion is limited to the situation where, as here, there is a reasonable basis for the conclusion that the failure to treat as confidential information for which confidential treatment may not have been specifically requested would result in the disclosure of information for which confidential treatment was properly sought and was granted.

7.707 Turning to China's claim under Article 6.5.1 of the AD Agreement, China alleges that no non-confidential summary of the individual production data at issue was provided, and no explanation as to why such summarization was not possible was given. The European Union asserts that China's claim in this regard is refuted by the Note for the File, dated 6 July 2005,[1383] which sets forth aggregate figures for EU production of footwear, which the European Union apparently considers an adequate non-confidential summary of the information in question.

7.708 The Note for the File does indeed set forth an estimate of total footwear production in the EU for the first quarter of 2005.[1384] However, it is not clear how this estimate relates to the individual production data at issue here. It appears from the evidence before us that the aggregate figure for production in the first quarter of 2005 was calculated by the Commission itself, based on information in the complaint and information received from individual companies and associations.[1385] Thus, it is not apparent to us that this constitutes an adequate non-confidential summary of the individual production data at issue, furnished by the provider of the information, as required by Article 6.5.1. We recall our view that Article 6.5.1 requires investigating authorities to ensure that the party submitting confidential information furnishes a non-confidential summary of the confidential information or, if that is not possible, that the party provides a statement of reasons explaining why such a summary is not possible.[1386] In our view, the obligation to require submitters of confidential information to provide a non-confidential summary thereof is not satisfied by the investigating authority itself making available an aggregate figure which is not, on its face, a summary of the confidential information provided.[1387] Thus, we consider that a non-confidential summary of the individual production data at issue was not provided. The European Union does not argue, and nothing in the evidence before us suggests, that the submitters of the production information at issue provided any explanation as to why summarization was not possible.

7.709 We therefore find that the European Union acted inconsistently with Article 6.5.1 of the AD Agreement by failing to ensure that the producers submitting confidential production data supplied an adequate non-confidential summary thereof, or an explanation as to why summarization was not possible. With respect to China's claim under Article 6.2 of the AD Agreement, we note that this provision concerns the more general right of interested parties to have a "full opportunity for the defence of their interests". The European Union did make available the estimate of total footwear production in the EU for the first quarter of 2005. That this was not an adequate non-confidential summary of the information submitted by the parties does not, in our view, demonstrate, in addition to the violation of Article 6.5.1, a violation of Article 6.2. China has made no additional arguments in this regard, and we therefore cannot conclude that interested parties did not have a full opportunity for the defence of their interests as a result. We therefore reject China's claim under Article 6.2 in this regard.

b) <u>information regarding adjustments for differences affecting price comparability made by the Commission</u>

7.710 China claims that the European Union did not make available all relevant information regarding the allowances made by the Commission for: (i) differences in transport costs; (ii) ocean

[1383] Note for the file dated 6 July 2005 (Excerpts), Exhibit CHN-108; and Note for the file dated July 2005, Exhibit EU-16.

[1384] Note for the file dated 6 July 2005 (Excerpts), Exhibit CHN-108; and Note for the file dated July 2005, Exhibit EU-16, para. 1.

[1385] Note for the file dated 6 July 2005 (Excerpts), Exhibits CHN-108; and Note for the file dated July 2005, Exhibit EU-16, para. 1.

[1386] See paragraphs 7.667 and 7.674 above.

[1387] We need not and do not address the question whether an investigating authority may prepare non-confidential summaries of confidential information submitted by a party which fails to do so, and if so, whether this would be consistent with the requirements of Article 6.5.1.

freight and insurance costs; (iii) handling; (iv) loading and ancillary costs; (v) packing costs; (vi) credit costs; (vii) warranty and guarantee costs and commissions; (viii) the quality of the leather; (ix) R&D and design costs; and (x) children's shoes. Specifically, China contends the Commission did not provide (a) the figures for the calculation of adjustments, (b) the levels of adjustments, and (c) the calculation methods.[1388] China claims that this information was treated as confidential in the absence of good cause, and further claims that no non-confidential summary was provided with respect to this information, nor was there any explanation for the lack of such a summary.[1389]

7.711 The European Union contends that the details of adjustments are not information of the kind whose release is regulated by the provisions invoked by China, as they concern the Commission's methodology in making the calculations required by the AD Agreement, and must be distinguished from the information obtained from interested parties and other sources to which that methodology is applied.[1390] With respect to the adjustment for children's shoes, the European Union asserts that the Definitive Regulation explains that the difference was apparent in Eurostat data, and those data could be checked by any interested party to evaluate the adjustment made.[1391] Finally, the European Union notes that it is not clear that any party requested further information about this adjustment when it was explained in the Definitive Disclosure in July 2006.[1392]

7.712 China's allegations in this context concern for the most part the methodologies used and determinations made by the Commission in calculating and making the allowances at issue. Essentially, China appears to consider that the Commission, by failing to provide full transparency with respect to the entire process of making adjustments, from the data involved to the methodologies employed and the conclusions reached, treated information as confidential inconsistently with Article 6.5. This is clear to us from the arguments advanced by China in support of this aspect of its claims.[1393] China asserts that "[s]ome details were provided" concerning adjustments, but interested parties demanded more details, that the "'explanation' in the Definitive Regulation … fails to address several vital issues", that "the disclosures sent to interested parties do not provide more details", and that there is "no explanation as to how [the figure for adjustments] was obtained … [o]ne can only guess how the calculations were made".[1394] We recall our view that Article 6.5 of the AD Agreement deals with the confidential treatment of information, and not the methodologies used and determinations made by investigating authorities in their investigations, or the disclosure of either information, explanations or conclusions. To the extent China's claim in this regard concerns methodologies and conclusions of the Commission, we do not consider these matters to fall within the scope of Article 6.5, and reject these aspects of China's claim.

7.713 With respect to the remaining aspects of China's claim, we find it difficult to see the relationship of China's arguments to a claim that the European Union treated information as confidential inconsistently with Article 6.5 of the AD Agreement. We note that China has not demonstrated that the European Union did not make the information at issue available because it was information submitted by an interested party and treated as confidential under Article 6.5. Rather,

[1388] China, first written submission, paras. 1306-1308.
[1389] China, first written submission, para. 1317.
[1390] European Union, first written submission, para. 778.
[1391] European Union, first written submission, para. 779, citing Definitive Regulation, Exhibit CHN-2, recital 136. The Definitive Regulation went on to note "parties that regarded this adjustment erroneous failed to provide any better alternative method that could be used and ensure comparison of export prices and normal values on a fair basis." Definitive Regulation, Exhibit CHN-2, recital 137.
[1392] European Union, first written submission, para. 779.
[1393] Moreover, China's arguments are again couched in terms of "all relevant information on such adjustments" not having been made available interested parties. China, first written submission, para. 1306. As noted above, Article 6.5 does not concern disclosure of or making available information. We address China's claims in terms of Article 6.5, under which they are advanced.
[1394] China, first written submission, paras. 1309-1313.

China's arguments at best demonstrate that the European Union failed to disclose certain information or explain certain conclusions. However, as we have explained, these are not matters that fall within the scope of Article 6.5. We therefore consider that China has failed to make a *prima facie* case of violation of Article 6.5 with respect to these aspects of its claim. As China's claim of violation of Article 6.2 of the AD Agreement is dependent on its claim of violation of Article 6.5, which we have rejected, we also reject China's claim under Article 6.2 with respect to China's allegations concerning all relevant information in regard to the allowances made by the Commission.

c) non-confidential questionnaire response of one sampled EU producer and missing declarations of support

7.714 China asserts that the non-confidential questionnaire response of one sampled EU producer and certain declarations of support from then-EC producers were not included in the non-confidential file, and argues that the European Union withheld this information without the necessary showing of "good cause". Specifically, in regard to the declarations of support, China asserts while the complaint was lodged on behalf of 814 Community producers, only around 229 declarations of support were included in the non-confidential file. Moreover, China contends that 36 "additional" Community producers allegedly supported the complaint but that only 10 declarations of support from these producers were included in the non-confidential file.[1395] China claims that this information was treated as confidential in the absence of good cause, and further claims that no non-confidential summaries were provided with respect to this information, nor was there any explanation for the lack of such summaries.[1396]

7.715 The European Union states that because of the time that has passed since the investigation, it was unable to locate in its archives the material that would enable it to address the issue raised by China regarding the non-confidential version of the questionnaire response of one sampled EU producer. Furthermore, the European Union submits that the declarations of support included in the non-confidential file constituted a representative sample of those that were received, and adds that interested parties did not request that the missing declarations of support at issue be made available.[1397]

7.716 With respect to the missing questionnaire response at issue, the evidence before us indicates that questionnaires were sent to the ten Community producers selected for the sample in the original investigation, and that all of them submitted responses to the Commission.[1398] The evidence also indicates, and indeed, the European Union does not dispute, that the non-confidential questionnaire response of the producer in question was never placed in the non-confidential file maintained by the Commission.[1399] Thus, it appears that this questionnaire response was treated as confidential by the Commission. However, there is no evidence concerning a request for confidential treatment for any or all information in that response. Nor is there any evidence that the submitter provided adequate non-confidential summaries of any confidential information, or, assuming exceptional circumstances, an explanation why summarization was not possible.

[1395] China, first written submission, paras. 1314-1316.
[1396] China, first written submission, para. 1317.
[1397] European Union, first written submission, paras. 780-781.
[1398] Interested parties expressed concern during the investigation about the absence of these questionnaire responses from the file. Provisional Regulation, Exhibit CHN-4, recitals 6-7. See also General Disclosure Document, dated 7 July 2006, Exhibit-CHN-81, para. 146.
[1399] See FESI comments date 8 May 2006, Exhibit CHN-87, p. 36; Comments on the Commission Final Disclosure, submitted on behalf of Chinese producers dated 17 July 2006, Exhibit CHN-105, paras. 97-99; and Comments regarding the Provisional Duty Regulation and the disclosure in relation thereto on behalf of, *inter alia*, Qingdao Changshin Shoes Co., Ltd dated 8 May 2006, Exhibit CHN-107, p. 26.

7.717 During the course of this proceeding, the European Union indicated that, because of the passage of time since the investigation, it was unable to locate in its records the material necessary to address China's claim. While we are sympathetic to the problems involved in responding to claims concerning treatment of information as confidential in investigations conducted several years in the past, we do not consider that the passage of time excuses a Member from responding to the claims of another Member in dispute settlement. Based on the evidence before us, it appears that the "missing" questionnaire response was received by the Commission. The European Union does not dispute that the questionnaire response in question was treated as confidential, but merely asserts that it lacks the information needed to respond to China's claim.

7.718 We recall that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.[1400] In this instance, the fact that the questionnaire response was received and not placed in the non-confidential file suffices, in our view, to make out a *prima facie* case that the information in that document was treated as confidential. There is no evidence that a showing of good cause for such treatment was ever made, as required by Article 6.5, and the European Union does not contend otherwise. We also consider that China has made out a *prima facie* case that neither an adequate summary of confidential information nor an explanation why summarization was not possible was provided. There is no evidence that these ever existed, and the European Union does not assert otherwise. In the absence of any substantive refutation by the European Union, we conclude that the European Union acted inconsistently with Articles 6.5 and 6.5.1 of the AD Agreement with regard to the missing questionnaire response. Having found a violation of Articles 6.5 and 6.5.1 in connection with the non-confidential version of the questionnaire response of the sampled EU producer in question, we consider that additional findings on China's claim under Article 6.2 would not contribute to the resolution of this dispute or be potentially useful in implementation. We therefore exercise judicial economy with respect to this claim.

7.719 Turning to China's claim with respect to the declarations of support missing from the non-confidential file, we recall that China asserts that this information was treated as confidential in the absence of good cause shown. The European Union does not dispute that 814 Community producers, as well as the 36 "additional" Community producers, submitted declarations of support. Nor does the European Union dispute that these declarations of support contained information treated as confidential.[1401] The European Union argues, however, that the declarations of support included in the non-confidential file constituted a representative sample of those that were received.[1402]

7.720 We fail to see the factual and legal relevance of the European Union's argument to China's claims under Articles 6.5 and 6.5.1. The European Union does not dispute that the missing declarations of support contained confidential information. There is no evidence that the submitters of these declarations provided adequate non-confidential summaries of such confidential information or, in exceptional circumstances, an explanation why summarization was not possible. The fact that a "representative sample" of the declarations of support was included in the non-confidential file does not demonstrate compliance with either Article 6.5 or Article 6.5.1.

7.721 Based on the evidence before us, it is clear that that missing declarations of support were received by the Commission and treated as confidential. It also seems clear that, at least for 229 declarations of support, non-confidential versions were provided by the submitters, as these were

[1400] Appellate Body Report, *EC – Hormones*, para. 104 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14). In order to establish a prima facie case, a complaining party must adduce evidence sufficient to raise a presumption that what is claimed is true. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[1401] European Union, first written submission, para. 781.

[1402] European Union, first written submission, para. 781.

placed in the non-confidential file. In this case, we are satisfied that China has made out a *prima facie* case that the declarations of support were treated as confidential. There is no evidence that a showing of good cause for such treatment was ever made, as required by Article 6.5, and the European Union does not contend otherwise. In addition, we are satisfied that China has made out a *prima facie* case that, with respect to the 585 missing declarations of support, neither an adequate non-confidential summary nor an explanation why summarization was not possible was provided. There is no evidence that these ever existed, and the European Union does not assert otherwise. In the absence of any substantive refutation by the European Union, we conclude that the European Union acted inconsistently with Articles 6.5 and 6.5.1 of the AD Agreement by failing to require either an adequate summary of confidential information or an explanation why summarization was not possible from the submitters of the 585 missing declarations of support. Having found a violation of Articles 6.5 and 6.5.1 with respect to the 585 missing declarations of support, we consider that additional findings on China's claim under Article 6.2 would not contribute to the resolution of this dispute or be potentially useful in implementation. We therefore exercise judicial economy with respect to this claim.

3. certain information in the complaint and Note for the File dated 6 July 2005

7.722 China asserts that the European Union violated Article 6.5 of the AD Agreement due to a lack of information in the complaint and the Note for the file dated 6 July 2005. Specifically, China argues that Annexes 2, 6, 7 and 8 of the complaint contain no information regarding (i) the list of "other" producers; (ii) domestic prices in Brazil; (iii) export prices from China; and (iv) export prices from Viet Nam, respectively. With respect to the information in the Note for the File dated 6 July 2005, China submits that (i) the production, sales, and employment data from 2001 to Q1 2005 contained in the CEC letter dated 26 May 2005 (attached to the Note for the File dated 6 July 2005) was not provided, and (ii) the production figures for 2003 and 2004 in the 229 declarations of support attached to the CEC letter were deleted.[1403] China also claims that, contrary to Article 6.5.1 of the AD Agreement, non-confidential summaries of this information were not provided, nor was any explanation for why such summarization was not possible given. In addition, China claims that to the extent that the information at issue was not confidential, or to the extent that it was but no non-confidential summary thereof was made available to interested parties, the European Union also violated Article 6.2 of the AD Agreement.[1404]

7.723 The European Union contends that commercial information of individual companies is confidential by nature, and this information in the complaint was therefore appropriately treated as confidential, and that an adequate non-confidential summary of the confidential information at issue was provided by the complainants themselves in the body of the complaint.[1405] The European Union contends that the letter dated 26 May 2005 was not part of the complaint, but was a document sent to the CEC which the CEC forwarded to the Commission to demonstrate the level of support for the complaint.[1406] The European Union maintains that the CEC's request for confidential treatment for the names of both "complainants and supporters" provided good cause to treat the data in the declarations of support as confidential.[1407]

a) certain information in the complaint

7.724 China claims that information concerning Brazilian domestic prices and Chinese and Vietnamese export prices, provided in Annexes 6, 7, and 8 to the complaint respectively, could not be

[1403] China, first written submission, paras. 1318-1321, 1324-1330 and 1333.
[1404] China, first written submission, paras. 1322-1323, 1332 and 1333.
[1405] European Union, first written submission, paras. 788-790.
[1406] European Union, opening oral statement at the second meeting with the Panel, para. 418.
[1407] European Union, first written submission, paras. 791 and 765.

considered confidential since the names of the producers concerned were unknown.[1408] China argues that domestic prices in Brazil and export prices for China and Viet Nam could not be linked to any individual company and therefore could not be considered confidential. China alleges that because the information at issue was provided without disclosing the names of the producers concerned, it could not possibly be of any advantage to a competitor nor have any adverse effect upon the complainants or the person supplying the information and therefore it could not be considered confidential information.[1409] Furthermore, China argues that no "good cause" was shown for the confidential treatment of this information.[1410]

7.725 The European Union contends that commercial information of individual companies, such as sales and production data, is confidential by nature and that it retains its value to competitors even when the name of the company is unknown. The European Union adds that good cause for confidential treatment of information that is by nature confidential is shown by placing it in that category. Furthermore, the European Union asserts that a non-confidential summary of the confidential information at issue was provided by the complainants themselves in the body of the complaint and that such summarization was adequate.[1411]

7.726 In our view, the fact that the name of the submitter of information (or of the person from whom the submitter acquired the information) is unknown does not necessarily mean that the information may not be treated as confidential. We do not agree that simply because the name of the submitter or the person from whom the information was acquired is unknown establishes that the information has no commercial value or could not be of any advantage to a competitor, nor that its disclosure could not have an adverse effect on the person supplying the information. We therefore reject China's contention that because the names of the producers concerned were not disclosed their individual sale price data could not be treated as confidential.

7.727 This does not mean, however, that confidential treatment in this particular case was justified. In this case, the evidence before us indicates that the complaint asked the Commission to treat the Brazilian domestic prices and the Chinese and Vietnamese export prices as confidential, asserting that disclosure of this information "would be of significant advantage to a competitor and/or would have a significantly adverse effect upon a person supplying the information and/or upon the person from whom he has acquired the information."[1412] China argues that merely reciting the language of Article 6.5 of the AD Agreement is insufficient to show good cause for confidential treatment of information, even of information that is by nature confidential.[1413] The European Union, as a general

[1408] In its first written submission, China also refers to the information contained in Annex 2 to the complaint, concerning the "list of other producers". China did not, however, identify the legal basis of its claims with respect to this information, nor did China address this aspect of its claims in its second written submission. China's oral statements make no reference to this issue. China's claim under Article 6.5 with respect to this information is addressed at paragraph 7.698 above. As regards China's claims under Article 6.5.1 and 6.2, however, we consider that China has not made a prima facie case of violation of these provisions with respect to the information contained in Annex 2 to the complaint.

[1409] China, first written submission, para. 1320.

[1410] China, first written submission, para. 1318; second written submission, para. 149.

[1411] European Union, first written submission, paras. 788-790.

[1412] The request for confidential treatment of the domestic prices in Brazil states that "[t]he [information is] confidential because it contains information on prices of individual companies and its disclosure would be of significant advantage to a competitor and/or would have a significantly adverse effect upon a person supplying the information." In the case of export prices from China and Viet Nam, both requests state that "[this information] is confidential because its disclosure would have a significantly adverse effect upon the person supplying the information and/or upon the person from whom he has acquired the information". Anti-dumping complaint lodged by CEC, Exhibit CHN-76, Annexes 6 to 8.

[1413] China, answer to Panel question 75(a).

matter, argues that for information that is by nature confidential, good cause is demonstrated by establishing that the information falls into that category.[1414] China disagrees, arguing that

> "a party providing information which is confidential by nature would have to first clarify whether the disclosure of the information would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information, as well as the proof of his statements. Thereafter, it would have to provide well substantiated reasons/justification as to why either of the three situations would exist. ... The standard for "good cause" for confidential treatment of information which is not confidential by nature but is submitted to the investigating authority in confidence for the purpose of the investigation should be even stricter."[1415]

7.728 We do not agree that Article 6.5 requires the showing posited by China in order to demonstrate good cause to treat information as confidential, whether it is information that is confidential by nature, or submitted on a confidential basis. We recall that while Article 6.5 requires that "good cause" be shown in order for information to be treated as confidential, it does not provide any guidance on what constitutes good cause means or how it should be established. In this connection, we recall our view that there is nothing in Article 6.5 which would require any particular form or means for showing good cause, or any particular type or degree of supporting evidence which must be provided.[1416] Moreover, we recall that the nature of the showing that will be sufficient to satisfy the "good cause" requirement will vary, depending on the nature of the information for which confidential treatment is sought.[1417] In this regard, we agree with the views of the panel in *Mexico – Steel Pipes and Tubes* that

> "a showing of 'good cause' for information that is 'by nature confidential' may consist of establishing that the information fits into the Article 6.5 (chapeau) description of such information: 'for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information.'"[1418]

7.729 In this case, the complaint requested confidential treatment of domestic prices in Brazil and export prices from China and Viet Nam on the basis that "disclosure of the information would be of significant advantage to a competitor and/or would have a significantly adverse effect upon a person supplying the information and/or upon the person from whom he has acquired the information." Thus, the complaint asserts that the information in question fits within the category of information that is described in Article 6.5 as being confidential by nature, and the Commission accepted that assertion. China has offered no evidence or arguments that would demonstrate that the assertion is untrue, arguing merely that it is insufficient. In our view, absent some evidentiary basis for concluding that the assertion that the information fits the Article 6.5 description of information that is by nature confidential is untrue, there is no basis for a finding of violation. In this instance, we conclude that the Commission did not err in treating the information in question as confidential, and therefore reject China's claim under Article 6.5.

[1414] European Union, first written submission, para. 789.
[1415] China, answer to Panel question 75(c).
[1416] See paragraph 7.684 above.
[1417] See paragraph 7.684 above.
[1418] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.378.

7.730 Turning to China's claim under Article 6.5.1, we recall that Article 6.5.1 requires that interested parties submitting confidential information also supply non-confidential summaries of that information and that these summaries shall "permit a *reasonable understanding* of the *substance* of the information submitted in confidence" (emphasis added). The non-confidential version of the complaint provides average data on domestic prices in Brazil and export prices from China and Viet Nam.[1419] We recall that the information in question was presented in the context of the complaint seeking the initiation of an anti-dumping investigation, presumably in satisfaction of Article 5.2(iii), which requires a complainant to provide "information" on normal value and export price. In this context, we are of the view that the average prices provided suffice as a non-confidential summary of the specific prices reported in the annexes, sufficient to permit a reasonable understanding of the "substance" of the confidential information in question. We therefore reject China's claim that an adequate non-confidential summary of the domestic prices in Brazil and export prices from China and Viet Nam was not provided.[1420]

7.731 Having found no violation of Article 6.5 or 6.5.1, we consider that there is no basis for China's claim under Article 6.2, which we recall recognizes the need to preserve confidentiality. We therefore reject China's claim under Article 6.2.

b) certain information in the Note for the File dated 6 July 2005

7.732 China argues that since the identities of the companies supplying certain information in a letter from the CEC dated 26 May 2005, provided with the complaint, and attached to a Note for the File dated 6 July 2005, were not disclosed, the information in question could not be considered confidential. In addition, China submits that no good cause was shown for the confidential treatment of this information.[1421]

7.733 The European Union asserts that the letter dated 26 May 2005 was not part of the complaint, but was a document sent to the CEC which the CEC forwarded to the Commission to demonstrate the level of support for the complaint.[1422] The European Union also argues, in respect of the data supplied in the declarations of support, that the CEC's request for confidential treatment of the names of both "complainants and supporters" provided good cause for treating that information as confidential.[1423]

7.734 The Note for the File dated 6 July 2005 reports the conclusions of the Commission's examination of the degree of support for the initiation of the investigation, or standing. The Note indicates that "attached documents" yielded the results relied on with respect to the volume of total production of footwear in the European Union, the volume of production accounted for by complainants and supporters of the complaint, and the fact that no producers expressing opposition came forward. The Note concludes that "the relevant thresholds, set out in the Basic AD Regulation,

[1419] Specifically, with respect to the Brazilian prices, an average of the ex-works domestic prices in Brazil for product type is provided, while with respect to the Chinese and Vietnamese prices, an adjusted average per product type of the ex-works prices for export to the European Union is provided. Questionnaire responses provided by the sampled EU producers, Exhibit CHN-101, p. 7.

[1420] We note China's argument, concerning the export prices from China, that while Annex 7 shows prices on a FOB basis, the summary provided contained adjusted figures at the ex-works level. However, while the summary of this information shows adjusted average data, it also sets out the level of the adjustments: the complaint states that the adjustments were less than 5 per cent of the price. Thus, by deducting the level of adjustments from the price information provided, it was possible to obtain a reasonable understanding of the substance of the confidential information at issue on the same basis. We therefore reject China's argument.

[1421] China, first written submission, paras. 1324-1325, 1328-1330 and 1333; second written submission, paras. 1461-1462.

[1422] European Union, opening oral statement at the second meeting with the Panel, para. 418.

[1423] European Union, first written submission, paras. 791 and 765.

are met."[1424] China's claim refers to information contained in some of the documents attached to the Note for the File dated 6 July 2005; specifically: (i) production, sales, and employment data from 2001 to Q1 2005 contained in a copy of a letter sent to the CEC dated 26 May 2005;[1425] and (ii) production figures for 2003 and 2004 allegedly contained in the 229 support forms attached to the Note.[1426]

7.735 We recall that Article 6.5 only addresses the confidential treatment of information submitted by parties to an investigation, and does not impose any obligations on the investigating authority to disclose information or its conclusions, or make information available to parties.[1427] China's claim, as presented, concerns the non-disclosure of information which formed the basis of the Commission's standing determination, and which is, to the extent relevant to that determination, summarized in the Note for the file. Whether this information must be disclosed is a matter that, in our view, does not fall within the scope of Article 6.5. Moreover, in our view, an investigating authority may treat as confidential information for which confidential treatment is not specifically sought, if this is necessary in order to maintain the confidentiality of information accorded such treatment. We recall that we have concluded that the treatment of the names of EU complainant producers and supporters as confidential was not inconsistent with Article 6.5 of the AD Agreement. Thus, to the extent disclosure of the specific information referred to in this aspect of China's claim could have resulted in the disclosure of that confidential information, we consider that the European Union was entitled to treat the specific information in question as confidential. We therefore conclude that China has not established that the European Union acted inconsistently with Article 6.5 in respect of certain information contained in the Note for the File dated 6 July 2005. Having found no violation of Article 6.5, we consider that there is no basis for China's claim under Article 6.5.1, which we recall applies only with respect to confidential information provided by interested parties. As China's claim of violation of Article 6.2 of the AD Agreement is dependent on its claim of violation of Article 6.5, which we have rejected, we also reject China's claim under Article 6.2.

4. certain information provided in the questionnaire responses of the sampled EU producers

7.736 China claims that information was removed or deleted from the non-confidential versions of EU producers' questionnaire responses, and that the European Union therefore violated Articles 6.5 and 6.5.1 of the AD Agreement. China asserts that where such information could have not been linked to specific companies, the information was not by nature confidential, and in any case no good cause was shown for treating it as confidential. In addition, China contends that there is no proof that non-confidential summaries were provided or any explanations as to why summarization was not possible were given. Furthermore, with respect to the instances in which questions were simply left blank or an entire questionnaire was missing, China argues that, to the extent that the European Union granted confidential treatment to such information, it violated Article 6.5.1 of the AD Agreement because no non-confidential summaries or statement as to why summarization was not possible were provided. In addition, China claims that the European Union also violated Article 6.5.2 of the

[1424] Note for the file dated 6 July 2005 (Excerpts), Exhibit CHN-108, p.1.
[1425] Note for the File dated 6 July 2005, Exhibit CHN-108, p. 2.
[1426] Note for the File dated 6 July 2005, Exhibit CHN-108, p. 3. China, first written submission, paras. 1324 and 1333; second written submission, paras. 1461-1462. We note that page 3 of Exhibit CHN-108 (Note for the file dated 6 July 2005 (Excerpts)) contains what appears to be the first page of one of the 229 support forms. That page contains no data. China refers to information in the individual declarations of support that "has been deleted", China, first written submission, para. 1328, but gives no indication as to the source on which this statement is based, or where the example reproduced in its submission might be found. Finally, while China refers to production figures having been "blacked out" in each of 229 declarations of support attached to the CEC's letter, China, first written submission, para. 1324, only one is included in Exhibit CHN-108. Nonetheless, taking a generous approach, we presume that the relevant data to which China refers is found in the pages of the support forms not attached to the Note for the File in question.
[1427] See paragraph 7.703 above.

AD Agreement because it should have rejected such information. China further claims that to the extent that the information at issue was not confidential, or if it was, but no non-confidential summary was provided, the European Union also violated Article 6.2 of the AD Agreement by denying interested parties with a full opportunity to defend their interests.[1428]

7.737 The European Union considers that Article 6.5 does not require investigating authorities to prevent the removal of information, but rather specifies how authorities must deal with documents for which confidential treatment has been claimed without adequate basis.[1429]

a) information removed or deleted from the questionnaire responses

7.738 China alleges that information was removed or deleted from the non-confidential versions of the questionnaire responses of sampled EU producers 1 through 9.[1430] China's claim concerns three main categories of information: (i) specific company information (name, address, contact, telephone, telefax, e-mail, list of shareholders holding more than 1 per cent of the capital, affiliated companies data, general products' information, audited accounts, legal representation); (ii) net unit sales price data; and (iii) information on the product concerned.[1431]

7.739 We note first that China's claims that information was wrongly treated as confidential with respect to the turnover of Company 4 and the audited accounts and product concerned of Company 5 appear to rest entirely on the fact that the non-confidential versions of these companies' questionnaire responses indicate that this information was provided as an attachment, but do not contain the attachments themselves. However, neither do these non-confidential versions indicate that confidential treatment of this information in the attachments was requested and granted. With respect to these items of information, China appears to assume that because the attachments were not with the non-confidential versions of these questionnaire responses, the information in those attachments was treated as confidential. This poses a difficulty for us, as in our view, the mere fact that some information is not in the non-confidential version of a questionnaire response does not necessarily mean that it was information treated as confidential – it may well be that the information was simply not provided. In the absence of an adequate showing that the information in question was actually submitted to the Commission and was treated as confidential, we consider that China has not made out a *prima facie* case under Article 6.5, and we therefore reject this aspect of China's claim.

7.740 Moving to the remaining aspects of China's claim, China argues that the specific information in question[1432] could not be considered "by nature confidential", and that no good cause was shown

[1428] China, first written submission, paras. 1334-1341.

[1429] European Union, first written submission, paras. 794-796.

[1430] Specifically, (a) for Companies 1 and 8, China's claim concerns information on net unit prices, (b) for Companies 2, 3, 7 and 9, China's claim concerns information on the list of shareholders holding more than 1 per cent of the capital and information on net unit prices, (c) for Company 4, China's claim concerns the list of shareholders holding more than 1 per cent of the capital, the audited accounts of the company, and turnover, (d) for Company 5, China's claim concerns the audited accounts of the company and information on the product concerned and on net unit prices, and (e) for Company 6, China's claim concern the identity of the company (name, address, contact, telephone, telefax, e-mail), the list of shareholders holding more than 1 per cent of the capital, information on affiliated companies, product information, the audited accounts of the company, and information on legal representation. China suggests that its claim under Articles 6.5 and 6.5.1 concerns all the instances in which information was removed or deleted from, or answers were left blank in questionnaire responses. China, first written submission, para. 1341. However, as previously noted, we consider that a claim under Article 6.5 requires a careful examination of the facts with respect to the claim. Thus, our analysis and conclusions are limited to the instances with respect to which China has made specific arguments, namely the instances addressed by China in its first written submission at para. 1337.

[1431] China, first written submission, para. 1337; Questionnaire responses provided by the sampled EU producers, Exhibit CHN-101.

[1432] See footnote 1430 above.

for treating this information as confidential. China recalls its position that, where the names of the companies are not disclosed and the information cannot be linked to them, such information cannot be considered "by nature confidential". In the context of this claim, China argues that because the names of the producers were not disclosed, the vast majority of the information provided in their questionnaire responses – i.e. information such as company turnover, sales volume, unit prices, full cost of sales, profit/loss, and cash-flow – could not be treated as confidential, as it could not be of any advantage to a competitor nor have any adverse effect upon the complainants or the person supplying the information.

7.741 We have already rejected China's position in this regard, concluding that the mere fact that the identity of the company submitting information is not disclosed does not mean that the information loses its commercial value or could not be of any advantage to a competitor, or that its disclosure could not have an adverse effect on the person supplying the information.[1433] We therefore reject China's argument that because the names of the sampled EU producers were not disclosed, the vast majority of the information provided in their questionnaire responses could not be treated as confidential.

7.742 We also reject China's allegation that the European Union violated Article 6.5 because no good cause was shown for the confidential treatment accorded to the specific company information[1434] in the questionnaire responses of the producers in question. In this regard, we recall that we have concluded that the confidential treatment of the names of the EU producers was not inconsistent with Article 6.5 of the AD Agreement. Moreover, we recall our view that an investigating authority may treat as confidential information for which confidential treatment is not specifically sought, if it is necessary in order to maintain the confidentiality of information accorded such treatment. In this case, it is evident to us that the disclosure of the specific information in question could well have resulted in the disclosure of the identities of the companies submitting it. Thus, even if a specific request for confidential treatment or showing of good cause was not made with respect to all the specific company information in question[1435], we do not consider that the European Union erred in treating this information as confidential.[1436] We therefore reject China's allegations under Article 6.5 with respect to this information.

7.743 We recall, however, that Article 6.5.1 requires investigating authorities to ensure that a party submitting confidential information furnishes a non-confidential summary of the confidential information or, in exceptional circumstances, an explanation why such summarization is not possible. In this instance, we see nothing in the evidence before us that suggests that the Commission requested the provision of a non-confidential summary of the confidential information in question, nor is there any evidence that the Commission requested the submitters to explain the reasons for the lack of such

[1433] See paragraph 7.726 above.

[1434] China refers in this regard to the name, address, contact, telephone, telefax, e-mail, list of shareholders holding more than 1 per cent of the capital, affiliated companies data, general products' information, audited accounts, and legal representation of the companies. China, first written submission, paras. 1337 and 1341, referring to Questionnaire responses provided by the sampled EU producers, Exhibit CHN-101.

[1435] The evidence shows that while this information was either blacked out or redacted as "limited", no good cause was shown for the confidential treatment accorded to this information. Questionnaire responses provided by the sampled EU producers, Exhibit CHN-101. The European Union does argue otherwise.

[1436] Indeed, we consider that it would not be appropriate to read Article 6.5 in a way that would effectively require an investigating authority to potentially disclose confidential information because the submitter of information failed to make an adequate request for confidential treatment or showing of good cause for such treatment.

summarization.[1437] We therefore consider that the European Union acted inconsistently with its obligations under Article 6.5.1 by failing to ensure sampled EU producers' compliance with the requirements of this provision. Having found a violation of Article 6.5.1 with respect to the specific company information in question, we consider that additional findings on China's claim under Article 6.2 would not contribute to the resolution of this dispute or be potentially useful in implementation. We therefore exercise judicial economy with respect to this aspect of China's claim.

7.744 With respect to the net unit sales price data, the non-confidential versions of the questionnaire responses of the sampled EU producers in question indicate that this information was labelled as "limited"[1438], which we understand to mean, in EU practice, that the information was submitted as confidential.[1439] The European Union asserts that the good cause requirement for information that is by nature confidential, such as sales price information, is satisfied by establishing that the information falls within that category. We recall that good cause must be established for information which is confidential by nature and information which is submitted on a confidential basis. In this case, while we do not disagree that sales price data may, in principle, constitute information "by nature confidential", we see nothing in the evidence before us that would indicate, nor does the European Union argue, that its legislation, or its practice, defines in advance the categories of information that the Commission will treat as "by nature confidential," so that simply because the information falls within that category will suffice to satisfy the good cause requirement. In the absence of any indication that the submitters of this information even asserted that the information met the criteria defining information which may be considered by nature confidential, we therefore conclude that the European Union acted inconsistently with Article 6.5 by treating this information as confidential.

7.745 Moreover, we see nothing in the evidence before us that indicates that the Commission requested the provision of a non-confidential summary of the information in question or that it requested the producers to explain the reasons for the lack of such summarization. We therefore conclude that the European Union violated Article 6.5.1 by failing to ensure sampled EU producers' compliance with the requirements of this provision. Having found a violation of Articles 6.5 and 6.5.1 with respect to the information at issue here, we consider that additional findings on China's claim under Article 6.2 would not contribute to the resolution of this dispute or be potentially useful in implementation. We therefore exercise judicial economy with respect to this aspect of China's claim.

b) <u>answers left blank in the questionnaire responses and absence of an entire questionnaire response</u>

7.746 China's claim in this regard refers specifically to (a) instances in which the answer is blank in the questionnaire responses of the sampled EU producers; and (b) the absence of an entire questionnaire response of one sampled EU producer.[1440] China asserts that the European Union violated Article 6.5.1 because, to the extent that this information was treated as confidential, the European Union did not assure the provision of a non-confidential summary or an explanation as to

[1437] The mere fact that the nature of information might make it not susceptible of summarization does not exempt investigating authorities from the obligation to ensure that the submitter of the confidential information provides an explanation why summarization was not possible.

[1438] Questionnaire responses provided by the sampled EU producers, Exhibit CHN-101.

[1439] We understand that in the EU practice, the label "limited" with respect to information submitted indicates that the submitter considers it to be confidential information within the meaning of Article 6.5 of the AD Agreement. In this regard, we note that in the Notice of Initiation of the investigation, the Commission explained that information submitted as "limited" means, *inter alia*, that it was considered confidential pursuant to Article 6 of the AD Agreement. Notice of Initiation, Exhibit CHN-6, recital 7.

[1440] China, first written submission, paras. 1340-1341.

why summarization was not possible.[1441] With respect to its claim under Article 6.5.2, China argues that the European Union should have disregarded the information in question as confidentiality was not warranted.[1442]

7.747 China's claim seems to rest on the view that an answer left blank in the non-confidential version of a questionnaire response demonstrates that information was treated as confidential by the Commission. In our view, however, the mere fact that information is not in the non-confidential version of a questionnaire response does not necessarily mean that an answer was treated as confidential – it is just as likely to be the case that no answer was provided to the question. There must be some demonstration by the complaining Member that information was actually treated as confidential before we can consider a claim that confidential treatment was accorded inconsistently with Article 6.5 of the AD Agreement.

7.748 Our examination of the evidence does not suggest that the Commission treated the information at issue as confidential. For instance, some producers provided responses, which were not treated as confidential, to some of the questions whose answers were left blank by other producers. This, in our view, indicates that the Commission did not treat as confidential the answers that were left blank.[1443] In the circumstances of this case, we cannot conclude, merely on the basis of blank answers in the non-confidential versions of some questionnaire responses, that the responses were provided but were treated as confidential. We recall that the Article 6.5.1 obligation to provide adequate non-confidential summaries applies only with respect to information treated as confidential. In this case, we consider that China has failed to demonstrate that the information at issue was, in the first place, treated as confidential. We therefore consider that China has failed to make a *prima facie* case that the European Union violated Article 6.5.1 with respect to the instances in which answers in the non-confidential versions of questionnaire responses were blank. As China's claim of violation of Article 6.2 of the AD Agreement is dependent on its claim of violation of Article 6.5.1, which we have rejected, we find no violation of Article 6.2 in this regard.

7.749 China also claims that the European Union violated Article 6.5.2 of the AD Agreement. As we understand it, China's argument is that the Commission should have determined that confidential treatment of the information in question was not warranted, and in the absence of authorization to disclose the information, should have disregarded it. However, Article 6.5.2 does not impose any affirmative obligation on investigating authorities to examine whether or not confidential treatment is warranted – that obligation is set out in Article 6.5 chapeau. Article 6.5.2 addresses what actions investigating authorities may take if they "find that a request for confidentiality is **not** warranted".[1444] There is no evidence before us indicating that the investigating authorities found that confidential treatment was not warranted, and China has not argued otherwise – rather, China argues that the Commission **should** have found the information did not warrant confidential treatment.[1445] In these circumstances, we fail to see the legal or factual basis for China's claim and we therefore reject China's claim under Article 6.5.2. As China's claim of violation of Article 6.2 of the AD Agreement is dependent on its claim of violation of Article 6.5.2, which we have rejected, we find no violation of Article 6.2 in this regard.

[1441] With respect to China's claim under Article 6.5.1 regarding the "missing" questionnaire response of one sampled EU producer, we recall our findings in this regard, in paragraph 7.718 above.

[1442] China, first written submission, para. 1341.

[1443] For instance, we note that while some producers left blank the question regarding the PCN information, there were other producers who answered this question by providing this information. Questionnaire responses provided by the sampled EU producers, Exhibit CHN-101.

[1444] We recall that that the obligation on investigating authorities to determine whether a request for confidential treatment is warranted is addressed by Article 6.5 of the AD Agreement. See paragraphs 7.667 and 7.675 above.

[1445] China, first written submission, para. 1341. Moreover, we have concluded that China has failed to demonstrate that the information in question here was, in fact, treated as confidential.

7.750 Based on the foregoing, we conclude that, with respect to the original investigation, China has established that the European Union acted inconsistently with Article 6.5 of the AD Agreement with respect to the questionnaire response of one sampled EU producer and missing declarations of support, and has established that the European Union acted inconsistently with respect to Article 6.5.1 of the AD Agreement with respect to the same information, the individual production data of the domestic producers for the first quarter of 2005 and certain information in the non-confidential questionnaire responses of the sampled EU producers. We further conclude that, with respect to the original investigation, China has failed to demonstrate that the European Union acted inconsistently with Articles 6.5, 6.5.1 and 6.5.2 with respect to the remaining information referred to by China in its claims. We also conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 6.2 of the AD Agreement, either as a consequence of violations of Articles 6.5, 6.5.1, or 6.5.2, or independently, with respect to names of the EU producers, methodology and data used for the selection of the sample of EU producers, adjustments for differences affecting price comparability, certain information in the complaint, certain information in the Note for the File dated 6 July 2005, and certain information in the non-confidential questionnaire responses of the sampled EU producers. Finally, we exercise judicial economy regarding China's claim under Article 6.2 with respect to the questionnaire response of one sampled EU producer, missing declarations of support, and certain information in the non-confidential questionnaire responses of the sampled EU producers.

c. Expiry Review

1. confidential treatment of the names of EU producers

7.751 China claims that by granting confidential treatment to the names of the EU producers, that is, the names of the complainants, the supporters of the expiry review request, the eight EU producers in the sample for the injury aspects of the expiry review, and the six sampled EU producers in the original investigation that completed the Union Interest questionnaire in the expiry review, the European Union violated Articles 6.5 and 6.5.1 of the AD Agreement.[1446] In particular, China alleges that the name of a producer cannot be considered "information" within the meaning of these provisions.[1447] In the alternative, China submits that were the Panel to find that "names" are "information" for purposes of Article 6, the European Union has still violated Articles 6.5 and 6.5.1 because the names of companies are neither information which is confidential "by nature" nor can they be considered as information that may be submitted in confidence because such information is already in the public domain.[1448]

7.752 Moreover, if the Panel finds that names may be treated as confidential, China argues that the European Union violated Article 6.5 by granting confidential treatment in the absence of "good cause" shown. China asserts that the general statement requesting confidentiality by CEC on behalf of the complainants and supporters was insufficient, as none of the producers concerned individually requested confidentiality, and therefore the CEC's request cannot be considered "good cause" for the confidential treatment accorded to their names. For China, it is the submitter of the information concerned, and not for a third party or association, to demonstrate "good cause".[1449] China also argues that the alleged risk of retaliation by some customers, in the absence of any proof, cannot be considered "good cause" within the meaning of Article 6.5.[1450] In addition, China asserts that the

[1446] China, first written submission, paras. 712 and 720; second written submission, para. 1034.
[1447] China, first written submission, paras. 713-715; second written submission, para. 1046.
[1448] China, first written submission, para. 721; second written submission, para. 1047.
[1449] China, first written submission, para. 722; second written submission, paras. 1048-1049, 1051-1053 and 1076; answer to Panel question 75(a), (d).
[1450] China, first written submission, para. 723; second written submission, paras. 1012-1017. China argues that the standard for demonstrating "good cause" for information which is not "confidential by nature",

alleged fear of retaliation was unreasonable, unfounded and untrue and thus did not constitute "good cause". In this regard, China notes in particular that, after the imposition of the provisional measure in the original investigation, seventeen Italian producers had disclosed their names when they filed an application for annulment of the Provisional Regulation, and also disclosed their names when they intervened in various European court proceedings filed by Chinese exporters following the imposition of the definitive measure. In addition, China notes that the names of the Italian producers cooperating as analogue country producers in the Brazilian anti-dumping investigation against Chinese footwear imports were disclosed.[1451]

7.753 China also claims that the European Union violated Article 6.5.2 of the AD Agreement by failing to find that the requests for the confidential treatment of the names of the EU producers were not warranted. China asserts that Article 6.5.2 imposes a positive obligation upon investigating authorities to evaluate whether or not confidentiality is warranted based on the criteria of Article 6.5 and the surrounding circumstances, notably the arguments/evidence provided by interested parties. This obligation, China argues, flows from the assumption that investigating authorities make their evaluations in an objective and impartial manner. In this case, China notes that the Commission was provided with evidence demonstrating that the confidentiality of the names of the complainant producers and supporters was not warranted as the alleged fear of retaliation was incorrect, unfounded and unsubstantiated.[1452]

7.754 In addition, China claims that the European Union violated Article 6.2 of the AD Agreement by failing to ensure that Chinese exporters had a full opportunity to defend their interests. In this regard, China submits that the European Union's decision to grant confidential treatment to the identities of the complainants was biased, and foreclosed all opportunities for Chinese exporters to defend their interests on several issues, including those related to the expiry review request, sampling, injury and causation determinations.[1453]

7.755 The European Union rejects China's allegations. In the European Union's view, the name of a producer is subject to confidential treatment where its disclosure could reveal whether the producer is a complainant or supporter of the expiry review request.[1454] Furthermore, the European Union asserts that the producers in question showed good cause for their requests for confidential treatment, even if they did not do so individually, as the assertion of potential retaliation as justification was made in the expiry review request in respect of all "complainants and supporters". In this regard, the European Union contends that the request for confidential treatment can be made by or on behalf of the party whom it is intended to benefit. In the expiry review, the European Union notes that while the complainants were evidently party to this request, the companies supporting the expiry review request signed a statement in which they stated that they "support the request for the review as applicant", and that the most plausible understanding of this action was that their support extended to the request for confidentiality.[1455] With respect to the six sampled producers in the original investigation which were included in and responded to the Union Interest questionnaire in the expiry review, the European Union asserts that these producers indicated to the Commission that they wanted to benefit

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such as names, is very high, and therefore an assertion of "fear of retaliation" based on mere conjectures does not establish "good cause". See, e.g. China, second written submission, paras. 1058-1059; answer to Panel question 75(a)-(b).

[1451] China, first written submission, para. 723; second written submission, paras. 1060-1063; closing oral statement at the second meeting with the Panel, para. 93.

[1452] See, e.g. China, first written submission, paras. 758-764; second written submission, paras. 1131 and 1133.

[1453] See, e.g. China, first written submission, paras. 764-765; second written submission, paras. 1146-1149.

[1454] European Union, first written submission, paras. 415-417 and 420.

[1455] European Union, first written submission, para. 422; answer to Panel question 75(d); opening oral statement at the second meeting with the Panel, para. 316.

from the confidential treatment accorded to the identities of the supporters of the expiry review request.[1456]

7.756 In addition, the European Union asserts that the producers presented a clearly argued and sufficiently substantiated good cause for confidential treatment, that is, fear of retaliation, on the basis of which the Commission determined that there "was a significant possibility of retaliation in the form of lost sales for these producers" and therefore granted confidential treatment to their names.[1457] With respect to the disclosure of names of Italian producers in European court proceedings during and after the original investigation, and in the Brazilian anti-dumping investigation, the European Union notes that the Commission concluded that none of these considerations outweighed the case made for granting confidential treatment, as those disclosures did not identify the companies as complainants or supporters in the expiry review.[1458] Furthermore, the European Union asserts that the Commission had received convincing accounts of threats of retaliation to be carried out by importers and distributors and that the implications for them of the participation of the Italian producers in the European court and Brazilian proceedings were much less significant than the consequence of the producers' support for the expiry review at issue.[1459]

7.757 Finally, the European Union submits that neither Article 6.2, nor Article 6.5.2, provides a basis for the kind of complaints that China raises in this claim. The European Union argues that while Article 6.5.2 refers to the obligations of Members "[i]f the authorities find that a request for confidentiality is not warranted", China's claim refers to instances where the Commission had found that the request for confidential treatment was warranted. In addition, the European Union asserts that Article 6.2 does not override the specific rights contained in Articles 6.1.2, 6.4 and 6.9. Therefore where an issue is one that is covered by one of these provisions, Article 6.2 cannot be invoked, unless it is invoked in a consequential way.

7.758 Before addressing China's claim, we first note the following relevant facts, which we understand to be undisputed. The evidence before us shows that the request for review, filed by the CEC on behalf of the producers, requests confidential treatment of the "names and countries" of the complainants and supporters of the request for review, as follows:

> "The disclosure of the names of the requesting parties and supporters of this application would have a significantly adverse effect upon them, in terms of being subject to retaliatory actions.
>
> The footwear market structure … has the perfect conditions for retaliation: import business interest at stake and unequal negotiation power for the parties involved, i.e. on one side a fragmented Community industry that in some cases import raw materials from the countries concerned, and on the other, very big distributors.
>
> In the initial investigation … the European Commission acknowledged that Community producers could be placed in a sensitive position vis-à-vis their clients who also supply themselves in China and Vietnam. The European Commission therefore granted this request for confidentiality of the names of the complainants …

[1456] This is evidenced, the European Union argues, by the fact these producers presented non-confidential versions of their responses. European Union, opening oral statement at the second meeting with the Panel, para. 325.

[1457] European Union, first written submission, paras. 423-424; opening oral statement at the second meeting with the Panel, para. 333.

[1458] In this regard, the European Union maintains that China has not demonstrated that the Italian footwear producers in the EU court proceedings were themselves complainants, as China contends. European Union, first written submission, para. 426; second written submission, para. 204.

[1459] European Union, opening oral statement at the second meeting with the Panel, paras. 328 and 330.

> Since the conditions leading to the granting of this request have not been altered since the publication of the Regulation and the imposition of provisional and subsequent definitive antidumping duties, Community producers still feel this protection through confidentiality necessary. We therefore trust the Commission will recognise the necessity of keeping in strict confidentiality the **names** and **countries** of the companies involved in this application for an expiry review, and will grant this request."[1460] (emphasis added)

In a subsequent letter, the CEC reiterated the importance for the EU industry not to disclose the identities of the complainants and supporters of the request for review, asserting a risk of retaliation and emphasizing that "certain Community producers indeed already have been subject to severe pressure to stop cooperating in the investigation and to withdraw their support for the request."[1461] The Commission granted confidential treatment to the identities of the complainants, the sampled EU producers, and the supporters of the expiry review request as it considered that the request for confidentiality was substantiated.[1462] The Review Regulation also states that, at verification, the sampled EU producers as well as other cooperating EU producers requested that their identities be kept confidential, asserting "risk of retaliation by some of their clients, including the possible termination of their business relationship."[1463]

7.759 China's claim with respect to the expiry review is premised on the same general contentions it advanced in connection with its claim concerning the confidential treatment accorded by the Commission to the names of the EU producers in the original investigation.

7.760 We recall our view that, provided good cause is shown, "any" information may be treated as confidential in an anti-dumping investigation, including the names of producers.[1464] We therefore reject China's contention that the names of producers are not "information" which may be treated as confidential. Similarly, we reject China's allegation that the name of a company cannot be subject to confidential treatment on the basis that it is information already in the public domain. In this case, it is clear to us that the basis for treating the names of the EU producers in question as confidential was not the confidentiality of their names *per se*, but rather the confidentiality of whether they were participating as complainants or supporters of the expiry review request, disclosure of which could have led to retaliation from complainants' and supporters' customers who import the subject product from China.[1465] Moreover, with respect to the required showing of good cause, as discussed above, nothing in Article 6.5 precludes a party from requesting confidential treatment of information it files on behalf of another party or parties and from showing good cause for such treatment on behalf of that party or parties. Nor does Article 6.5 require that the "owner" of the information for which confidential treatment is sought requests such treatment and shows good cause.[1466] In this case, it is clear to us that the request for confidential treatment, along with the demonstration of good cause, was made by the CEC on behalf of the complainants and supporters of the expiry review request. It is also clear to us that the CEC was actually the submitter of the information for which confidential treatment was requested, and was therefore entitled to request and demonstrate good cause for that treatment. As we have noted with respect to the original investigation, in our view, nothing in the AD Agreement supports the notion that each complainant was somehow required to individually request confidential

[1460] Expiry review request/complaint filed by CEC, Exhibit CHN-29, Annex 0; and CEC letter dated 8 December 2008, Exhibit CHN-63.
[1461] CEC letter dated 8 December 2008, Exhibit CHN-63.
[1462] Review Regulation, Exhibit CHN-2, recitals 4, 40, 49 and 330.
[1463] Review Regulation, Exhibit CHN-2, recital 40.
[1464] See paragraphs 7.669-7.676 above.
[1465] See e.g. Review Regulation, Exhibit CHN-2, recitals 4 and 40.
[1466] See paragraphs 7.694-7.699 above.

treatment and show good cause therefor.[1467] In addition, in their letters of support, each supporter of the expiry review request explicitly stated that it supported the expiry review request, which included the request for confidentiality.[1468] Nothing in the evidence before us indicates that these supporting producers, in separately declaring their support for the expiry review request, disclaimed or rejected the CEC's request for confidential treatment of their identities. Nor is there any indication that these producers subsequently, during the investigation, waived or disclaimed the confidential treatment that had been accorded. We therefore see no legal and factual basis for China's assertion that the complainants and supporters of the expiry review request failed to request confidential treatment or their names and/or to show good cause for such treatment. Accordingly, we reject China's contention in this regard.[1469]

7.761 China asserts that the alleged fear of retaliation in the expiry review was unreasonable, unfounded and untrue, noting in support of its assertion that after the imposition of provisional measures in the original investigation, seventeen Italian footwear producers disclosed their names when they filed an application for annulment of the Provisional Regulation, and also when they intervened in various European court proceedings filed by Chinese exporters following the imposition of the definitive measures. We recall that we have already considered and rejected China's arguments in this respect in the context of the original investigation.[1470] We reach the same conclusions for the same reasons here.[1471] In addition, even assuming, *arguendo*, that the seventeen Italian producers were among the producers whose names were treated as confidential in the expiry review, we certainly fail to see how the disclosure of their names in *past* court proceedings demonstrates that the risk of retaliation asserted in the expiry review request was untrue at the time it was made.[1472] In this case, moreover, the CEC's request states that "certain Community producers indeed already have been subject to severe pressure to stop cooperating in the investigation and to withdraw their support for the request." This assertion of fact, which China does not contest, supports the conclusion that the asserted fear of retaliation was neither untrue nor unfounded.

[1467] See paragraphs 7.694-7.697.

[1468] Examples of non-confidential versions of declarations of support of complainant producers, Exhibit CHN-30.

[1469] Moreover, with respect to the EU sampled producers and other cooperating EU producers in the expiry review, the evidence before us shows that they requested confidential treatment of their names and asserted risk of retaliation as cause for the confidential treatment accorded to their identities. Review Regulation, Exhibit CHN-2, recital 40. With respect to the sampled EU producers in the original investigation which completed the Union Interest questionnaire in the expiry review, we note the European Union's assertion that these producers indicated to the Commission that they wanted to benefit from the confidentiality accorded to the identities of the supporters of the expiry review request, and that this was evidenced by the fact that they submitted non-confidential versions of their responses. China has not adduced any evidence or arguments to counter these assertions. Nothing in the evidence before us indicates that these assertions are not true. We therefore consider that China has not established that the Commission erred in granting confidential treatment to the names of these producers.

[1470] See paragraphs 7.677-7.699 above.

[1471] As it did in the context of the original investigation, China assumes, but has not established, that the seventeen Italian producers were complainants involved in the expiry review whose names were treated as confidential. China, second written submission, para. 1137. As in the context of the original investigation, we do not consider that the participation of companies assumed to be among the complainants or supporters in European court proceedings establishes that the risk of retaliation asserted in the expiry review was unreasonable, unfounded or untrue.

[1472] China also refers to the Brazilian anti-dumping investigation against Chinese footwear imports, in which the names of the Italian producers cooperating as analogue country producers were disclosed. We fail to see the relevance of China's argument to our evaluation of the grant of confidential treatment of the names of the EU producers in the expiry review. We do not see how the disclosure of the names of these producers, as analogue country producers in a Brazilian anti-dumping investigation, establishes that the asserted fear of retaliation in the expiry review request was untrue, especially given that their involvement in the expiry review as complainants has not been demonstrated.

7.762 Based on the foregoing, we conclude that China has not established that the confidential treatment accorded by the European Union to the names of the complainants, the supporters of the expiry review request, the sampled EU producers in the review, and the sampled EU producers in the original investigation that completed the Union Interest questionnaire in the review, was inconsistent with Article 6.5 of the AD Agreement.

7.763 We recall, however, that Article 6.5.1 requires investigating authorities to ensure that a party submitting confidential information furnishes a non-confidential summary of the confidential information or, in exceptional circumstances, an explanation why such summarization is not possible. In this case, we see nothing in the evidence before us that suggests that the Commission requested the provision of a non-confidential summary of the information in question, nor is there any evidence that the Commission requested an explanation of the reasons for the lack of such summarization. We recall our view that the mere fact that information might not be susceptible of summarization, does not exempt investigating authorities from their obligation to ensure that the submitter of confidential information provides an explanation as to why a summary of the information is not possible. We therefore consider that the European Union acted inconsistently with its obligations under Article 6.5.1 by failing to ensure compliance with the requirements of this provision.

7.764 With respect to China's claim under Article 6.5.2 of the AD Agreement, we recall that, as discussed previously[1473], Article 6.5.2 does not impose any affirmative obligation on investigating authorities to examine whether or not confidential treatment is warranted, but addresses what actions investigating authorities may take if they "find that a request for confidentiality is not warranted". As we have found that the confidential treatment accorded by the Commission to the names of the EU producers in question was warranted, we fail to see any legal or factual basis for China's claim that the European Union acted inconsistently with its obligation under Article 6.5.2, and we therefore reject that claim.

7.765 Finally, with respect to China's claim under Article 6.2, we note that while China asserts that the European Union's decision to treat as confidential the identities of companies in the expiry review was biased and deprived Chinese exporters of their right to make meaningful comments on several issues, China has failed to demonstrate such bias. We recall that the right of parties to defend their interest accorded by Article 6.2 is not indefinite, that is, it does not allows parties to participate in the inquiry as and when they choose.[1474] In this case, the evidence before us shows that interested parties *did* make comments throughout the expiry review on the issues mentioned by China.[1475] Moreover, we recall that the rights set forth in Article 6.2 do not apply to information treated as confidential under Article 6.5, and that we have found that the Commission did not err in according confidential treatment to the names of the EU producers. We therefore see no factual or legal basis for China's contention that Chinese exporters were deprived of their right of defence due to the confidential treatment granted to this information by the Commission, and we therefore reject China's claim of violation of Article 6.2 in this respect.

[1473] See paragraphs 7.667 and 7.675 above.

[1474] See paragraphs, 7.604, 7.621, 7.633, and 7.640 above.

[1475] In this regard, we note for instance the submissions of the Chinese Footwear Coalition and China Leather Association, dated 24 March and 6 April 2009, respectively Exhibits CHN-10 and CHN-18 (second document); the submissions of the EFA, dated 12 November 2008 and 23 February 2009, respectively Exhibits CHN-34 and CHN-23; and the submission of the Chinese exporter Yue Yuen, dated 3 November 2009, Exhibit CHN-46. China also argues that it was the lack of objectivity and biased conduct of the European Union which precluded interested parties from fully exercising their rights of defence, since the European Union did not even bother to evaluate or make a comparative assessment of the substantiated comments submitted by the interest parties. China, second written submission, para. 1146. We note, however, that the Commission did examine the comments made by interested parties in this regard. E.g. Review Regulation, Exhibit CHN-2, recitals, 4, 104 and 328-331.

2. certain information provided in the expiry review request, CEC's submissions, standing forms, and questionnaire responses of sampled EU producers

7.766 China claims that the European Union violated Article 6.5 of the AD Agreement by granting confidential treatment to some information in the expiry review request, standing forms, CEC submissions, and the non-confidential questionnaire responses of the sampled EU producers, in the absence of "good cause" shown for such treatment. China argues that even if good cause is demonstrated for one type of information, such as the names of the complainants, it may not be presumed to exist for all information which the investigating authority considers may lead to the identification of the complainants. For China, the confidential treatment granted to the name of a producer cannot be extended to other data, even if that data serves as a route to identifying that producer.[1476] China also claims that the European Union violated Article 6.5.1 of the AD Agreement by failing to require the submitters of this information to provide non-confidential summaries or to give a statement of reasons as to why summarization was not possible, and by failing to ensure that the non-confidential summaries provided permitted a reasonable understanding of the information submitted as confidential.[1477]

7.767 The European Union asserts that in each instance of confidential treatment challenged by China, the relevant information was entitled to confidential treatment. The European Union argues that treating the identity of a producer as confidential does not make the issue of confidential treatment of the remainder of its data irrelevant, since that data might serve as a route to identifying the producer. Furthermore, even if the producers' names are not known, the European Union submits that their individual sales, production, etc. would be considered information by nature confidential, and for such information, the showing of "good cause" consists in establishing that the information falls into that category.[1478]

a) information in the expiry review request

7.768 China asserts that the European Union acted inconsistently with Article 6.5 by not requiring that good cause be shown for the complainants' request for confidential treatment with respect to the information submitted in Annexes 1, 5, 6, 7 and 10 of the expiry review request. China notes that the producers' request for confidential treatment simply repeated the text of Article 6.5, and argues that this cannot be considered "good cause" without further substantiation. China also argues that simply quoting the title of the Annexes in question does not satisfy the requirement of Article 6.5.1 to provide a sufficiently detailed non-confidential summary as to permit a reasonable understanding of the "substance" of the information submitted as confidential.[1479]

7.769 The European Union notes that the information contained in Annexes 1, 6, 7, and 10 was withheld on the ground that it was by nature confidential, and that while the information in Annex 5 was the same in the confidential and non-confidential versions, and thus was not treated as confidential, the names of the applicants appearing in Annex 5 were treated as confidential. Furthermore, the European Union argues that the general request for confidential treatment of identities, supported by the fear of retaliation, was sufficient good cause for all the individual instances in which confidential treatment was granted. Finally, the European Union asserts that all the information in question was used as part of calculations and conclusions presented in the expiry

[1476] China, second written submission, paras. 1080-1081.
[1477] China, first written submission, para. 724.
[1478] European Union, first written submission, paras. 428 and 438.
[1479] See, e.g. China, first written submission, paras. 728-735.

review request, and was effectively summarized in those parts of the expiry review request that were not treated as confidential.[1480]

7.770 With respect to Annex 1, China's claim concerns the following information: (i) the answers provided by the applicants; (ii) their countries; and (iii) a table regarding the standing of CEC.[1481] Although the body of the non-confidential version of the expiry review request states that "the answers provided [by the individual applicants] are given in confidence … and attached in (limited) Annex 1", as China contends, we note that Annex 1 itself indicates that it contains "the list with the names and countries of the individual applicants and support forms" as well as a "table on standing of CEC".[1482] Thus, nothing in Annex 1 suggests that it included any "answers of the applicants" and, in our view, it seems more likely that the "answers" mentioned in the body of the expiry review request refer to the "support decisions" mentioned in Annex 1. We also note that the expiry review request requested confidential treatment of the names and countries of the individual applicants and support forms, on the basis that "its disclosure would be of significant competitive advantage to a competitor and/or would have a significant adverse effect upon a person supplying the information or upon a person from whom he has acquire the information."[1483] In this case, it is clear to us that the expiry review request asserted that the information in question was by nature confidential, as described in Article 6.5.[1484] Moreover, we recall that we have already found that the request and good cause for the confidential treatment accorded to the names of the complainants by the Commission was consistent with Article 6.5 of the AD Agreement. We therefore conclude that the European Union did not err in treating the information contained in Annex 1 as confidential, and we therefore reject China's claim under Article 6.5 in this regard.[1485]

7.771 Turning to China's claim under Article 6.5.1, we recall that this provision requires investigating authorities to ensure that the submitter of confidential information furnishes a non-confidential summary of the information or, in exceptional circumstances, an explanation why such summarization is not possible. The European Union notes that the complaint stated that the CEC was acting on behalf of the "producers of the product concerned, representing 38% of the total EU27 production" and asserts that therefore a summary of the confidential information in the table regarding the standing of the CEC was provided.[1486] In our view, this is sufficient to permit a reasonable understanding of the "substance" of the confidential information in question, that is, the standing issue, and we therefore reject China's claim under Article 6.5.1 with respect to this information. However, with respect to the applicant's countries of origin and their support decisions, there is nothing in the evidence before us that indicates that the Commission requested the provision of a non-confidential summary of this information, or that it requested the submitter to explain the reasons for the lack of such summarization. In connection with this information, we therefore consider that the

[1480] European Union, first written submission, paras. 429-442.
[1481] China, second written submission, paras. 1083-1087.
[1482] Expiry review request/complaint filed by CEC, Exhibit CHN-29, Annex 1.
[1483] Expiry review request/complaint filed by CEC, Exhibit CHN-29, Annex 1.
[1484] We recall our view that the showing of good cause for information that is by nature confidential may be satisfied by establishing that the information meets the description of such information set out by Article 6.5 chapeau.
[1485] We also reject China's claim under Article 6.5 with respect to the table regarding the standing of CEC mentioned in Annex 1 of the complaint. As we understand it, this table contained information of the individual applicants and their position with respect to the review request. European Union, opening oral statement at the second meeting with the Panel, para. 339. Thus, in our view, the disclosure of this information would have been inconsistent with the confidential treatment granted to the names of the EU producers, including the applicants, as it would have revealed whether or not these producers were participating as complainants or supporters of the expiry review request. We conclude that the European Union did not err in treating this information as confidential, and we therefore dismiss China's claim under Article 6.5 in this regard.
[1486] European Union, opening oral statement at the second meeting with the Panel, para. 339, referring to Expiry review request/complaint filed by CEC, Exhibit CHN-29, p. 5.

European Union acted inconsistently with its obligations under Article 6.5.1 by failing to ensure compliance with the requirements of this provision.

7.772 With respect to Annex 5, China's claim concerns the information regarding the representativeness of the products types.[1487] The factual basis for China's claim is the statement in the non-confidential version of the expiry review request that "CEC provides a table in annex 5, explaining how the representativeness of each product type [A, B and C] was calculated".[1488] The European Union asserts that this description in the body of the expiry review request is incorrect, and that the actual contents of Annex 5 were the same in the confidential and non-confidential version.[1489] We have no reasons to disbelieve this assertion. In particular, nothing in the evidence before us suggests that the two versions were different, and China has pointed to nothing that would suggest otherwise. We therefore see no factual basis for China's contention that the European Union treated as confidential information in Annex 5 of the expiry review request, and we therefore reject China's claim of violation of Article 6.5 with respect to this alleged information. Having found no violation of Article 6.5, we consider that there is no basis for China's claim under Article 6.5.1, which we recall applies only with respect to confidential information. We therefore reject China's claim under Article 6.5.1 with respect to the information in question.

7.773 With respect to Annex 6, China's claim concerns the domestic sales prices of three types of footwear produced and sold in Brazil.[1490] China argues that no good cause was shown for the confidential treatment accorded to this information, asserting that a mere *pro forma* repetition of the text of Article 6.5 does not meet this requirement. In addition, China argues that the average figures provided in the non-confidential version do not satisfy the requirement of Article 6.5.1 to provide a non-confidential summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.[1491] The European Union asserts that the evidence of Brazilian domestic prices was submitted in confidence on the ground that it was by nature confidential, and that the level of detail, consisting in average figures, provided in the non-confidential version of the expiry review request was adequate given the *bona fide* interest in preserving commercial confidentiality.[1492]

7.774 In this case, the expiry review request requested confidential treatment of domestic prices in Brazil, which was evidenced by the submission of invoices for the year 2007, on the basis that "its disclosure would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from who he has acquired the information."[1493] Thus, the expiry review request asserted that the information in question fell within the category of information that is described in Article 6.5 as being confidential by nature.[1494] Nothing in the evidence before us suggests that this assertion is not true, and indeed, China does not argue otherwise. We therefore conclude that the European Union did not err in

[1487] China, first written submission, para. 725.

[1488] Expiry review request/complaint filed by CEC, Exhibit CHN-29, p. 7.

[1489] European Union, first written submission, para. 430; second written submission, para. 341. The non-confidential version of Annex 5 of the expiry review request, as provided by the European Union, contains pictures of the products types A, B and C as well as a list of the TARIC Codes of the product concerned. European Confederation of the Footwear Industry (CEC) *Request for Expiry Review of Council Regulation (EC), No 1472/2006*, 27 June 2008, Non-limited, Annex 5, Exhibit EU-12.

[1490] China, first written submission, para. 725.

[1491] China, second written submission, paras. 1091-1092.

[1492] European Union, first written submission, para. 431; opening oral statement at the second meeting with the Panel, para. 343.

[1493] Expiry review request/complaint filed by CEC, Exhibit CHN-29, p. 15 and Annex 6.

[1494] We recall our view that the showing of good cause for information that is by nature confidential may be satisfied by establishing that the information meets the description of such information set out by Article 6.5 chapeau.

treating the domestic prices in Brazil as confidential, and we therefore reject China's claim under Article 6.5 in this regard.

7.775 Turning to China's claim under Article 6.5.1, in this case, the non-confidential version of the expiry review request sets out average normal values (ex-factory prices) on the Brazilian market for each product type concerned. These average figures, in our view, are sufficient to permit a reasonable understanding of the "substance" of the confidential information in question, that is, information with respect to the normal value in the analogue country. We therefore reject China's claim that an adequate non-confidential summary of the information contained in Annex 6 was not provided.

7.776 With respect to Annex 7, China's claim concerns (i) Chinese production figures for the product concerned and estimates for production levels until 2011; and (ii) export prices for Chinese footwear, consisting of price offers and invoices.[1495] The factual basis for the first aspect of China's claim is the statement in the non-confidential version of the expiry review request that "Annex 7 … contain[s] evidence on [China's] production level and the estimations made for production of the product concerned until 2011".[1496] The European Union asserts that this description in the body of the expiry review request is incorrect, and asserts that the confidential version of Annex 7 only contains "information on export prices for China consisting of invoices".[1497] We have no reason to disbelieve this factual assertion. In particular, we note that the expiry review request itself states elsewhere that Annex 7 contains "Export price from the People's Republic of China – Confidential", and we see nothing in the evidence before us that would suggest to us that this is not, as the European Union asserts, a correct description of the contents of Annex 7.[1498] We therefore see no factual basis for China's contention that the European Union treated as confidential Chinese production figures for the product concerned and estimates for production levels until 2011, allegedly contained in Annex 7 of the expiry review request, and we therefore reject this aspect of China's claim.

7.777 With respect to the information on export prices for China consisting of price offers and invoices, the expiry review request sought confidential treatment of this information asserting that "its disclosure would be of significant competitive advantage to a competitor and/or would have a significant adverse effect upon a person supplying the information or upon a person from whom he has acquired the information."[1499] The expiry review request asserted that this information was by nature confidential, as described in Article 6.5.[1500] Nothing in the evidence before us suggests that this assertion was untrue. We therefore consider that the European Union did not err in treating the information contained in Annex 7 of the expiry review request as confidential, and we reject China's claim under Article 6.5 with respect to this information. Having found no violation of Article 6.5, we consider that there is no basis for China's claim under Article 6.5.1, which we recall applies only with respect to information treated as confidential. We therefore reject China's claim under Article 6.5.1 with respect to the information in question.

7.778 With respect to Annex 10, China's claim concerns (i) evidence on injury factors provided by the complainants; (ii) calculations made by CEC on the basis of Eurostat data; (iii) data collected from producers and supporters; and (iv) tables made by CEC providing an overview of the injury factors.

[1495] China, first written submission, para. 725; second written submission, paras. 1094-1096.

[1496] Expiry review request/complaint filed by CEC, Exhibit CHN-29, p. 11.

[1497] European Union, first written submission, para. 432; opening oral statement at the second meeting with the Panel, para. 344.

[1498] Expiry review request/complaint filed by CEC, Exhibit CHN-29, page 4. We note in this regard that China has not argued that information concerning Chinese production figures was required to be provided in the request for expiry review.

[1499] Expiry review request/complaint filed by CEC, Exhibit CHN-29, Annex 7.

[1500] We recall our view that the showing of good cause for information that is by nature confidential may be satisfied by establishing that the information meets the description of such information set out by Article 6.5 chapeau.

China argues that the expiry review request only quotes Article 6.5 verbatim, and therefore no good cause was shown for the confidential treatment granted to this information. In addition, China alleges that no non-confidential summaries of this information were provided. Nor was any explanation given as to why such summarization was not possible.[1501] The European Union asserts that good cause was shown for the confidential treatment of this information. In addition, the European Union notes that the request for confidential treatment was not made in favour of Eurostat data, but with respect to the results of adjustments to those data made by the CEC, and that the adjustments contained confidential information.[1502]

7.779 The expiry review request sought confidential treatment of this information on the basis that "its disclosure would be of significant competitive advantage to a competitor and/or would have a significant adverse effect upon a person supplying the information or upon a person from whom he has acquired the information."[1503] Thus, the expiry review request asserted that the information in question was by nature confidential, as provided for in Article 6.5.[1504] Nothing in the evidence before us suggests that this information does not fit into the category asserted, and China does not argue otherwise. We conclude that the European Union did not err in treating the information contained in Annex 10 of the expiry review request as confidential, and we therefore reject China's claim under Article 6.5 with respect to this information. With respect to China's claim under Article 6.5.1, we note that the non-confidential version of the expiry review request provides average figures with respect to the various injury factors, as well as with respect to the results of the calculations made by CEC in connection with its injury allegations.[1505] These average figures, in our view, suffice to permit a reasonable understanding of the "substance" of the confidential information in question, that is the injury alleged in the expiry review request. We therefore reject China's claim that an adequate non-confidential summary of the information contained in Annex 10 was not provided.

b) information in the expiry review request, standing forms, and CEC submissions

7.780 China notes that the European Union had stated in the Review Regulation that there was extensive information about the individual complainant producers in the expiry review request, standing forms and CEC submissions, on the basis of which the sample of the EU producers was selected. China asserts that the non-confidential versions of the expiry review request and CEC submissions did not contain individual data on production volumes and sales, business models, and product specialization, and there is no proof that good cause was demonstrated for the confidential treatment of such information, or that non-confidential summaries were required by the European Union.[1506] The European Union asserts that China's argument implies that the expiry review request had to contain a range of information similarly wide as the range of information used by the Commission in selecting the sample, and contends that this argument cannot constitute a claim of violation of the AD Agreement. The European Union also notes that much of the information contained in the expiry review request and its annexes was entitled to and was accorded confidential treatment.[1507]

[1501] China, first written submission, para. 725; second written submission, paras. 1098-1099.
[1502] European Union, first written submission, paras. 433-437; opening oral statement at the second meeting with the Panel, para. 345.
[1503] Expiry review request/complaint filed by CEC, Exhibit CHN-29, Annex 10.
[1504] We recall our view that the showing of good cause for information that is by nature confidential may be satisfied by establishing that the information meets the description of such information set out by Article 6.5 chapeau.
[1505] Expiry review request/complaint filed by CEC, Exhibit CHN-29, pp. 7-8 and 18-23.
[1506] China, first written submission, paras. 736-737.
[1507] European Union, first written submission, para. 443.

7.781 As we understand it, China's claim rests on the assumption that because the non-confidential versions of the expiry review request and CEC submissions did not contain individual EU producer data on matters which the Commission stated it took into account in selecting the sample of the EU producers, this information was treated as confidential without a showing of good cause, and with no non-confidential summaries provided. We have previously observed that the mere fact that information is not available to interested parties does not necessarily mean that it was information treated as confidential under Article 6.5.[1508] Similarly, the allegation that the information is not reflected in the non-confidential versions of documents referred to by the investigating authority as containing extensive information which served as the basis of the selection of the sample, does not, in our view, establish that the specific information was submitted in those documents and accorded confidential treatment. We recall that Article 6.5 is not a provision calling for disclosure of information to parties. Thus, merely that information is not available to a party does not demonstrate that it was wrongly treated as confidential. China has not demonstrated that the information at issue was submitted in the expiry review request and CEC submissions, and was treated as confidential. Under these circumstances, we see no factual basis on which to conclude that the European Union acted inconsistently with its obligations under Article 6.5 with respect to this information. We therefore consider that China has not made out a *prima facie* case under Article 6.5, and we therefore reject China's claim in this regard. Having found no violation of Article 6.5, we see no basis for China's claim under Article 6.5.1, which we recall applies only with respect to confidential information. We therefore reject China's claim under Article 6.5.1 with respect to the information in question.

c) information in the standing forms

7.782 China notes that the European Union, following questions from the Panel, stated that four companies supporting the expiry review request completed standing forms. China argues that interested parties were not provided any opportunity during the expiry review to see these documents. In China's view, this implies that the information in those standing forms was granted confidential treatment, without good cause having been shown. In addition, China asserts that there were no non-confidential summaries provided, or a statement of the reasons why such summaries could not be provided.[1509] China submits that the European Union's explanation, that the standing forms of the producers in question were not added to the non-confidential file because the contents were identical to the declarations of support, is incorrect, as the information requested in the standing form was more extensive than that provided in the declarations of support.[1510]

7.783 The European Union contends that these four companies were among the 196 that had already declared their support for the expiry review request, and that the non-confidential versions of their responses to the standing form were the same as their non-confidential declarations of support, that is, the only information in these documents was that an unidentified company was supporting the expiry review request.[1511] Consequently, the European Union explains, the Commission decided not to add these four standing forms to the non-confidential file, as to do so would have given the impression that four additional companies supported the request.[1512] Furthermore, the European Union argues that the confidential information in the standing forms largely duplicated that in the support statements, and that the extra information sought by the standing forms included (i) questions to

[1508] See paragraph 7.747 above.
[1509] China, second written submission, para. 1107; answer to Panel question 116.
[1510] China, closing oral statement at the second meeting with the Panel, para. 97.
[1511] In particular, the European Union explains that because of the request for confidential treatment, the non-confidential declarations of support said no more than that there was an unidentified company that supported the review request and that the non-confidential responses to the standing form were exactly the same in this respect. European Union, opening oral statement at the second meeting with the Panel, para. 347.
[1512] European Union, opening oral statement at the second meeting with the Panel, paras. 347-348.

which the four companies provided no answers, so there was nothing to summarize in non-confidential form; and (ii) data specific to the four companies, which was summarized in the Note for the File dated 2 October 2008, together with all the information that the Commission had received on standing.[1513]

7.784 The non-confidential versions of the standing forms of the four companies show that the answers to the questions in the standing form are blank.[1514] The European Union does not deny that these answers were treated as confidential by the Commission. Rather, the European Union asserts that the non-confidential responses of these producers were not included in the non-confidential file in order to avoid double counting these four companies, which had also submitted declarations of support, and had provided no additional information in the standing forms.[1515]

7.785 On the basis of the evidence before us we cannot determine whether the four companies which completed the standing forms were among the 196 supporters of the expiry review request, as the European Union contends. Thus, we cannot accept the European Union's contention that their standing forms did not contain information additional to that in the declarations of support, non-confidential versions of which had been included in the file. Moreover, it is clear that the standing forms requested information additional to that provided in the declarations of support.[1516] While the information in the standing forms may fall within the scope of information for which confidential treatment was requested by these four companies, or by the CEC on their behalf, it is not clear that it would fall within the scope of information for which the need to protect their identities would establish good cause for confidential treatment, and the European Union has not demonstrated otherwise. In these circumstances, we consider that the European Union acted inconsistently with its obligations under Article 6.5 by treating as confidential, in the absence of good cause shown, the non-confidential responses to the standing form of the four EU producers concerned. Having found a violation of Article 6.5 with respect to this information, we consider that additional findings on China's claim under Article 6.5.1 would not contribute to the resolution of this dispute or be potentially useful in implementation. We therefore exercise judicial economy with respect to China's claim under Article 6.5.1 in respect to this information.

d) declarations of support

7.786 China claims that no good cause was shown for the confidential treatment accorded to (i) the supporters' countries of origin and (ii) their production volume of the like product for the year 2007 and January 2008. China first argues that it was for each complainant to request for confidentiality; and second, that the cause provided in the declarations of support, that all information "was provided to the Commission in confidence", cannot be considered a "good cause" demonstration. In addition, China asserts no non-confidential summaries of the information in question were provided, nor was a statement as to why summarization of such information was not possible given. In this regard, China rejects the European Union's assertion that the information was summarized in the expiry review request, noting that expiry review request contained only aggregate data, but no summaries of individual data of the complainants.[1517]

7.787 The European Union submits that by giving support to the expiry review request, the producers were also endorsing the request and justification for confidential treatment of their identities contained in that request. Furthermore, the European Union asserts that the individual

[1513] European Union, comments to China's answer to Panel question 116.
[1514] Sampling form sent to Chinese exporters, Exhibit EU-20.
[1515] European Union, opening oral statement at the second meeting with the Panel, paras. 347-348.
[1516] For instance, we note that the standing form requires production, sales, employment, etc. data for the year 2006. Sampling form sent to Chinese exporters, Exhibit EU-20.
[1517] China, first written submission, paras. 738-739; second written submission, paras. 1104-1106.

production volumes of the supporting producers is information that could have led to their identification and was therefore associated with their fear of retaliation. In addition, even without company names, the European Union argues, this kind of information represents commercial information that is entitled to confidential treatment. The European Union adds that the information was effectively summarized in the expiry review request.[1518]

7.788 China's claim concerns certain information in the declarations of support, namely the information regarding the countries of origin and production volume of the like product of the supporting producers for the year 2007 and January 2008 of the supporting producers. We recall that the expiry review request explicitly sought confidential treatment of the "countries" of the supporters and of their "support forms" as a whole.[1519] In addition, we recall that in their letters of support, each supporter explicitly declared its support for the expiry review request, which included the requests for confidentiality contained therein. We see nothing in the evidence before us that would indicate that the supporting producers, in separately declaring their support for the expiry review request, nonetheless were somehow disclaiming or rejecting the CEC's requests for confidential treatment of the information contained in their declarations of support. Nor is there any indication that these producers waived or disclaimed the confidential treatment that the Commission accorded to this information, and that we have found to be consistent with Article 6.5.[1520] Moreover, as discussed above, we see no requirement, in the context of an expiry review request filed by a trade association on behalf of producers, for individual requests for confidential treatment and showings of good cause therefor. We therefore see no factual or legal basis for China's contention that no good cause was shown for the confidential treatment accorded by the Commission to the supporters' countries of origin and production volume for the year 2007 and January 2008, and we therefore reject China's claim under Article 6.5 in respect of this information.

7.789 With respect to China's claim Article 6.5.1, we recall that this provision requires investigating authorities to ensure that a party submitting confidential information furnishes a non-confidential summary of the confidential information or, in exceptional circumstances, an explanation why such summarization is not possible. In this case, we see nothing in the evidence before us that suggests that the Commission requested the provision of a non-confidential summary of the information in question, nor is there any evidence that the Commission requested an explanation of the reasons for the lack of such summarization.[1521] We recall that, in our view, the mere fact that information might not be susceptible of summarization does not exempt investigating authorities from ensuring that the submitter of confidential information provides an explanation as to why a summary of the information is not possible. We therefore consider that the European Union acted inconsistently with its obligations under Article 6.5.1 with respect to the information in question.

e) information in the non-confidential questionnaires responses of the sampled EU producers

7.790 China claims that the European Union violated Article 6.5 of the AD Agreement by treating as confidential, in the absence of good cause, information in the injury questionnaire responses of the eight sampled EU producers. China also claims that the European Union acted inconsistently with Article 6.5.1 either by failing to require the sampled EU producers to provide non-confidential

[1518] European Union, first written submission, para. 445; opening oral statement at the second meeting with the Panel, para. 346.

[1519] Expiry review request/complaint filed by CEC, Exhibit CHN-29 Annexes 0 and 1.

[1520] See paragraph 7.760 above.

[1521] The European Union asserts that the production data at issue was summarized in the expiry review request. We fail to see the factual relevance of this assertion, however. The review request does not contain a summary of the supporters' production data for the year 2007 and January 2008, but overall estimations of the production in the European Union. Expiry review request/complaint filed by CEC, Exhibit CHN-29.

summaries, or a statement as to why summarization was not possible, or by failing to ensure that the non-confidential summaries provided were sufficiently detailed to permit a reasonable understanding of the substance of the confidential information.[1522] In addition, China claims that the European Union violated Article 6.5.2 of the AD Agreement by failing to find that confidential treatment of information for which no non-confidential summaries were provided was not warranted. In particular, China argues that the Commission was obligated, as an objective and unbiased investigating authority, to disregard this information because (i) it could have been summarized; (ii) no request for its confidential treatment was made; and (iii) there was no explanation as to why only some producers provided summaries for responses to particular questions while others did not.[1523] China further claims that the European Union violated Article 6.2 of the AD Agreement because Chinese exporters were precluded from defending their interests due to the absence of non-confidential responses of the sampled EU producers on certain vital issues.[1524]

7.791 The European Union asserts that in the vast majority of individual instances referred to by China, the confidential and non-confidential responses of the companies concerned were the same, and therefore no issue of confidentiality arose. In addition, the European Union submits that the confidential treatment challenged by China was justified, because the information was by nature confidential, and for such information, good cause is shown by establishing that the information falls into that category. Furthermore, the European Union argues that the producers reiterated orally the requests for confidentiality made by the CEC in the expiry review request, and many of the producers also submitted individual letters emphasizing the importance of confidentiality and their fear of retaliation. The European Union further contends that China's claim that the European Union failed to require the producers to submit adequate summaries of information is misplaced, because in many of the instances referred to by China, the answers were by nature confidential and therefore nothing meaningful by way of summary could have been provided.[1525] The European Union maintains that neither Article 6.2 nor Article 6.5.2 provides a basis for the kind of complaints China makes in these claims. Thus, the European Union contends that Article 6.5.2 refers to the obligations of Members where a request for confidentiality is not warranted, while China's claim concerns instances where the request for confidentiality was found to be warranted by the Commission. In addition, the European Union asserts that Article 6.2 does not override the specific rights contained in other provisions of Article 6, and therefore where an issue is one that is covered by one of these provisions, Article 6.2 cannot be invoked, unless it is invoked in a consequential way.[1526]

7.792 China's claim under Article 6.5 concerns (i) "questions not answered" in the questionnaire responses of the sampled EU producers, that is, instances where the answer is blank; and (ii) "incomplete or meaningless" answers provided by producers.[1527] As we understand it, the first aspect of China's claim rests on the premise that the fact that answers were blank in the non-

[1522] See, generally, China, first written submission, paras. 740-747; second written submission, paras. 1109-1110.

[1523] See, e.g. China, first written submission, para. 769.

[1524] China, first written submission, para. 770.

[1525] See, e.g. European Union, first written submission, paras. 447 and 449; answers to Panel questions 59, 74 and 75(c); opening oral statement at the second meeting with the Panel, paras. 323 and 350.

[1526] European Union, first written submission, paras. 456-472.

[1527] China suggests that its claim under Articles 6.5 and 6.5.1 concerns all the instances where confidential treatment was granted in the injury questionnaire responses of the sampled EU producers. China, second written submission, para. 1109. However, as previously noted, we consider that a claim under any paragraph of Article 6 requires a careful examination of the facts with respect to the claim. Thus, our analysis and conclusions are limited to the instances with respect to which China has made specific arguments, namely the instances referred to by China in Exhibit CHN-65 (Examples of questions in the non-confidential injury questionnaire responses of each of the eight sampled producers that were left blank and for which the non-confidential summaries of data and information was not provided) as "questions not answered" and "incomplete/meaningless answers".

confidential versions of the questionnaire responses of the sampled EU producers demonstrates that information was treated as confidential by the Commission. We recall our view that the mere fact that information is not in the non-confidential version of a questionnaire response does not prove that an answer was treated as confidential – it is just as likely to be the case that no answer at all was provided to the question.[1528] In this case, except for one instance in which the European Union acknowledges that the information in question was treated as confidential treatment[1529], China has not demonstrated that the information it challenges was actually treated as confidential by the Commission. Nothing in the non-confidential versions of the questionnaire responses of the sampled producers indicates that confidential treatment of information was requested and granted with respect to these blank answers. In these circumstances, we see no factual basis on which to conclude that the information at issue was accorded confidential treatment inconsistently with Article 6.5 of the AD Agreement.

7.793 Similarly, we fail to see the factual or legal basis for China's claim with respect to the instances where allegedly "incomplete" or "meaningless" answers were provided in the non-confidential versions of questionnaire responses by the sampled producers. China has not demonstrated, nor does anything in the evidence before us suggest, that the "incompleteness" or "meaninglessness" of the answers of the producers was due to confidential treatment being granted to information, and the non-confidential summaries being inadequate. It may simply be that these answers were substantively poor in both the confidential and non-confidential versions. We note in this regard that the questions at issue call for narrative responses, and the answers reproduced by China appear to be in poor English, but not entirely meaningless.[1530] Article 6.5 only addresses the treatment of information submitted by parties to an investigation as confidential.[1531] It says nothing about the substantive quality of that information. Thus, in the absence of any showing that the non-confidential versions were meaningless versions of meaningful information submitted in the confidential version, as opposed to poorly drafted narrative statements, we cannot conclude that China has demonstrated that information was granted confidential treatment, or that inadequate non-confidential summaries were provided. We conclude that China has not made out a *prima facie* case under either Article 6.5 or Article 6.5.1 with respect to the allegedly blank, incomplete and meaningless answers in the questionnaire responses of the sampled EU producers, and we therefore reject China's claim in this regard.[1532]

[1528] See paragraph 7.747 above. In this case, we note for instance the European Union's assertion that in the majority of instances referred to by China, the confidential and non-confidential responses of the sampled EU producers were the same. European Union, opening oral statement at the second meeting with the Panel, para. 350. We have no evidentiary basis that would justify rejecting this assertion as untrue.

[1529] With respect to Table C4 (sales price data) of the questionnaire response of Company H, the European Union acknowledges that although this producer did not request confidential treatment of this information, it was nonetheless treated as confidential by the Commission, since it was considered "by nature confidential". European Union, answer to Panel question 59. We recall, however, that good cause must be shown to justify confidential treatment even of information which is confidential by nature, although the essence of that showing may be different than for information which is submitted on a confidential basis. In the absence of any indication that the producer even asserted that the information in question met the criteria defining information which may be considered by nature confidential as per Article 6.5, we consider that the European Union acted inconsistently with Article 6.5 by treating this information as confidential.

[1530] China, first written submission, paras. 745-746.

[1531] See paragraph 7.703 above.

[1532] Our conclusion in this regard also applies to the instances in the questionnaire responses at issue, namely Section A5 of the questionnaire response of Company A, in which the information was provided as an attachment, but the response does not contain the attachment itself. Nothing in the evidence before us indicates that confidential treatment was requested and accorded to the information in this attachment, and in the absence of an adequate showing that the information was in fact treated as confidential, we consider that China has not made a prima facie case of violation of Article 6.5 with respect to this information.

7.794 China asserts that Company C did not provide an adequate non-confidential summary of its answer to Section C4 of the questionnaire, concerning sales price data. The evidence before us indicates that this producer asserted that this information was by nature confidential as provided for in Article 6.5, stating that "its disclosure would be of a significant competitive advantage to a competitor and/or would have a significant adverse effect upon the company supplying the information."[1533] We therefore consider that the confidential treatment accorded to this information was not inconsistent with Article 6.5.[1534] In addition, the European Union asserts that an adequate non-confidential summary of this information, in indexed form, was provided. China does not dispute this, but argues that the sales price data was requested on a quarterly basis, while the summary provided contained indexed data on annual basis. As we understand it, China's position is that indexed information on an annual basis cannot be an adequate non-confidential summary of quarterly information. We recall that Article 6.5.1 requires that non-confidential summaries of confidential information must "permit a reasonable understanding of the substance of the information submitted in confidence".[1535] Nothing in the text of the Article 6.5.1 requires that the summary of the confidential information must correspond exactly to the format in which the information was requested or provided on confidential basis. In this case, we see nothing that would indicate to us that only indexed data on quarterly basis could suffice to permit a reasonable understanding of the substance of the confidential information in question, the net unit sales price for each PCN produced for the period 1 July 2007 to 30 June 2008.[1536] Nor has China argued otherwise. We therefore reject China's contention that an adequate non-confidential summary of the confidential information at issue was not provided. For all the reasons above, we reject China's claims under Articles 6.5 and 6.5.1 with respect to the information contained in Section C4 of the non-confidential version of the questionnaire response of Company C.

7.795 China asserts that no answer was provided by Company F to Section B2 of the questionnaire, concerning PCNs. The European Union asserts that Company F produced shoes falling into only one PCN category, and therefore confidential treatment of this information was necessary in order to protect the confidentiality of its identity.[1537] The non-confidential version of the questionnaire response of this producer confirms that it reported production of only one PCN and that it blacked out the relevant information in its non-confidential response.[1538] We recall our view that information for which a specific request for confidential treatment or showing of good cause has not been made may be treated as confidential if it is necessary to maintain the confidentiality of information accorded such treatment.[1539] In this case, it seems clear to us that failure to keep this information confidential could have resulted in the disclosure of the identity of Company F, as it could have been deduced from the single category of the product it produced. We have concluded above that the identities of producers were entitled to confidential treatment, and to disclose this information could have rendered pointless the confidential treatment given to its identity and could well have constituted a violation of the investigating authority's duty under the second sentence of Article 6.5. Thus, in our view, the conclusion that the confidential treatment of the PCN information of Company F was necessary, in order to ensure the confidentiality of its identity, is not unreasonable. We therefore reject China's contention that the European Union violated Article 6.5 by according confidential treatment to this information.

[1533] Injury questionnaire response of Company C, dated 15 December 2008, Exhibit CHN-67, p. 11.
[1534] We recall our view that the showing of good cause for information that is by nature confidential may be satisfied by establishing that the information meets the description of such information set out by Article 6.5 chapeau.
[1535] See paragraphs 7.667 and 7.674 above.
[1536] Injury questionnaire response of Company C, dated 15 December 2008, Exhibit CHN-67, p. 11.
[1537] See, e.g. European Union, answer to Panel question 59.
[1538] Injury questionnaire response of Company F dated 19 November 2008, Exhibit CHN-73, p. 6.
[1539] See paragraphs 7.735 and 7.742 above.

7.796 We recall, however, that Article 6.5.1 requires investigating authorities to ensure that a party submitting confidential information furnishes a non-confidential summary of the confidential information or, in exceptional circumstances, an explanation why such summarization is not possible. We also recall that the mere fact that information may not be capable of summarization does not exempt investigating authorities from their obligation to ensure that the submitter of the information provides an explanation why summarization is not possible. In this case, we see nothing in the evidence before us that suggests that the Commission requested the provision of a non-confidential summary of the confidential information in question, nor is there any evidence that the Commission requested the submitter to explain the reasons for the lack of such summarization. We therefore consider that the European Union acted inconsistently with its obligations under Article 6.5.1 by failing to ensure the sampled EU producer's compliance with the requirements of this provision.

7.797 China also claims that the European Union violated Article 6.5.2 of the AD Agreement. China's claim refers to the instances where no non-confidential summaries were provided, that is, to instances in the questionnaire responses of the sampled EU producers where the answers are blank.[1540] China argues that in such instances, it was the obligation of the European Union to find that confidentiality was not warranted. We recall our view that Article 6.5.2 does not impose any affirmative obligation on investigating authorities to examine whether or not confidential treatment is warranted, but addresses what actions investigating authorities may take if they "find that a request for confidentiality is not warranted".[1541] There is no evidence before us indicating that the Commission found that confidential treatment was not warranted, and China has not demonstrated or argued otherwise. In these circumstances, we cannot see the legal or factual basis for China's claim and we therefore reject China's claim under Article 6.5.2.

7.798 Finally, with respect to China's claim under Article 6.2 of the AD Agreement, China argues that Chinese exporters were precluded from defending their interests because of the blank or incomplete or meaningless answers in the questionnaire responses of the sampled EU producers. However, China does not explain, much less demonstrate, how Chinese exporters were deprived of their right of defence because of the allegedly inadequacy of the information in question. China merely asserts that Chinese exporters could not have a complete picture based on the responses of the producers to adequately and in a timely manner defend their interests.[1542] China's claim is premised on the assumption that the information in question was treated as confidential by the Commission, and the non-confidential summaries were inadequate, which we have found not to be substantiated.[1543] Moreover, to the extent that the companies provided no answers to questions, it is clear that there could be no effect on Chinese exporters' ability to defend their interests with respect to information that did not exist. In these circumstances, we consider that China has failed to establish a *prima facie* case of violation of Article 6.2.[1544]

[1540] See, e.g. China, first written submission, para. 767.

[1541] See paragraphs 7.667 and 7.675 above.

[1542] China, first written submission, para. 770.

[1543] China, first written submission, para. 770; second written submission, para. 1150.

[1544] Moreover, we recall that the rights of interested parties established in Article 6.2 do not apply to information treated as confidential consistently with Article 6.5 of the AD Agreement. In this respect, we recall that we have found that the confidential treatment accorded by the European Union to the information in Section C4 and Section B2 of the questionnaire responses of Companies C and F, respectively, was consistent with Article 6.5, and we therefore see no legal basis for China's claim under Article 6.2 with respect to this information. With regard to the information in Table C4 of the questionnaire response of Company H, in respect of which we have found a violation of Article 6.5, we consider that additional findings on China's claim under Article 6.2 would neither contribute to the resolution of this dispute nor be potentially useful in implementation. We therefore exercise judicial economy with respect to China's claim under Article 6.2 in connection with this information.

3. Union interest questionnaire responses

7.799 China claims that the Union Interest questionnaire responses of the five sampled EU producers in the expiry review and the four sampled EU producers in the original investigation are not available in the non-confidential file. Furthermore, China asserts that no good cause for confidential treatment was shown by these producers, and that the European Union failed to require them to provide non-confidential summaries or to explain why summarization of this information was not possible.[1545] China submits that it is for the European Union to demonstrate, *prima facie*, that the five sampled producers in the expiry review did not submit Union Interest questionnaire responses, and that in the absence of proof, the European Union's assertion in this regard cannot be accepted.[1546] The European Union asserts that, as stated during the first substantive meeting with the Panel, only three Union Interest questionnaire responses were received from the sampled EU producers in the expiry review, all of which were made available to interested parties, and that the remaining five EU producers referred to in China's claim did not submit responses. The European Union also argues that all the non-confidential responses to the Union Interest questionnaire received by the Commission were made available to China.[1547]

7.800 We recall that despite China's suggestion that the European Union failed to engage in dispute settlement procedures in good faith by not indicating earlier that the five EU producers in question did not submit Union Interest questionnaire responses, when it would have known this since January 2009,[1548] we accept the European Union's statement in this respect as a matter of fact.[1549] Thus, China's claim of violation rests on a flawed factual premise. In our view, the European Union cannot be found to have violated Article 6.5 by treating as confidential information which was never submitted by the parties to the investigation.

7.801 With respect to China's claim concerning the Union Interest questionnaire responses of the four sampled EU producers in the original investigation, China asserts that these responses were not available in the non-confidential file and therefore contends that the European Union violated Article 6.5 by failing to require these producers to provide good cause for the confidential treatment accorded to this information. Thus, China's claim appears to rest on the assumption that because these questionnaire responses were not in the non-confidential file, the information in those responses was treated as confidential. However, as noted before, the mere fact that some information is not in the non-confidential file does not, in our view, establish that it was treated as confidential. In the absence of an adequate showing that the information in question was actually treated as confidential, we see no factual basis on which to conclude that the European Union acted inconsistently with its obligations under Article 6.5. Moreover, we note the European Union's assertion, which China does not contest, that "all" the non-confidential responses to the Union Interest questionnaires were made available to China.

7.802 In light of the above, we consider that China has failed to make a *prima facie* case of violation of Article 6.5 with respect to the questionnaire responses at issue here, and therefore reject China's claim in this respect. Having found no violation of Article 6.5, we consider that there is no basis for China's claim under Article 6.5.1, which we recall applies only with respect to information treated as confidential. We therefore reject China's claim under Article 6.5.1 with respect to the information in question.

[1545] China, first written submission, para. 748.
[1546] China, second written submission, para. 1121.
[1547] European Union, answers to panel questions 59 and 63; opening oral statement at the second meeting with the Panel, para. 325.
[1548] China, answer to Panel question 57.
[1549] See paragraphs 7.588 and 7.654.

4. analogue country responses

7.803 China asserts that the European Union treated as confidential, in the absence of good cause, information in the analogue country questionnaire responses of the producers in the potential analogue countries, and failed to require these producers to provide non-confidential summaries or a statement as to why summarization of confidential information was not possible.[1550] Specifically, China refers to (i) the specific questions, as listed in Exhibit CHN-68, in the non-confidential questionnaire responses of the producers in the potential analogue countries[1551]; and (ii) the information regarding the PCNs manufactured and the net sales price and quantity of each PCN sold in the questionnaire responses of some of these producers.[1552]

7.804 The European Union submits that most of the instances challenged by China concern information regarding the PCNs manufactured by those producers and the net sale prices and quantity for shoes in each PCN. In the European Union's view, this is information that is confidential by nature and therefore good cause was shown by establishing that the information fell into that category. Similarly, with respect to profit/loss and expenses information, the European Union argues that this data is by nature confidential. Furthermore, the European Union asserts that the aim of providing summaries is in these cases in direct contradiction of the very reason why confidentiality is sought. According to the European Union, producers do not want to release any information that could benefit competitors and therefore summaries are likely to be of no use. In particular, the European Union notes that the three Brazilian companies whose data were used declined to provide summaries, asserting that they could jeopardize their position in the market.[1553]

7.805 Our examination of the evidence indicates that the information referred to by China mainly is (i) information submitted on a confidential basis; and (ii) questions left unanswered in the questionnaire responses of the producers in question. With respect to latter aspect of China's claim, we recall our view that the mere fact that information is not in the non-confidential version of a questionnaire response does not prove that an answer was treated as confidential. Nothing in the non-confidential versions of the questionnaire responses of the producers concerned indicates that confidential treatment for this information was requested and granted. Nor China has demonstrated otherwise. We therefore see no factual basis on which to conclude that the responses were provided and treated as confidential inconsistently with Article 6.5 of the AD Agreement, and therefore reject this aspect of China's claim.[1554] Having found no violation of Article 6.5, we consider that there is no basis for China's claim under Article 6.5.1, which applies only with respect to information treated as

[1550] See, e.g. China, first written submission, paras. 749-751; second written submission, para. 1123.

[1551] China's claim in this regard refers to the non-confidential analogue country questionnaire responses of West Coast Group; Henrich & CIA LTDA; Werner Calçados LTDA; Lakhani Footwear Ltd; Pt. Sepatu Mas Idaman; Pt.Utaliya; Kreasi San Ginesio; Kreasi Polart Asri; and Pt. Teguh Murni Perdana. See, e.g. China, second written submission, para. 1128.

[1552] China's claim in this respect refers to the analogue country questionnaire responses of Werner Calçados LTDA; Henrich & CIA LTDA; Lakhani Footwear Ltd; Pt. Sepatu Mas Idaman; Pt. Utaliya; Kreasi San Ginesio; Kreasi Polart Asri; and Pt. Teguh Murni Perdana. See, e.g. China, second written submission, para. 1128.

[1553] European Union, first written submission, paras. 453-454; opening oral statement at the second meeting with the Panel, para. 357.

[1554] Our conclusion in this regard also applies to the instances in the questionnaire responses at issue, namely Sections A2 and Da of the questionnaire responses of Pt. Sepatu Mas Idaman and Lakhani Footwear Ltd, respectively, in which the information was provided as an attachment, but the responses do not contain the attachments themselves. Nothing in the evidence before us indicates that confidential treatment was requested and accorded to the information in these attachments, and in the absence of an adequate showing that the information was in fact treated as confidential, we consider that China has not made a prima facie case of violation of Article 6.5 with respect to this information.

confidential. We therefore reject China's claim under Article 6.5.1 with respect to the information at issue here.

7.806 With respect to the information submitted as confidential, this information concerns information on sale prices, profit/loss/selling and expenses, and PCN information.[1555] The evidence before us indicates that this information was labeled as "confidential" or simply blacked out in the non-confidential responses.[1556] The European Union contends that this information is by nature confidential and that for such information good cause is satisfied by establishing that it falls within that category. We recall that we have already addressed the European Union's argument in this respect and rejected it. In particular, we determined that the European Union has not established that its legislation or practice defines in advance the categories of information that the Commission will treat as "by nature confidential." Thus, simply because the European Union asserts that information falls within that category will not suffice to satisfy the good cause requirement.[1557] In this instance, we see no indication that the submitters of this information ever asserted that the information met the criteria defining information which may be considered by nature confidential. In these circumstances, we therefore conclude that the European Union acted inconsistently with Article 6.5 by treating this information as confidential. Having found a violation of Article 6.5 with respect to this information, we consider that additional findings on China's claim under Article 6.5.1 would not contribute to the resolution of this dispute or be potentially useful in implementation. We therefore exercise judicial economy with respect to China's claim under Article 6.5.1 in connection with this information.

7.807 Based on the foregoing, we conclude that, with respect to the expiry review, China has established that the European Union acted inconsistently with Article 6.5 of the AD Agreement with respect to the non-confidential responses to the standing form of four EU producers, Table C4 of the questionnaire response of Company H and certain information in the non-confidential analogue country questionnaire responses of specific producers, and has established that the European Union acted inconsistently with Article 6.5.1 of the AD Agreement with respect to certain information in the expiry review request, declarations of support, and Section B2 of the non-confidential questionnaire response of Company F. We further conclude that, with respect to the expiry review, China has failed to demonstrate that the European Union acted inconsistently with Articles 6.5, 6.5.1 and 6.5.2 with respect to the remaining information referred to by China in its claims. We also conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 6.2 of the AD Agreement, with respect to names of the EU producers and certain information in the non-confidential questionnaire responses of the sampled EU producers. Finally, we exercise judicial economy regarding China's claim under Article 6.2 with respect to non-confidential responses to the standing form of four EU producers and with respect to Table C4 of the questionnaire response of Company H and China's claim under Article 6.5.1 with respect to the analogue country responses.

[1555] In particular, we refer to (i) Section E of the questionnaire response of West Coast Group; (ii) Section Dc of the questionnaire response of Werner Calçados LTDA; (iii) Section Dc of the questionnaire response of Henrich & CIA LTDA; (iv) Sections Dc, D1 and E of the questionnaire responses of Kreasi Polart Asri and Kreasi San Ginesio; (v) Section E of the questionnaire response of Pt. Sepatu Mas Idaman; (vi) Sections Dc and E of the questionnaire responses of Pt. Utaliya and Lakhani Footwear Ltd; and (vii) Sections Dc, D1 and E of the questionnaire response of Pt. Teguh Murni Perdana. Examples of questions left unanswered by the analogue country producers, Exhibit CHN-68.

[1556] Examples of questions left unanswered by the analogue country producers, Exhibit CHN-68. With respect to Section D1 (PCN information) of the questionnaire response of Pt. Sepatu Mas Idaman, the evidence indicates that this producer submitted this information as confidential, asserting that it is "considered to be commercially sensitive in that its disclosure would reveal the detailed product scope of the company for domestic and export markets". Exhibit CHN-68. This statement, however, does not assert that the disclosure would have been of significant competitive advantage or have a significantly adverse effect, and thus, we cannot conclude that this producer established that the information fit within the description of information "by nature confidential" in Article 6.5 chapeau.

[1557] See paragraph 7.744 above.

(e) Claim II.10 – Alleged violation of Articles 3.1 and 6.8 of the AD Agreement – Failure to apply facts available

7.808 In this section of our report, we address China's claim that the European Union acted inconsistently with Articles 3.1 and 6.8 of the AD Agreement in the expiry review by failing to apply facts available in examining injury.

(i) Arguments of the parties

a. China

7.809 China claims that the European Union acted inconsistently with Articles 3.1 and 6.8 of the AD Agreement in the expiry review by failing to apply facts available to sampled EU producers who provided incorrect and misleading information or did not provide necessary information in their responses to the injury questionnaire. China refers specifically to (i) the production information in the injury questionnaire response of the sampled producer that discontinued its production of the like product during the review period of investigation;[1558] (ii) the PCN information provided by some or all of the sampled producers in their injury questionnaire responses; and (iii) the five sampled EU producers which did not complete the Union Interest questionnaires.[1559]

7.810 China acknowledges that the word "may" in Article 6.8 allows Members to resort to facts available and does not compel them to do so. However, China asserts that the permissive language in this provision presumes that an investigating authority would make its evaluation in an objective and impartial manner. China argues that if an investigating authority does not apply facts available to a domestic producer when it would have done so in the case of an exporter, the investigating authority violates Article 6.8.[1560] China also argues, under Article 3.1, that because the sampled EU producers concerned "impeded the investigation", it was incumbent upon the Commission, as an unbiased and objective investigating authority, not to favour the interests of the sampled EU producers, but instead to apply facts available to them.[1561]

7.811 With respect to the facts, China asserts that the EU producer which discontinued production during the review investigation period provided incorrect and misleading information about its production of the like product in the European Union, and by providing this information impeded the investigation, as it affected, *inter alia*, the representativity of the sample and the injury determination based on this sample.[1562] China contends that the European Union did not apply facts available to this producer because it was a domestic producer, and asserts that if similarly incorrect and misleading information were provided by an exporter, the European Union would have automatically resorted to

[1558] China refers to information in both the confidential and non-confidential versions of this response.

[1559] China, first written submission, paras. 772-773, 776, 781 and 788; second written submission, paras. 1161, 1169 and 1180.

[1560] China, first written submission, para. 774; answers to Panel questions 78-79; second written submission, para. 1154.

[1561] China contends that its claim under Article 3.1 raises two questions: first, whether the European Union conducted the investigation in an unbiased and objective manner or disregarded the principles of good faith and fundamental fairness by favouring the interests of the domestic producers and declining to apply facts available; and second, whether in light of its decision not to apply facts available and accept the data provided by these producers, its injury determination can be considered to have been based on an objective examination of positive evidence. China, second written submission, para. 115; answer to Panel question 80.

[1562] China, first written submission, paras. 777-779; answer to Panel question 79; second written submission, paras. 1157 and 1159-1161. For instance, China alleges that the information regarding the sales volume, total production, production capacity, and capacity utilization in the injury questionnaire response of this producer was incorrect and misleading. China, first written submission, para. 779.

facts available.[1563] China contends that this situation demonstrates the absence of an objective and unbiased evaluation in the context of this producer, inconsistent with Articles 3.1 and 6.8.[1564] China also asserts that some, or possibly all, of the sampled EU producers provided incorrect and/or incomplete information with respect to the PCNs applicable to their production.[1565] China argues that the provision of this incorrect information affected (i) the sample selected by the Commission (by including a producer that did not fall within the definition of an EU producer); (ii) all aspects of the European Union's injury determination; and (iii) other categories of information in the questionnaire.[1566] China argues that the European Union, as an unbiased and objective investigating authority, should have found that these producers "impeded the investigation". China asserts that the Commission corrected the information in question, rather than applying facts available, contrary to its long-standing practice.[1567] Finally, China submits that in light of the European Union's disclosure during the first meeting with the Panel that five of the eight sampled EU producers did not complete the Union Interest questionnaire, the European Union also violated Articles 3.1 and 6.8 by failing to apply facts available to these producers and to act in an objective and unbiased manner. In China's view, the failure to complete these questionnaires was a failure to "provide necessary information" within the meaning of Article 6.8.[1568]

b. European Union

7.812 The European Union argues that the language of Article 6.8 of the AD Agreement is permissive, and not compulsory. According to the European Union, the use of the word "may" in this provision allows Members, if the necessary conditions are met, to resort to using facts available, but does not compel them to do so in any case. The European Union considers that the purpose of Article 6.8 is to provide investigating authorities with a means of overcoming obstructive parties, if and when they need to do so, but does not impose any obligation on investigating authorities with

[1563] China, second written submission, para. 1161. In support of this contention, China refers to various anti-dumping investigations where, having found that exporters had provided misleading information or that their questionnaire responses were significantly deficient and further weaknesses were revealed at verification, the Commission relied on facts available. China, first written submission, para. 780; answer to Panel question 79; second written submission, fn. 705.

[1564] China, first written submission, para. 782.

[1565] China notes that there were differences between the PCN information provided by the sampled EU producers in their non-confidential injury questionnaire responses and the verified PCN information provided by the Commission. Specifically, China argues that 12 PCNs in the injury questionnaire responses were not reflected in the PCN compilation by the Commission, and that in total 24 PCNs in the Commission's compilation were not in the injury questionnaire responses. China submits that since the Commission's compilation does not mention to which companies the specific PCNs belonged, it cannot specify which of the sampled EU producers provided incorrect and/or incomplete PCN information. China, first written submission, paras. 783-785; second written submission, para. 1162.

[1566] China points, in particular, to the following categories of information in the questionnaire: PCN; production process and outsourcing; sales volume and value of the like product in the European Union and outside; profit and loss from the sales of the like product in the European Union; net production from fixed assets; and cash-flow for 2005, 2006, 2007 and the review investigation period; transaction-by-transaction sales information of the like product on a PCN-basis for each quarter in the review investigation period; total production, production capacity, capacity utilization, purchases of the product under consideration from third countries; stocks of the like product; investments; employment in production in the European Union and salaries and wages thereof, for 2005, 2006, 2007 and the review investigation period; determination of the price of the like product by the company; turnover of the like product and profitability from the sales of the like product for 2005, 2006, 2007 and the review investigation period; and financial situation of the company. China, first written submission, para. 779.

[1567] China refers to examples of instances in which the Commission applied facts available when it found at verification that relevant information was omitted from the questionnaire response of an exporter, or that the information provided by an exporter was false or misleading. China, first written submission, para. 786.

[1568] China, second written submission, paras. 1171 and 1175.

respect to the way they carry out their investigations.[1569] The European Union further asserts that nothing in the circumstances referred to by China in this claim could possibly convert the Article 6.8 permission to use facts available into an obligation to do so.

7.813 With respect to the situations referred to by China, the European Union argues that the producer who discontinued production of the like product in the European Union during the review investigation period in fact provided "necessary information within a reasonable period" and did not "significantly impede the investigation".[1570] The European Union adds that contrary to China's assertions, the information originally provided was not "false and misleading", but rather reflected an error which appeared to the Commission "to have been made in good faith".[1571] With regard to the PCN information submitted by the sampled producers, the European Union argues that this information was usable. The European Union contends that errors in the information as provided were innocent and the result of honest confusion, and argues that the rejection of this information would have amounted to a punishment for error on the part of the submitters, and would have been contrary to the objectives of the AD Agreement, which values the use of data from firms.[1572] The European Union contends that China introduces a new claim alleging breach of Article 6.8 in relation to the five producers that did not respond to the Union Interest questionnaires.[1573] The European Union asserts that issues related to the Union Interest questionnaires are not within the scope of this claim, which relates to failure to apply facts available with respect to information in the injury questionnaire responses.[1574] With regard to the substance, the European Union reiterates that the option of using facts available is a means to an end, in this case, to obtain information regarding the Community interest test under EU law, and contends that the discussion of this issue in the Review Regulation demonstrates that this end was achieved.[1575]

(ii) Arguments of the third parties

a. United States

7.814 The United States considers that even assuming, *arguendo*, that the producers concerned supplied "incorrect and misleading information", China's claim is not supported by the language of Article 6.8 of the AD Agreement. The United States agrees with the European Union that the word "may" in this provision indicates that investigating authorities have the ability to use facts available under certain circumstances but they are not required to do so. According to the United States, if Article 6.8 were intended to impose a mandatory obligation on authorities, it would have used the word "shall".[1576]

(iii) Evaluation by the Panel

7.815 Before addressing China's claim, we note that the relevant facts do not appear to be in dispute. Some information provided in the original injury questionnaire responses of some producers contained errors. The Commission explained how it addressed the situation of the producer found to have discontinued production in the European Union during the course of the review investigation

[1569] European Union, first written submission, paras. 477, 481 and 492.
[1570] The European Union asserts that this producer provided information that, once the correct parameters were respected, was used by the Commission. Furthermore, the information was supplied "within a reasonable period", as the Commission was able to use the information during the expiry review proceeding. European Union, first written submission, paras. 478-480.
[1571] European Union, first written submission, para. 479.
[1572] European Union, first written submission, para. 493.
[1573] European Union, opening oral statement at the second meeting with the Panel, para. 367.
[1574] European Union, opening oral statement at the second meeting with the Panel, para. 368.
[1575] European Union, opening oral statement at the second meeting with the Panel, para. 372.
[1576] United States, third part submission, paras. 41-42.

period, finding that the company acted in good faith in reporting its production as "EU production", and took into consideration only the correct information, which did not affect the overall determination. The Commission did not make any findings suggesting that the producer either failed to provide necessary information or significantly impeded the investigation.[1577] With respect to the errors in the PCNs reported by some EU producers, the Commission used the data provided by the companies, which was corrected by allocating production to the appropriate PCN categories.[1578] The Commission made no findings suggesting that any producer who committed errors in this respect either failed to provide necessary information or significantly impeded the investigation. Finally, we accept, as a matter of fact, the European Union's contention that five EU producers did not respond to the Community Interest questionnaire. It is clear that the European Union did not resort to facts available in examining the Community interest in this case, and that the Commission made no findings suggesting any producer who committed errors in this respect either failed to provide necessary information or significantly impeded the investigation.

7.816 Article 6.8 of the AD Agreement provides:

> "6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."

Article 6.8 addresses the situation where an interested party has "necessary information" for making "determinations", and the information is not provided to the investigating authority within a reasonable period. In particular, Article 6.8 specifies that where an interested party refuses access to, or otherwise does not provide, "necessary information" within a reasonable period, or where an interested party significantly impedes the investigation, an investigating authority "may" make "determinations" on the basis of "facts available". Thus, it is clear on the face of this provision that in order for an investigating authority to make a preliminary or final determination on the basis of facts available, at least one of two conditions must be satisfied: (a) an interested party must refuse access to or fail to provide necessary information within a reasonable period of time, or (b) an interested party significantly impedes the investigation. Even if one or both of these conditions is satisfied, Article 6.8 merely **allows** the investigating authority to make determinations on the basis of facts available. We consider it evident that the use of the term "may" in this provision precludes the view that an investigating authority is required to use facts available, even if the conditions in Article 6.8 are satisfied. We are of the view that, in light of the permissive language of Article 6.8, even

[1577] Review Regulation, Exhibit CHN-2, recitals 23-24. The Commission explained that in the course of the investigation it found that one of the sampled EU producers had progressively discontinued its production in the European Union during the review investigation period, ultimately taking its entire manufacturing activity outside the European Union. This producer had reported the entirety of its production, including the outsourced production, as EU production. According to the Commission, it appeared that this producer mistakenly considered outsourcing to a neighbour country as EU production, and the Commission concluded that the error was made in good faith. In its analysis, the Commission used only data pertaining to its activity in the European Union. *Id.*, recital 23. The Commission noted that the weight of this producer in the data was minimal in terms of overall production as well as in relation to the sample, so that even if it were excluded from the sample or the definition of the domestic industry, this would not affect the representativeness of the sample, the standing of the domestic industry or the findings on injury. The Commission also noted that this producer did produce the like product in the European Union during the review investigation period. In addition, the Commission noted that this producer subcontracted a large part of its production, which represented an important business model in the European Union footwear industry, and that this further ensured the representativeness of the sample in qualitative terms. *Id.*, recitals 196 and 338.

[1578] European Union, first written submission, para. 493.

assuming that the producers concerned supplied "incorrect and misleading information" or impeded the investigation, Article 6.8 did not require the European Union to resort to facts available.

7.817 Indeed, China itself acknowledges that "the language of Article 6.8 is permissive and the presence of the word "may" allows Members to resort to facts available and does not "compel" them to do so."[1579] Nonetheless, China goes on to assert that

> "this rule must be applied in a fundamentally fair and impartial manner to all interested parties alike. For instance, if an investigating authority has a practice of applying facts available to exporters when they fail to respond to a request for information or when they give misleading information such that it impedes the investigation, the same practice should be applied in the case of domestic producers. Otherwise, investigating authorities can act in an arbitrary manner and there were [sic] will be no limit to the discretion provided to investigating authorities. The permissive language of this Article presumes that an investigating authority would make its evaluation in an objective and impartial manner."[1580]

We do not agree. We fail to see how the Article 3.1 obligation to undertake an objective evaluation of positive evidence can be interpreted as requiring an investigating authority to use facts available, particularly where the prerequisite conditions of Article 6.8 are not satisfied. Indeed, it seems to us that an investigating authority which receives information that is erroneous and then works with the provider to correct that information is in fact making an effort to ensure that its determination is based on an objective examination of positive evidence.[1581]

7.818 The decision of an investigating authority to base a determination on facts available rests first on a conclusion that one or both of the conditions in Article 6.8 is satisfied. That conclusion can only be reached on the basis of the particular facts and circumstances of the case. China refers to the "practice" of the Commission in applying facts available to exporters in support of its view that an objective examination required the application of facts available in this case, essentially arguing that the European Union discriminates in the application of facts available between the two groups, that is, exporters and domestic producers. However, China has made no claim in this dispute with respect to the consistency of any EU practice in the use of facts available, either as applied to exporters, or as applied to domestic producers. Moreover, China's assertion that the European Union does not apply the same practice to exporters and domestic producers implies that the two groups are in the same situation with respect to the provision of information. However, in our view, the situation of exporters, whose information is used in the calculation of dumping margins, which as we have discussed elsewhere in this report is generally undertaken on an individual basis, is different from the situation of domestic producers, whose information is relevant to a determination of injury caused by dumped imports to a domestic industry as a whole, not to the individual producer. Thus, even assuming there were a practice with respect to use of facts available with respect to exporters, as asserted by China, we do not agree that not applying the identical practice to domestic producers demonstrates a violation of either Article 6.8 or Article 3.1.

[1579] China, answer to Panel question 78, para. 474.
[1580] China, answer to Panel question 78, para. 474.
[1581] Whether it has in fact succeeded in that effort is another question, which is not before us in this dispute. Moreover, we note that paragraph 5 of Annex II to the AD Agreement, which is an integral part of Article 6.8, provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." To us, the fact that even imperfect information may not in all circumstances be disregarded supports the view that, if information containing errors is submitted, the investigating authority may work to correct those errors.

7.819 Moreover, we consider that China has failed to demonstrate that the prerequisite conditions for the use of facts available existed in this case. We recall that Annex II to the AD Agreement is an integral part of Article 6.8. Paragraph 3 of Annex II identifies one circumstance when the conditions for resorting to "facts available" will *not* be established – namely, when the information that is provided by an interested party in response to a specific request from an investigating authority "is verifiable, ... appropriately submitted so that it can be used in the investigation without undue difficulties, ... supplied in a timely fashion, and, where applicable, ... supplied in a medium or computer language requested by the authorities". When information is submitted that satisfies paragraph 3, it "should be taken into account when determinations are made". It follows that when the conditions for resorting to "facts available" have *not* been established, the specific information provided by an interested party in response to a request from an investigating authority must be taken into account in the investigating authority's determination.[1582] In this case, the European Union's arguments support the conclusion that the information submitted by the producer who discontinued production in the European Union, and by producers who erred in the allocation of their production to the appropriate PCN codes was sufficient to be deemed "verifiable, ... appropriately submitted so that it can be used in the investigation without undue difficulties, ... supplied in a timely fashion". Indeed, China merely argues that "it cannot be precluded that the investigation was … impeded" by the information submitted by the producer who discontinued production in the European Union,[1583] and that the Commission "should have found that the investigation was impeded" by the errors with respect to allocation of production to PCNs.[1584] But it is clear the European Union did not so conclude.[1585] Even assuming we were to agree that the conditions for applying facts available could have been established on the basis of the facts in this case, it is not within the scope of our task in reviewing the Review Regulation to make such conclusions where the Commission did not do so.

7.820 Finally, with respect to China's allegations concerning five EU producers who did not complete the Union Interest questionnaire, and the failure to apply facts available to them, we share the European Union's concern over the introduction of this aspect of China's claim at a late stage of the proceedings. While China did not respond specifically with respect to this concern, it did point out the distinction between claims and arguments, and asserted that much of what was "new" in its second written submission was in response to the European Union's first written submission and the first meeting with the Panel, including the disclosure of facts.[1586] Assuming that China includes in this category the fact that five EU producers did not respond to the Union Interest questionnaire, we agree with the European Union that the failure to submit Union Interest questionnaires is not within the scope of this claim, which, as set out in the panel request and China's first written submission, relates to failure to apply facts available with respect to information in the injury questionnaire responses.[1587]

[1582] Panel Report, *EC – Salmon (Norway)*, para. 7.34; Appellate Body Report, *US – Hot-Rolled Steel*, para. 81; Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073, para. 7.55.

[1583] China, first written submission, para. 780.

[1584] China, first written submission, para. 788.

[1585] In the absence of findings that the conditions of Article 6.8 for use of facts available were satisfied, had the European Union based its determination on facts available, a panel might well conclude, if faced with such a claim, that the investigating authority had acted inconsistently with Article 6.8.

[1586] China, closing oral statement at the second meeting with the Panel, para. 6.

[1587] China's claim II.10 is set out at page 4 of its panel request, as follows:

> "Articles 3.1 and 6.8 of the Anti-Dumping Agreement because the EU did not apply facts available when faced with incorrect and deficient information, including but not limited to the product classification information, provided by sampled EU producers in the injury questionnaire responses."

We do not consider that the phrase "including but not limited to" provides a basis for including failure to respond to the Community Interest questionnaires to the factual basis underlying this claim.

7.821 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Articles 6.8 and 3.1 of the AD Agreement in failing to apply facts available in the Review Regulation.

(f) Claim III.14 – Alleged violation of Article 6.9 of the AD Agreement – Failure to properly disclose the essential facts under consideration

7.822 In this section of our report, we address China's claim that the European Union acted inconsistently with Article 6.9 of the AD Agreement by failing to provide sufficient time for comment following issuance of the "Additional Final Disclosure Document" in the original investigation.

(i) Arguments of the parties

a. China

7.823 China claims that in the original investigation, the European Union acted inconsistently with Article 6.9 of the AD Agreement. China asserts that the European Union issued an "additional Final Disclosure" on Friday, 28 July 2006 at 18:00, and contends that this document contained essential facts that formed the basis for Commission's decision whether to apply definitive measures and in particular, the import value amounts for the calendar year 2005 and their intended use by the European Union.[1588] China claims that by providing only three working days, until 2 August 2006, for exporting producers to respond to the "Additional Final Disclosure Document", the European Union failed to make this disclosure "in sufficient time for the parties to defend their interests", contrary to Article 6.9 of the AD Agreement.[1589] China contends that the European Union's reliance on *EC – Salmon (Norway)* to argue that the Additional Final Disclosure was not required by Article 6.9 is misplaced, arguing that the situation in this case involved more than the facts which led that panel to conclude that additional disclosure under Article 6.9 was not required. According to China, in *EC – Salmon (Norway)* the panel made a distinction between (i) "facts" and "factors" under consideration to make a determination and (ii) a "reassessment" of facts before the investigating authority and a revision of calculations resulting in a different dumping margin. Pursuant to China, while the former would require a "disclosure" within the meaning of Article 6.9, the latter would not.[1590] China considers the facts relied upon in making the calculations disclosed in the Additional Final Disclosure, in particular the import value amounts for the entire calendar year 2005, to be new facts under consideration to make a determination that had not previously been disclosed.[1591]

b. European Union

7.824 The European Union asserts that the Additional Final Disclosure Document informed interested parties of the new methodology used to calculate the 'lesser duty', that is, the actual amounts of anti-dumping duty that would be imposed on imports from China and Viet Nam.[1592] The European Union contends that, as its title indicates, this document followed the distribution of a Final General Disclosure Document, containing a draft of the proposed measure, on 10 July 2006, which the European Union asserts was clearly a disclosure within the meaning of Article 6.9.[1593] The European Union relies on the report of the panel in *EC – Salmon (Norway)* to argue that the

[1588] China, first written submission, paras. 1372, 1378 and 1380. Specifically, China alleges that the document "significantly revised, *inter alia*, the form, method of calculation and level of the measures ..." *Id.*, para. 1374. See also China, second written submission, paras. 1489-1491; closing oral statement at the second meeting with the Panel, paras. 117-118.

[1589] China, first written submission, paras. 1375 and 1381.

[1590] China, second written submission, paras. 1487-1488.

[1591] China, second written submission, para. 1491.

[1592] European Union, first written submission, para. 819.

[1593] European Union, first written submission, para. 821.

European Union was not obliged to provide this "additional" disclosure under Article 6.9, and therefore the remaining provisions of Article 6.9 were not applicable to it.[1594] The European Union notes that the changes that were made by the Additional Final Disclosure concerned the calculation of the lesser duty, and asserts that, even assuming this topic constituted a decision whether to apply definitive measures, because it involved merely a change in the calculation formula it was not one which would have required a further disclosure within the terms of Article 6.9.[1595] Moreover, the European Union contends that the change did not even involve consideration of any new facts.[1596] The European Union reiterates that the Commission was doing more than it was legally obliged to do when it provided disclosure of its changed decision and gave interested parties a further opportunity for comment rather than moving directly to a definitive determination, and asserts that, given the precise and limited nature of the change that had been made, the period given for comment, although short, was sufficient so that even if it were found that Article 6.9 did apply to the Additional Final Disclosure its requirements would have been satisfied.[1597]

(ii) Arguments of third parties

a. United States

7.825 The United States asserts that Article 6.9 of the AD Agreement clearly does not specify any minimum amount of time that would constitute "sufficient time" for a party to defend its interest. Moreover, the United States notes that Article 6.9 "does not prescribe the manner in which the authority is to comply with this disclosure obligation."[1598] In the United States' view, because Article 6.9 does not specify the manner in which authorities are to make disclosures, individual authorities may use different means to implement the requirements of the provision. The United States believes that what constitutes a "sufficient time" for an interested party to defend its interests and respond to the disclosure will depend on the size, significance, and nature of the disclosure.[1599] The United States takes no position on whether the amount of time allowed by the European Union for response to the final disclosure was sufficient under the circumstances.[1600]

(iii) Evaluation by the Panel

7.826 Before addressing China's claim under Article 6.9, we note certain relevant facts, which we understand to be undisputed. On 10 July 2006, the Commission sent a letter conveying the "Final General Disclosure Document" in the original investigation to interested parties.[1601] The letter states that the document "constitutes disclosure of the details underlying the essential facts and

[1594] European Union, first written submission, para. 823. The European Union notes that the document sets forth the possibility for an extension of the deadline for responses in the event of a substantiated request in this regard, and that at least one interested party made such a request and received a one-day extension. European Union, first written submission, para. 818.

[1595] European Union, opening oral statement at the second meeting with the Panel, para. 431.

[1596] European Union, opening oral statement at the second meeting with the Panel, para. 432.

[1597] European Union, opening oral statement at the second meeting with the Panel, paras. 433-434.

[1598] United States, third party written submission, para. 54, quoting Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* ("*Argentina – Ceramic Tiles*"), WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241, para. 6.125.

[1599] The United States suggests that this is analogous to the statement of the Appellate Body in *US – Hot-Rolled Steel* in construing the term "reasonable period" under Article 6.8 of the AD Agreement, that "[t]he word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances." United States, third party written submission, fn. 54, quoting Appellate Body Report, *US – Hot-Rolled* Steel, para. 84.

[1600] United States, third party written submission, fn. 55.

[1601] Final General Disclosure Document, dated 7 July 2006, Exhibit CHN-81.

considerations on the basis of which it is intended to recommend the imposition of definitive anti-dumping measures."[1602] The document contains a draft of the proposed definitive regulation, including information on the proposed form and level of the anti-dumping duties to be imposed, as well as (i) the methodology for injury calculations and (ii)undercutting and underselling calculations.[1603] Interested parties were given ten calendar days, until 17 July 2006, to comment.[1604] On 28 July 2006, the Commission sent a letter to interested parties, conveying the "Additional Final Disclosure Document" which set out "the details of the revision of the envisaged form of measures" and gave interested parties five calendar days, until 2 August 2006, to submit comments.[1605] The document states that "[t]he purpose of this additional final disclosure document is to provide interested parties with information about a change with regard to the envisaged form of the definitive anti-dumping measures concerning imports of certain footwear with uppers of leather originating in China and in Viet Nam", that "DG Trade took careful note of the issues and questions raised by interested parties with regard to the originally envisaged Delayed Duty System (DDS)", and that "[t]he envisaged course of action has been revised."[1606] An annex to the document contains a "New Part H. of the General Disclosure Document."[1607]

7.827 In evaluating China's claims, we begin with the text of Article 6.9 of the AD Agreement, which provides:

> "The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

The obligations set out in this provision are quite straightforward – the investigating authority shall inform interested parties of "essential facts under consideration" prior to making a final determination, but in sufficient time for the interested parties to defend their interests.

7.828 China claims that the European Union failed to give interested parties sufficient time to defend their interests in connection with the Additional Final Disclosure made by the Commission on 28 July 2006, thus violating Article 6.9. The premise of this claim is that the Additional Final Disclosure in question is subject to the requirements of Article 6.9, that is, that it "inform[s] all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" within the meaning of Article 6.9. The European Union disputes this premise, and it is to this question that we first turn our attention.

7.829 Both parties refer to the report of the panel in *EC – Salmon (Norway)* in support of their position. In that case, the panel was considering a claim by Norway that the then-European Communities had failed to disclose essential facts based in part on the fact that the Definitive Regulation ultimately issued was different from the draft of that regulation disclosed to interested parties in October 2005 pursuant to Article 6.9.

[1602] Cover letter accompanying Final General Disclosure Document, dated 7 July 2006, Exhibit CHN-81.

[1603] Final General Disclosure Document, dated 7 July 2006, Exhibit CHN-81, paras. 269-293 and Annex.

[1604] Cover letter accompanying Final General Disclosure Document, dated 7 July 2006, Exhibit CHN-81.

[1605] Cover letter accompanying Additional General Disclosure Document, dated 28 July 2006, Exhibit CHN-99.

[1606] Additional General Disclosure Document, dated 28 July 2006, Exhibit CHN-99, page 2.

[1607] Additional General Disclosure Document, dated 28 July 2006, Exhibit CHN-99, page 4.

7.830 The panel rejected the view that a change between what was disclosed for purposes of Article 6.9 and the ultimate determination entails a change in the essential facts, concluding that "the essential facts do not change simply because the ultimate determination of the investigating authority is not that which was intimated in the disclosure".[1608] The panel further concluded that on the facts before it, an additional or further disclosure was not required after the October 2005 disclosure, before the final determination was issued.[1609] Moreover, as in case before us, the then-European Communities had chosen to provide information to interested parties subsequent to the definitive disclosure. The panel in *EC – Salmon (Norway)* observed in this regard that this "does not establish that there was an obligation to do so – the AD Agreement establishes the minimum rights that must be afforded [to] interested parties in an anti-dumping investigation, but does not preclude a Member from affording additional rights, so long as in doing so it does not violate some provision of the AD Agreement."[1610]

7.831 China asserts that in *EC – Salmon (Norway)* the investigating authority merely reassessed facts that were before it, while in this case, the facts and factors under consideration in making the final determination changed. We do not accept the distinction China seeks to draw. In our view, the situation before us is entirely congruent with the facts in *EC – Salmon (Norway)*, where the panel noted that "the investigating authority did not make a different determination regarding dumping, but rather reassessed the facts before it, and revised its calculations resulting in a different dumping margin than that foreshadowed in the disclosure."[1611] Having reviewed the documents in question, we consider that the Additional Final Disclosure Document reflects that, having considered comments by the interested parties on the Final General Disclosure, the Commission reassessed facts and arguments, revised calculations, and concluded that a different form and level of anti-dumping duties than that foreshadowed in the Final General Disclosure was appropriate. In these circumstances, we conclude that simply because the European Union chose to disclose the revised section of the proposed definitive regulation does not mean that it was required to do so, and therefore does not mean that the Additional Final Disclosure triggered the obligation to provide a sufficient time for comment under Article 6.9 of the AD Agreement.[1612]

7.832 China's position would require the investigating authority to disclose whatever specific information it took into consideration in revising the form and level of the measures proposed, on the premise that the different result demonstrates that "new" information was taken into account which constituted "essential facts" within the meaning of Article 6.9. Article 6.9 would then mandate a further opportunity for interested parties to defend their interests, and an endless stream of disclosures and "sufficient time" for comments could ensue. This could well result in an impossible situation for investigating authorities, which must complete the investigation within the time limits set out in Article 5.10 of the AD Agreement. Like the panel in *EC – Salmon (Norway)*,[1613] we do not accept that this is an appropriate understanding of the requirements Article 6.9.

7.833 Finally, even assuming that the Additional Final Disclosure Document did constitute a disclosure of "essential facts under consideration which form the basis for the decision whether to

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[1608] Panel Report, *EC – Salmon (Norway)*, paras. 7.796-7.797.

[1609] Panel Report, *EC – Salmon (Norway)*, para. 7.797.

[1610] Panel Report, *EC – Salmon (Norway)*, para. 7.797.

[1611] Panel Report, *EC – Salmon (Norway)*, para. 7.798. In addition, we note that while there were multiple "disclosures" by the then-European Communities in that case (the "general" disclosure document consisting of a draft of the definitive regulation, an information note on "developments" following the Definitive Disclosure, and a subsequent information note regarding the definitive minimum import prices for fillets), interested parties were in fact not given opportunities to comment following the later disclosures. Panel Report, *EC – Salmon (Norway)*, para. 7.779.

[1612] We recall that the interested parties were, in fact, given an opportunity to submit comments in this case.

[1613] Panel Report, *EC – Salmon (Norway)*, para. 7.802.

apply definitive measures", we recall that interested parties were, in fact, given an opportunity to submit comments. China's claim is that the period allowed, five calendar days (which China counts as three business days, presumably because the document was apparently provided to interested parties in an e-mail at 18h Brussels time[1614]), was insufficient to allow interested parties "to analyse and comment on the substantial change in the form of the measures and the modification in the underlying calculations of the injury margins."[1615] We note, in this regard, that interested parties were allowed only ten calendar days, or six working days, to comment on the Final General Disclosure, which included the entirety of the proposed definitive regulation, including the originally proposed form of the measures and the underlying calculations. Interested parties, including Chinese exporters, did submit comments on various aspects of that disclosure within the time allowed.[1616] While it may well be, as China asserts, that the Additional Final Disclosure Document contained complex calculations, there is no support for a conclusion that this document was more complex than the original disclosure, and China does not argue otherwise. China has made no other arguments suggesting that the time allowed for comments was insufficient. Given that the Additional Final Disclosure Document concerned only one aspect, albeit an important one, of the matters addressed in the Final General Disclosure Document, we do not agree with China's view that the period for comments provided was not sufficient for interested parties to defend their interests. This is particularly so since the cover letter made clear that extensions of time could be sought, and at least one interested party did submit comments, and did seek and receive a one-day extension of time to do so.

7.834 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 6.9 of the AD Agreement with regard to the time provided for submission of comments on the Additional Final Disclosure Document in the original investigation.

(g) Claims II.12 and III.19 – Alleged violations of Article 12.2.2 of the AD Agreement – Failure to provide sufficiently detailed explanations

7.835 In this section of our report, we address China's claims that the European Union acted inconsistently with Article 12.2.2 of the AD Agreement in both the original investigation and the expiry review by failing to provide certain information and explanations in the Definitive and Review Regulations.

(i) Arguments of the parties

a. China

7.836 China claims that the European Union violated Article 12.2.2 of the AD Agreement in both the Review and Definitive Regulations by failing to provide the relevant information on matters of fact and law, and reasons that led to the original imposition and subsequent extension of the anti-dumping measures on footwear.[1617] China asserts that Article 12.2.2 of the AD Agreement requires the investigating authority to provide *information* on all factual and legal issues, as well as reasons concerning the imposition and extension of the measures. China argues, relying on the panel report in *EC – Tube or Pipe Fittings*, that the phrase "have led to" in Article 12.2.2 implies that the published notice must address those matters on which a factual or legal determination must necessarily be made

[1614] E-mail to legal representatives, dated 28 July 2006, sent around 17:59, Exhibit CHN-109.
[1615] China, first written submission, para. 1381.
[1616] See Comments of Golden Step on General Disclosure Document, dated 18 July 2006; Comments on the proposed analogue country by FESI, dated 18 July 2005; and Comments on the definitive disclosure on behalf of FESI dated 17 July 2006, respectively, Exhibits CHN-82, CHN-83, and CHN-89. We note that there may well have been other comments on various aspects of the Final General Disclosure Document submitted to the Commission, which were not provided to us by the parties as exhibits, but these alone are sufficient to demonstrate that the interested parties did make comments on the disclosure.
[1617] China, first written submission, paras. 796 (Review Regulation) and 1386 (Definitive Regulation).

in connection with the decision to impose a definitive anti-dumping duty. China maintains that the investigating authorities must provide a sufficient explanation on how the evidence supports the authority's determination on all matters of fact and law, and the reasons for the imposition or extension of the measures.[1618] China considers that, under Article 12.2.2, the investigating authorities must provide information that is relevant and sufficient, from the perspective of the interested parties, to understand the basis and reasons for the investigating authority's determination. In China's view, the relevance and sufficiency of the information provided on a particular matter of fact or law or with regard to the reasons for the imposition of the measures cannot be considered on the basis of the extent to which the investigating authority desires to disclose such information.[1619]

7.837 With respect to the Review Regulation, China asserts that the European Union failed to provide relevant information with respect to a series of issues: the determination of the EU producers' sample; the confidential treatment of the names of the complainants, supporters, sampled producers and producers sampled in the original investigation; the determination concerning the evaluation of the macroeconomic injury indicators; the difference in the figures concerning the representativeness of the sample; the data of the sampled EU producer that discontinued production of the like product in the review investigation period; PCN reclassification; and the dumping margin calculation. Finally, China asserts that the European Union did not provide reasons for the rejection of arguments made by interested parties on a number of issues.[1620]

7.838 With respect to the Definitive Regulation, China asserts that the European Union failed to provide relevant information with respect to a series of issues: the determination of the EU producers' sample; the confidential treatment of the names of the complainants, supporters, sampled producers and reasons for granting confidential treatment to their names; the determination concerning the evaluation of the macroeconomic injury indicators; the names of the suppliers; the price threshold for STAF; the number of MET questionnaires received; and the dumping margin calculation. Finally, China asserts that the European Union did not provide reasons for the rejection of arguments made by interested parties on a number of issues.[1621]

b. European Union

7.839 The European Union first recalls its argument that China's claim is not within the Panel's terms of reference because China failed to link the legal basis of its claim, Article 12.2.2, with precise conduct on the part of the European Union, such that the claim is so lacking in specificity that it fails to satisfy the requirements of Article 6.2 of the DSU.[1622]

7.840 With respect to the substance of China's claims, the European Union argues that China's demands for explanation imply a greater level of detail than is required by Article 12.2.2. The European Union rejects the view, which it attributes to China, that Article 12.2.2 requires Members to include information as to how they gathered evidence relevant to the categories of data necessary for the investigation, such as which entities would be approached. The European Union notes that the

[1618] China, first written submission, para. 795 (emphasis in original), citing Panel Report, *EC – Tube or Pipe Fittings*, para. 7.421 and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 98. China refers to and reincorporates the analysis presented in the context of its claims with respect to the Review Regulation in support of its claims concerning the Definitive Regulation, but makes no additional arguments. China, first written submission, para. 1386.

[1619] China, second written submission, para. 1183.

[1620] China, first written submission, paras. 798-800 and 802-808; second written submission, paras. 1186 and 1196.

[1621] China, first written submission, paras. 1287, 1388-1392 and 1394-1402.

[1622] European Union, first written submission, paras. 501-502. We recall that we have rejected the European Union's request for a preliminary ruling to this effect, see paragraph 7.50 above, and we therefore go on to consider China's claim below.

Appellate Body has indicated that an investigating authority's "evidentiary path" must be clearly discernable when it reconciles divergent information and data, and asserts that this is not the situation here. In addition, the European Union notes that the Definitive Regulation does not stand on its own, but adopts by reference, or modifies as indicated, the reasoning and conclusions of the Provisional Regulation, and both Regulations assume to some extent statements made in the Notice of Initiation of the original investigation. The European Union asserts that Article 12.2.2 does not forbid Members referring to matters contained in earlier public notices, such as the Provisional Regulation, and contends that where such other documents are properly identified, have a similar degree of publicity and are equally accessible, there is no basis for the view that a reference to them is insufficient under Article 12.2.2. The European Union maintains that there is no obligation under Article 12.2.2 to address matters which are not required by the AD Agreement to be considered, and which are not actually considered during the investigation. In addition, the European Union notes that the Regulations rest on EU anti-dumping law, as interpreted and applied by the European courts, and apply that law, but do not explain or justify it.[1623] The European Union addresses China's specific assertions of error, and asserts that they are unfounded, and should be rejected.

(ii) Arguments of third parties

a. Brazil

7.841 Brazil contends that Article 12.2 of the AD Agreement requires that the public notice contain information on findings reached on material issues, and asserts that material findings are those related to issues that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. Brazil does not take a position as to whether the European Union is in breach of Article 12.2 of the AD Agreement with respect to the matters raised by China. However, in Brazil's view, China's claim implies the inclusion of a higher level of detail than the standard laid down in Article 12.2 of the AD Agreement. In Brazil's view, Article 12.2 of the AD Agreement does not require the publication of all information but only of material issues of fact and law. Brazil asserts that the standard is the information expressly listed in items (i) to (v) of Article 12.2.1 of the AD Agreement. Brazil notes that Article 12.2 of the AD Agreement deals with publicity of determinations and not with the right of defence, which involves distinct standards. Brazil recalls that even when certain information is not available in the public notice, this does not mean that the information was not disclosed to the interested parties in the course of the proceedings.[1624]

(iii) Evaluation by the Panel

a. Overview

7.842 Article 12.2.2 of the AD Agreement provides:

> "A public notice of conclusion … of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty … shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures …, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance

[1623] European Union, opening oral statement at the second meeting with the Panel, paras. 446-448, citing Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; first written submission, para. 861.

[1624] Brazil, oral statement, paras. 13 and 15-16, citing Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.

> or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6".

7.843 China alleges that the European Union violated this provision in the Review and Definitive Regulations by failing to provide "relevant information on matters of fact and law and reasons" that led to the determinations to impose and extend the measures. China details numerous aspects of the determination which, it argues, demonstrate the European Union's failings with respect to Article 12.2.2, concerning most of the aspects of those determinations with respect to which China has made substantive claims of violation. Before addressing each of China's allegations in this regard, we address our understanding of the requirements of Article 12.2.2, which will guide our examination of China's claim.

7.844 The chapeau of Article 12.2.2, Article 12.2, requires the publication of "findings and conclusions on all issues of fact and law considered material *by the investigating authorities*" (emphasis added). In our view, this is relevant context for a proper understanding of Article 12.2.2, and thus informs our understanding of what must be included in a public notice under that provision. China suggests that whether information and reasons for the acceptance or rejection of arguments must be provided in such a notice should be judged from the perspective of the interested parties. We do not agree. We consider that while an investigating authority must make innumerable decisions during the course of an anti-dumping investigation, with respect to procedural matters, investigating methods, factual considerations, and legal analysis, which may be of importance to individual interested parties, not all of these are "material" within the meaning of Article 12.2.2. In our view, what is "material" in this respect refers to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping duty. We note in this regard the views of the panel in *EC – Tube or Pipe Fittings*:

> "Article 12.2 provides that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material" by the investigating authority. The ordinary meaning of the term of "material" is "important, essential, relevant".
>
> We understand a "material" issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. … contextual considerations also support this interpretation since, the only matters referred to "in particular" in subparagraph 12.2.2 are, in addition to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for certain decisions."[1625]

[1625] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.423-7.424. That panel went on to conclude that, while Article 15 was an integral part of the AD Agreement, the elements of Article 15 are not of the same nature as those referred to in Article 12, that is, elements as to which "a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty", and concluded that it was therefore not a violation for the European Communities to not have provided information with regard to them in its published final determination. *Id.*, para. 7.425.

We cannot conclude that every single decision of an investigating authority in the course of an investigation can be considered as having "led to" the imposition of the final measures, such that it must be described, together with the "information" relevant to the decision, in the published notice of the final determination. Not every question or issue which arises during an investigation, and which is resolved by the investigating authority, is necessarily considered material by the investigating authorities, and may be said to have "led to" the imposition of the anti-dumping duty, even though it may be of interest or significant to one or more interested parties. In our view, the notions of "material" and "relevant" in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given, and not the entirety of the investigative process. Other provisions of the AD Agreement, notably Articles 6.1.2, 6.2, 6.4, and 6.9 address the obligations of the investigating authority to make information available to parties, disclose information, and provide opportunities for parties to defend their interests. In our view, Article 12.2.2 does not replicate these provisions, but rather, requires the investigating authority to explain its final determination, providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood.

7.845 In addition, we consider that, where there is a substantive inconsistency with the provisions of the AD Agreement, it is neither necessary nor appropriate to consider whether there is a violation of Article 12, as the question of whether the notice of a decision that is inconsistent with a substantive requirement of the AD Agreement is "sufficient" under Article 12.2.2 is, in our view, immaterial.[1626] Moreover, it is clear from the text of the provision that Article 12.2.2 does not permit the inclusion of information treated as confidential during the investigation in the public notice.[1627] We also consider that it is appropriate to take into account the challenged notice or report as a whole,[1628] and that where a later notice or report refers to or incorporates matters addressed in previously published notices or reports, we consider that this may, depending on the substance, be sufficient to satisfy Article 12.2.2.[1629] Finally, we agree with the view expressed by the panel in *EC – Fasteners (China)* that "the nature and content of the explanation given may well differ depending on the nature of the determination or decision in question."[1630]

7.846 With these principles in mind, we examine below each of China's allegations of error.

b. Review Regulation

1. determination of the EU producers' sample

7.847 China asserts that the European Union did not provide any information about the factual data used for the selection of the EU producers' sample, such as the total number of complainants from which the eight companies in the sample were selected, the total number of member States

[1626] We find support for our position in the views of the Panel in *EC-Bed Linen*,

> "A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement."

Panel Report, *EC – Bed Linen*, para. 6.259. Other panels have reached the same conclusion, e.g. Panel Reports, *EC – Fasteners (China)*, para. 7.544; *EC - Salmon (Norway)* paras. 7.831-834; and *Mexico – Steel Pipes and Tubes*, para. 7.400.

[1627] Panel Report, *Korea – Certain Paper*, paras. 7.210, 7.314-316)

[1628] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.252.

[1629] Panel Report, *EC – Bed Linen*, paras. 6.47 and 6.256.

[1630] Panel Report, *EC – Fasteners (China)*, para. 7.547.

represented by the complainants, the different business models or product segments represented by the complainants, the total sales represented by the sampled companies. In addition, the European Union did not provide information regarding the evidentiary path that led to the selection of the eight complainant producers. Nor did it provide information which could link the sampling criteria to the evidence in the non-confidential file which explains or supports the application of these sampling criteria and the availability of the relevant data for each of the complainants leading to the selection of the eight complainant producers.[1631] China further contends that the European Union used four criteria for the selection of the sample, but that relevant information concerning three of these, and the representativity of the sample with reference to these criteria, was not provided. China asserts that given that only the European Union had access to the data of complainant producers, interested parties could not draw inferences as to the number and distribution of the member States that were represented by the sample. China notes that the assurances of the European Union that information was considered cannot replace the requirement to provide the relevant information in the public notice/separate report.[1632]

7.848 The European Union notes that the Review Regulation sets forth, in recital 22, the relevant information.[1633] The European Union states that the collection of producer names was part of a process of selecting a representative sample, and that what was significant was the relative production represented by the sample rather than the absolute number of firms, as the former would give the best indication of the representativeness of the sample, as discussed in recital 27 of the Review Regulation. The European Union also notes that the information in the Review Regulation was in addition to that provided to interested parties in a series of notes from the European Union authorities.[1634] The European Union acknowledges that the total number of member States represented by the complainants is not given, but asserts that the Review Regulation does address the issue of geographical spread, in recital 28.[1635] The European Union contends that reasonable inferences could be drawn from this statement as to the number and distribution of member States that were represented by the sample. The European Union notes that the Review Regulation addressed the different business models or product segments represented by the complainants, at recital 21.[1636]

[1631] China, first written submission, para. 797.

[1632] China, second written submission, paras. 1186-1188.

[1633] European Union, first written submission, para. 506, citing recital 22 of the Review Regulation, Exhibit CHN-2:

> "The 8 producers selected in the sample were thus considered to be representative of the overall producers in the Union, and represented 8,2% of the production of the complaining Union producers and 3,1% of the total Union production."

[1634] European Union, first written submission, para. 507, referring to, e.g. Note of 9 December 2008, Exhibit CHN-26; Note of 3 March 2009, Exhibit CHN-27. The European Union also refers to Note of 18 November 2008, Exhibit CHN-37, which it asserts provided information on total production of both the complainants and the firms sampled. European Union, first written submission, fn. 379.

[1635] European Union, first written submission, para. 509, citing recital 28 of the Review Regulation, Exhibit CHN-2:

> "the Commission took geographical spread into account when selecting the sample. It is underlined that, by nature, a sample does not have to reflect the exact geographical spread (nor the exact distribution or breakdown of any other criterion) of the entire population in order to be representative. It suffices that, as is the case for the current sample, which includes four Member states, it reflects the relevant proportions of the major manufacturing countries involved."

[1636] European Union, first written submission, para. 511, citing recital 21 of the Review Regulation, Exhibit CHN-2:

> "On the basis of the information obtained, the Commission selected a sample based on the largest representative volumes of production and sales within the Union which could be investigated within the time available. However, as detailed above, this is not an entirely homogenous industry and in order to assess representativeness of the selected companies, the producers' geographical spread amongst Member States (1), as well as the segment to which

According to the European Union, the Commission assured that the different models found were represented in the sample, and moreover, the European Union notes that individual business models, while not described in this recital, were examined elsewhere in the Review Regulation.[1637] With respect to China's assertion regarding the evidentiary path that led to the selection of the sample, the European Union maintains that its investigating authorities were not engaged in reconciling diverging information and data, which was the focus of the Appellate Body in using that term in its report in *US – Softwood Lumber VI (Article 21.5 – Canada)*. Rather, the investigating authorities were engaged in identifying relevant factors and applying them to the information that they possessed. The European Union asserts that the Review Regulation gives a lengthy explanation of this process,[1638] and considers that China is seeking information at a level of detail that is greater than required by Article 12.2.2. Furthermore, the European Union asserts that a meaningful explanation at this level would not have been possible without revealing information that was protected as confidential.[1639]

7.849 We note that we have concluded that the AD Agreement does not establish any guidelines for the selection of a sample for purposes of the injury determination.[1640] In this context, given that there are no specific legal requirements for the process of selecting a sample,[1641] we cannot agree with China's view that the procedural steps of and information considered by the investigating authority are issues of fact and law that must be considered material by the investigating authority and set out in sufficient detail in the public report. In any event, we note that the Review Regulation does, in fact, provide a significant amount of information on the selection of the sample, at recitals 19 to 33. The Review Regulation explains in considerable detail why the Commission chose to rely on a sample for its injury examination, how the sample was selected, the bases on which the sample was selected, the number of producers selected for the sample and percentage of EU production accounted for by those producers, and the conclusion that the sample was considered to be representative of the overall producers in the European Union.[1642] The Review Regulation also addresses issues that arose with respect to the sample during the investigation, and allegations and arguments made by the parties during the investigation with respect to representativeness of the sample.

7.850 In our view, while the discussion in the Review Regulation may not go into all the details China would have it address, it is more than sufficient to explain the European Union's selection of

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> their products belong were also taken into consideration. As a result 8 companies operating in four member States were selected. The selected companies also represent all the major business models present in the Union, in terms of how the product is manufactured, of how the product is distributed, and of product specialisation. Regarding product specialisation, the companies selected included production across all major price segments (low range, mid range, high range) as well as across all gender and age segments (ladies, men, unisex, children footwear). Regarding product distribution, the companies selected included all major levels of distribution (to wholesalers, to retailers, as well as direct retailing). Regarding production, the companies selected included full inhouse manufacturing in all key stages of the production process as well as companies which had outsourced parts of such manufacturing process (both in and outside the Union)."

[1637] European Union, first written submission, para. 512. The European Union notes that, in any event, the business model of the producer was not part of the criteria on which the sample was initially selected. European Union, first written submission, fn. 380.

[1638] European Union, first written submission, para. 514 and fn. 382, referring to Review Regulation, Exhibit CHN-2, recitals 19-33.

[1639] European Union, first written submission, para. 514.

[1640] See paragraph 7.358 above.

[1641] Of course, the sample selected must ultimately be sufficiently representative of the domestic industry to be an appropriate basis for the examination of injury, such that the resulting determination is consistent with Article 3.1 of the AD Agreement. But we do not consider that the process of selecting the sample is a necessary aspect of this issue – that is to say, in our view, the process by which a sample is selected is not determinative of whether it will result in a determination of injury consistent with Article 3.1.

[1642] Review Regulation, Exhibit CHN-2, recital 22.

the sample of EU producers. We agree with the European Union that China seeks a level of detail in the published notice that is not required by Article 12.2.2. For instance, we do not consider that "information which could link the sampling criteria to the evidence in the non-confidential file which explains or supports the application of these sampling criteria" and "the availability of the relevant data for each of the complainants leading to the selection of the eight complainant producers" are material issues of fact and law which have led to the imposition of the final measures. While they may well be of interest to the parties to the investigation, Article 12.2.2 does not, in our view, require an investigating authority to explain the elements of information and links between the evidence it relied upon and its conclusions in its published report, particularly where, as here, there are no specific requirements under the AD Agreement that must be satisfied in question.[1643] Moreover, we consider that to have addressed some of the details China considers should have been addressed might well have entailed discussion of confidential information, which we recall is prohibited under Article 6.5, and under Article 12.2.2 itself.

7.851 We recall that we rejected China's arguments with respect to the sample selection as a matter of substance, and in so doing based our consideration primarily on the discussion in the Review Regulation itself.[1644] China's arguments imply that the phrase "all relevant information" in Article 12.2.2 refers to all evidence on the basis of which the investigating authority made its decisions, whether relevant and probative to the investigating authority or not. We do not agree. Not only would such a requirement potentially conflict with the requirement not to disclose confidential information, but it would be entirely unworkable as a practical matter.[1645] Moreover, China has asserted no reason why the specific issues it raises in connection with the selection of the sample should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duty. We therefore reject China's allegations in this regard.

2. <u>confidential treatment of the names of complainants, supporters, sampled producers and producers sampled in the original investigation</u>

7.852 China asserts that the European Union failed to provide the names of the complainants, supporters, sampled producers and producers sampled in the original investigation, and proper reasons for granting confidential treatment to their names, did not explain whether it had any information that substantiated the risk of retaliation made by the complainants and supporters, and did not provide any reasonable explanation as to why confidentiality was warranted.[1646]

7.853 The European Union contends that the Review Regulation refutes China's allegations, referring in particular to recital 40, which states:

> "As was the case in the original investigation the sampled Union producers as well as other cooperating Union producers requested, on the grounds of the provisions of Article 19 of the basic Regulation that their identities be kept confidential. They claimed that the disclosure of their identity could lead to a risk of significant adverse effects. Certain complainant Union producers supply customers in the Union that also source their products from the PRC and Viet Nam, thus benefiting directly from these

[1643] We recall that China's claims are with respect to the selection of the sample, and not with respect to whether, substantively, the injury determination was based on a sample which was representative of the domestic industry. It may well be that more explanation of evidence and reasoning is required with respect to aspects of the final determination relating to matters where the AD Agreement does establish specific guidelines or requirements.

[1644] See paragraph 7.358 above.

[1645] See Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* ("*US – Softwood Lumber VI*"), WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, 2485, para. 7.41.

[1646] China, first written submission, para. 798.

> imports. Those complainants are therefore in a sensitive position since some of their clients may have evident reasons to oppose their lodging or supporting a complaint against alleged injurious dumping. For these reasons they considered that there was a risk of retaliation by some of their clients, including the possible termination of their business relationship. The request was granted as it was sufficiently substantiated."[1647]

Moreover, the European Union rejects China's assertion that the use, in the Review Regulation, of phrases that had been used in previous measures for the same purpose fails to satisfy the requirements of Article 12.2.2.[1648] Finally, the European Union considers that it was in the nature of the kind of threats of retaliation which were considered in this case that formal evidence would not be forthcoming, and thus China's assertion that no reasonable explanation was provided as to why confidentiality was warranted is refuted by recital 40 of the Review Regulation.[1649]

7.854 We recall that we have concluded that the European Union did not err in treating the names of producers as confidential.[1650] Therefore, that information could not be provided in the Review Regulation itself, and there can be no violation of Article 12.2.2 in this regard. With respect to the alleged lack of explanation as to whether the Commission had any information that substantiated the risk of retaliation asserted by the complainants and supporters, we have found that the European Union did not err, as a substantive matter, in concluding that the risk of retaliation sufficed to demonstrate good cause for confidential treatment of certain information, even in the absence of the kind of evidence substantiating that risk China argued was necessary. In light of this conclusion, we reject China's argument that the Review Regulation did not explain why confidential treatment was warranted. We therefore reject China's allegations in this regard.

3. determination concerning the evaluation of macroeconomic injury indicators

7.855 China asserts that the European Union did not provide any information or reasons regarding why the macroeconomic indicators were evaluated at the level of the "whole [European] Union production" and not at the level of the EU industry, as was done in the original investigation, and did not provide any information explaining how the figures used for the evaluation of the macroeconomic indicators were calculated.[1651] China considers that such a significant change in the methodology required a detailed explanation, in view of Article 11(9) of the Basic AD Regulation.[1652]

7.856 The European Union maintains that, as the Review Regulation is a free-standing measure that provides its own justification, the information on the matters of fact and law, and reasons which have led to its adoption, does not include an explanation of how the methodology has changed from the Provisional Regulation. The European Union asserts that the remaining details China asserts should have been covered[1653] were not considered of sufficient significance by the European Union to warrant inclusion in the Review Regulation.[1654] The European Union notes that China refers to a

[1647] European Union, first written submission, para. 515, citing Review Regulation, Exhibit CHN-2, recital 40 (emphasis added by the European Union).

[1648] European Union, first written submission, para. 517, citing China, first written submission, para. 798.

[1649] European Union, first written submission, para. 517.

[1650] See paragraph 7.762 above.

[1651] China, first written submission, paras. 799-800. China further claims that no information was provided regarding how many and which individual producers' data was used, how estimates provided by national producer associations were reconciled with the Prodcom data, and how Prodcom data was established for the review investigation period which was not a calendar year. *Id*., para. 800.

[1652] China, second written submission, para. 1196.

[1653] The European Union refers in this regard to China, first written submission, para. 800.

[1654] European Union, first written submission, para. 520.

provision of EU law that has no equivalent in the WTO system in support of its argument, and asserts that it is not the Panel's role to enforce EU law in this respect.[1655]

7.857 We recall that we have concluded that the European Union did not act inconsistently with Article 3.4 in its consideration of injury factors in the context of the review proceeding.[1656] Our conclusion in this regard is based principally on our examination of the Review Regulation itself, in light of China's arguments. In these circumstances, we see no basis for the conclusion that the European Union should have included additional information and explanations in that Regulation. In any event, we recall that the European Union defined the domestic industry in the expiry review as EU producers as a whole, and in this circumstance, it seems to us that a consideration of information on macroeconomic factors at that level is entirely appropriate.

7.858 Moreover, even assuming the evaluation of macroeconomic factors was undertaken on a different basis in the expiry review than it was in the original investigation, such a change in methodology does not require explanation in the Review Regulation. There is nothing in the AD Agreement that requires an investigating authority to follow the same methodology in an expiry review as it did in the original investigation, and thus we see no reason why a different methodology requires explanation. Clearly, some explanation of the methodology that is actually applied, and the relevant facts and conclusions, is required in the public notice of the final determination in an expiry review, but that is a different matter, and not the subject of China's claim here. Finally, we agree that whether or not EU law requires an explanation of a change in methodology is irrelevant to our analysis, as it is not our role to enforce EU law. China has asserted no reason why the specific issues it raises in this context should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duty. We therefore reject China's allegations in this regard.

4. difference in the figures concerning the representativeness of the sample

7.859 China asserts the European Union did not provide any information or reasoning for the discrepancy between the figures stated in the Note for the File dated 18 November 2008 and in the Review Regulation taking into account the fact that in the interim it was discovered that one sampled producer had discontinued production of the like product in the European Union.[1657]

7.860 The European Union maintains that Article 12.2.2 does not require an account of the development of the investigation, and thus it was not required to explain differences in figures given for production by sampled EU producers and all complainant producers early in the review, and figures for that same information set out in the Review Regulation.[1658] The European Union notes that "the phrase "have led to" in Article 12.2.2 implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty," and asserts that the only determinations that necessarily had to be made by the European Union authorities in the expiry review were those relating to the final figures referred to by China, and it was on the basis of these figures that the Review Regulation was adopted.[1659]

[1655] European Union, opening oral statement at the second meeting with the Panel para. 378. The European Union notes that this is not a situation where the Panel is required to determine the content of national law. *Id.*

[1656] See paragraph 7.432 above.

[1657] China, first written submission, paras. 802-803.

[1658] European Union, first written submission, para. 522.

[1659] European Union, first written submission, para. 522, citing Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.

7.861 We consider that Article 12.2.2 does not require that changes in the data on which the final determination is made from that considered at earlier stages of the investigation must be explained in the published notice of the final determination. Indeed, it is to be expected that data under consideration, and the relevance of data, may change over the course of an investigation, as information is collected, checked for accuracy and verified, and corrected as necessary. The public notice of the final determination, which is at issue here, must provide a sufficiently detailed explanation of that determination, but we see no basis for requiring that it explain how the information that was actually considered in making that final determination was different from information at some earlier stage in the investigation, even if reported in a Note for the file and made available to interested parties.[1660] Moreover, China has asserted no reason why the change in the data should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duty. We therefore reject China's allegations in this regard.

5. data of the sampled EU producer that discontinued production of the like product in the review investigation period

7.862 China asserts that the European Union did not provide any information regarding the extent to which the data of the sampled producer that discontinued production in the European Union of the like product during the review investigation period was used for the purpose of the injury examination, notably for the evaluation of the microeconomic injury indicators and the undercutting margin calculation.[1661]

7.863 The European Union asserts that the Review Regulation explains in detail how the European Union authorities reacted to the developments with respect to one EU producer included in the sample of EU producers, which substantially changed its business model during the review investigation period, engaging increasingly in outsourcing, and what account was taken of the changes, referring to recital 23 of the Review Regulation, which states:

> "The investigation revealed that one of the sampled Union producers progressively discontinued production in the Union during the RIP, taking its full manufacturing activity outside the Union. It should be noted that the weight of the company was not such as to have any significant impact, at least from a quantitative point of view, on the situation of the sampled companies as a whole—including their representativeness. The quantitative findings on injury would not have been materially different should this company have been excluded. In this context, and given that (i) it had produced in the Union during the RIP, and that (ii) it subcontracts large part of the production, a business model which, according to many parties, is important in the Union, it was decided not to formally exclude this company from the sample. This further ensures that, qualitatively, the sample represents as adequately as possible the reality of the sector. Furthermore, considering that an expiry review requires an analysis of continuation/recurrence of injury, this may help in better predicting how the situation on the Union market could develop if the measures were

[1660] China asserts that the European Union failed to provide the information or explanations despite a request by Chinese exporters in this regard. China, first written submission, para. 803. We note in this regard that Article 12.2.2 does not establish a requirement for investigating authorities to disclose information during the course of an investigation. Thus, the fact that information and explanation may have been requested does not, in our view, establish that it was required to be published in the notice of the final determination under Article 12.2.2.

[1661] China, first written submission, para. 804.

> not continued. However, evidently only data pertaining to its activity as Union producer were used." [1662]

The European Union asserts that the specific information China considers was wrongly not included in the published notice is very detailed in nature.[1663] Given that the Review Regulation observes that "[t]he quantitative findings on injury would not have been materially different should this company have been excluded", the European Union considers that China has not established that the information in question would have been "relevant" in terms of Article 12.2.2 of the AD Agreement.[1664]

7.864 We note that we have concluded as a substantive matter that the European Union did not err in its treatment of the producer who progressively outsourced production of footwear outside the European Union during the review investigation period. Our conclusion in that regard is based principally on the Review Regulation itself, which explains how the European Union took this development into account, and concludes that resulting differences in the data did not affect its conclusions.[1665] In our view, it would be anomalous for us to conclude that Article 12.2.2 requires a greater level of detailed information and explanation than is necessary to ascertain that the final determination was not, as a matter of substance, inconsistent with the European Union's obligations under the AD Agreement. We agree with the European Union that there is no basis on which to conclude that the extent to which this producer's data was used for the purpose of the injury examination, the evaluation of the microeconomic injury indicators and the undercutting margin calculation was relevant. Moreover, China has asserted no reason why these issues should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duty. We therefore reject China's allegations in this regard.

6. PCN reclassification

7.865 China asserts that the European Union did not provide information as to how the reclassification of certain footwear from one PCN category to another was achieved for the Chinese exporters and the sampled complainant producers, or regarding the effect of the reclassification on the dumping and injury margins.[1666]

7.866 The European Union reiterates its argument that the reclassification in question was not a restructuring of the PCN system, but a correction of a misallocation of footwear into PCNs on the part of certain interested parties. The European Union asserts that the matter is sufficiently explained at recital 59 of the Review Regulation, which states:

> "Certain parties alleged that the Commission changed its methodology as compared to the original case by changing the definition of the product control numbers (PCN's) in the course of the investigation. This allegation is however not correct. Rather, in the course of the investigation, it became apparent that certain parties had wrongly interpreted and applied the PCN structure for certain product types. In order to ensure

[1662] European Union, first written submission, para. 524, quoting Review Regulation, Exhibit CHN-2, recital 23.

[1663] The European Union describes the information in question as: (i) whether data of this producer was used for the years 2006, 2007 and the review investigation period, or only for 2006 and 2007, or even partly for the review investigation period; (ii) to what extent were the sales prices of this producer used in the undercutting margin calculation; and (iii) how was the data of this producer used for the evaluation of the various microeconomic indicators. European Union, first written submission, para. 525.

[1664] European Union, first written submission, paras. 525-526.

[1665] Review Regulation, Exhibit CHN-2, recital 23.

[1666] China, first written submission, para. 805.

> a consistent approach, the footwear models in question were therefore re-classified and attributed to the proper PCN heading wherever this was found necessary. Thus, wherever the Commission identified inaccurate information given by the parties concerned it had to rectify this. Such rectification can therefore neither be considered as a change in methodology, nor as a change of content of the PCN. On the contrary, the need to respect the PCN methodology was the very reason why the rectification had to be carried out. Therefore the argument had to be rejected."[1667]

7.867 We have concluded that the European Union (i) did not err with respect to the PCN system it employed in the context of the dumping determination, and (ii) did not wrongly reclassify footwear into different PCNs. Our conclusions in this regard are based principally on the Review Regulation itself, including recital 59, which is sufficient, in our view, to explain the matter, to the extent that any explanation in this respect is necessary. As we have noted, it would be anomalous for us to conclude that Article 12.2.2 requires a greater level of detailed information and explanation than is necessary to ascertain that the final determination was not, as a matter of substance, inconsistent with the European Union's obligations under the AD Agreement. Moreover, China has asserted no reason why the correction of errors in the allocation of imports to one or another PCN category should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duty. We therefore reject China's allegations in this regard.

7. dumping margin calculation

7.868 China asserts that the European Union failed to provide relevant information regarding the quantification (e.g. in terms of percentages) for allowances for differences in the level of trade, differences in commissions, and R&D and design, although the R&D adjustment made to the prices of the EU producers for the purposes of the undercutting calculation was disclosed in terms of a percentage.[1668]

7.869 The European Union notes that the types of data China mentions typically involve confidential information. The European Union states that, where there was no issue of confidentiality, such as when an adjustment was made "across the board" the European Union published the relevant figure.[1669]

7.870 We note that it is clear that the European Union did explain the nature of the allowances made in order to undertake a fair comparison of normal value and export price, at recitals 120 through 125 of the Review Regulation. It is true, as China alleges, that the actual value of those adjustments is not set forth in the Review Regulation. However, we share the European Union's view, which China has not disputed, that the relevant information may well be confidential, and therefore could not be included in the public notice under Article 12.2.2. In any event, while it is clear that **whether** adjustments were made in the calculation of dumping margins is significant in the calculation of dumping margins, China has not demonstrated that the precise **level** of those adjustments, while no doubt of interest to the parties, should have been considered material by the investigating authorities,

[1667] European Union, first written submission, para. 527, referring to European Union, first written submission, para. 236, and quoting Review Regulation, Exhibit CHN-2, recital 59.

[1668] China, first written submission, paras. 806-807. We note that China asserts that this information was not provided in the disclosure to Chinese exporters. China, first written submission, para. 806. The European Union clarifies that this information would normally be included in disclosures made to individual exporters, but where an analogue country is used, the actual exporter would not receive these details. European Union, first written submission, para. 528. However, as China has made no claim with respect to the disclosure of information to Chinese exporters under Article 6.9 in this regard, we do not address this question.

[1669] European Union, first written submission, para. 528.

and as having led to the imposition of the anti-dumping duties. We therefore reject China's allegations in this regard.

8. alleged failure to provide reasons for the rejection of arguments made by interested parties on a number of issues

7.871 China asserts that the European Union did not provide any information regarding the reasons for the rejection of arguments made by interested parties. Specifically, China refers to: (i) the rejection or acceptance of the fact, asserted by Chinese exporters, that there is production of the like product in at least 20 member States, (ii) the rejection of the argument by one interested party that the high labour costs in the European Union affecting the competitiveness of the EU producers and not the allegedly dumped imports from China were the source of injury to the EU industry, (iii) the rejection of the arguments of interested parties questioning whether the European Union had investigated the accuracy of the evidence, to the extent any existed, of the risk of retaliation claimed by the complainant producers as a basis for requesting confidentiality of their names, and (iv) the rejection of the argument of interested parties regarding the absence of the then-Community Interest questionnaire responses of five sampled EU producers from the non-confidential file and that accordingly the European Union should reject the confidential information provided by these companies.[1670]

7.872 The European Union notes that the argument by exporters that there was production in 20 EU member States arose in the context of the sampling of EU producers, and was addressed at recital 28 of the Review Regulation which states:

> "As explained above in recital 21, the Commission took geographical spread into account when selecting the sample. It is underlined that, by nature, a sample does not have to reflect the exact geographical spread (nor the exact distribution or breakdown of any other criterion) of the entire population in order to be representative. It suffices that, as is the case for the current sample, which includes four Member states, it reflects the relevant proportions of the major manufacturing countries involved. Any other approach would have been administratively impracticable, particularly if several different criteria have to be taken into account in order to ensure representativeness. In fact, this claim would imply *in fine* that a sample would be sufficiently representative only if it contained the full population. The investigation has thus underlined that the sample which covers four Member states, including the three with the by far biggest production, is largely representative of the Union production as a whole, in particular when taking into account production that is based on tolling arrangements and therefore should be accounted for in the Member state of the company ordering the tolling service."[1671]

For the European Union, the relevant issue at this stage of the investigation was whether the sample was representative, and in this context the total number of member States that were in some way involved in production was not a relevant consideration, a point the European Union considers did not need articulation. The European Union asserts that the Review Regulation contained a full examination of the structural condition of the industry, which included the issue of labour costs.[1672] The European Union reiterates its argument that it had no substantive obligation to reject confidential information provided in the context of its Union Interest investigation, and asserts that it would be

[1670] China, first written submission, para. 808.

[1671] European Union, first written submission, para. 530, quoting Review Regulation, Exhibit CHN-2, recital 28 (emphasis added by the European Union).

[1672] European Union, first written submission, paras. 531-532, referring to European Union, first written submission, para. 318.

paradoxical if it were required by Article 12.2.2 to publish information regarding the reasons for its actions.[1673]

7.873 We consider that China's allegations with respect to the failure of the European Union to address certain arguments is based not on a lack of understanding as to information or clarity of reasons set out in the European Union's determination, but on substantive disagreements with various elements of that determination. Thus, for instance, it is clear from recital 28 of the Review Regulation that the European Union considered that, in selecting a sample, it had sufficiently considered the question of geographical distribution of EU producers. That China disagrees does not demonstrate that the argument that there is production of the like product in at least 20 member States was material to the European Union's decision, or that reasons for its rejection were required to be explicitly set out in the public notice. Similarly, it is clear that the European Union took into account arguments concerning the allegedly high labour costs in the EU industry,[1674] but did not reach the conclusions urged by China. This does not, however mean that it was required to respond in detail to the argument of one Chinese exporter asserting that high labour costs, not dumped imports, caused injury to the EU industry. We have concluded that the European Union did not err in its consideration of the risk of retaliation asserted by complainant producers in requesting confidential treatment of their names, and can see no reason why the rejection of parties' arguments to the contrary should have been addressed in the public notice of the final determination, as China has asserted no reason why the rejection of the arguments regarding the absence of the then-Community Interest questionnaire responses of five sampled EU producers from the non-confidential file should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duty. We therefore reject China's arguments in this regard.

c. Definitive Regulation

1. determination of the EU producers' sample

7.874 China asserts that the European Union did not provide any information about (i) the reason for the selection of the sample on the basis of the geographical spread; (ii) the factual data used for the selection of this sample such as the production figures and the five member States represented by the complainants; (iii) the different business models or product segments represented by the complainants; (iv) the total sales represented by the sample; and (v) the evidentiary path that led to the selection of the ten complainant producers or information which could link the sampling criteria to evidence in the non-confidential file that explains or supports the application of these sampling criteria and the availability of relevant data for each of the complainants leading to the selection of the ten complainant producers for the sample.[1675]

7.875 The European Union notes that the Notice of Initiation of the original investigation and Provisional Regulation both addressed the question of the selection of the sample of EU producers, and that the Definitive Regulation addressed a number of complaints that had been made by interested parties.[1676] The European Union observes that China's argument with respect to the geographical spread of the sample in effect suggests that the European Union should have explained why it was

[1673] European Union, first written submission, para. 534, referring to European Union, first written submission, para. 450.

[1674] See Review Regulation, Exhibit CHN-2, recitals 229, 256 and 269-274.

[1675] China, first written submission, para. 1287.

[1676] European Union, first written submission, paras. 862-865, quoting Notice of Initiation, Exhibit CHN-6, Provisional Regulation, Exhibit CHN-4, recital 65, and Definitive Regulation, Exhibit CHN-3, recitals 55-58.

infringing WTO law in this respect, and asserts that this notion cannot be taken seriously.[1677] Moreover, the European Union notes that recital 65 of the Provisional Regulation explains the reasons for adopting such a spread.[1678] The European Union asserts that individual production figures of the sampled companies and the particular member States represented in the sample were not published for reasons of confidentiality. In addition, the European Union contends that "total sales represented by the sample" was not information used by European Union, as it relied on production levels, and that information regarding the "different business models or product segments represented by the complainants" was also not used. With respect to the "evidentiary path" that led to the selection of sample, the European Union contends that its intentions in this regard were clearly set out in the Initiation Notice, and were implemented, and thus no further reference to the matter was necessary.[1679]

7.876 To the extent that explanation of the selection of the EU producers' sample is necessary, we consider that recitals 53 to 59 of the Definitive Regulation are sufficient to satisfy the requirements of Article 12.2.2.[1680] For the same reasons as set out in paragraphs 7.849 and 7.850 above, we reject China's allegations in this regard.

2. confidential treatment of the names of complainants, supporters and sampled producers, and reasons for granting confidential treatment to their names

7.877 China asserts that the European Union acted inconsistently with Article 12.2.2 by failing to provide the names of the complainants, supporting and sampled producers, and by failing to provide proper reasons for granting confidential treatment to their names, or information that substantiated the risk of retaliation made by the complainants and supporters, or any reasonable explanation as to why confidentiality was warranted.[1681]

7.878 The European Union considers that China merely repeats the points that it made in challenging the grant of confidentiality, and suggests that China appears to have an exaggerated notion of the extent of the obligation in Article 12.2.2. For example, the European Union disputes the notion that Article 12.2.2 requires that it list all of the more than 800 individual firms that sent statements of support for the complaint. Similarly, the European Union contends that the scope of Article 12.2.2 with respect to reasons for granting confidential treatment is not as wide as China suggests, asserting that while China may not regard the reasons set forth in recital 8 of the Provisional Regulation as sufficient, that does not demonstrate a violation of Article 12.2.2. The European Union also contends that Article 12.2.2 does not require that the Commission explain, with respect to every factual assertion in the Regulation, the evidence on which it is based.[1682]

7.879 We recall that we have concluded that the European Union did not err in treating the names of producers as confidential.[1683] For the same reasons as set forth in paragraph 7.854 above, we reject China's allegation that the Definitive Regulation was deficient in this regard.

[1677] European Union, first written submission, para. 866, referring to China, first written submission, para. 1387.

[1678] The European Union recalls its view that Article 12.2.2 permits Members to rely on statements in earlier public notices, such as the Provisional Regulation. European Union, opening oral statement at the second meeting with the Panel, para. 447.

[1679] European Union, first written submission, para. 866; European Union, opening oral statement at the second meeting with the Panel, para. 446.

[1680] We note also recital 65 of the Provisional Regulation, Exhibit CHN-4, which addresses the EU producers' sample.

[1681] China, first written submission, para. 1388.

[1682] European Union, first written submission, para. 867.

[1683] See paragraphs 7.690 and 7.699 above.

3. determination concerning the evaluation of macroeconomic injury indicators

7.880 China asserts that the European Union did not provide information explaining how the figures used for the evaluation of the macroeconomic indicators were calculated, including information as to how many and which individual producers' data was used, to what extent such data was used and where the data for the year 2001 came from, how the data of the associations was reconciled with the data of the individual producers, how the data for the investigation period was established, and which national associations' data were used.[1684]

7.881 The European Union asserts that China is seeking a level of detail in the published measures that is not required by Article 12.2.2. The European Union contends that it is not required to explain how the figures used for the evaluation of the macroeconomic indicators were calculated.[1685] Moreover, the European Union asserts that Article 12.2.2 refers to "all relevant information on matters of fact and law, and reasons", but does not require publishing information regarding evidence or the sources of information.[1686]

7.882 We consider that China is seeking a level of detail in the public notice which is beyond what is required by Article 12.2.2. While it is clear that the notice must set forth in sufficient detail the information on which the final determination is based, and the reasoning and conclusions of the investigating authority, we do not agree that such methodological questions as are addressed in China's arguments are within the scope of what is required. Moreover, China has not demonstrated why these matters should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duties. We therefore reject China's allegations in this regard.

4. names of suppliers

7.883 China asserts that the European Union did not provide the names of the suppliers, in that it provided only the names of the sampled Chinese producers, but not the non-sampled companies that cooperated.[1687]

7.884 The European Union contends that such information is too detailed to merit publication, in particular since the anti-dumping duty that was imposed did not require these companies to be separately identified.[1688]

7.885 We note that we have concluded, above, that the imposition of a country-wide anti-dumping duty pursuant to Article 9(5) of the Basic AD Regulation was inconsistent with the European Union's obligations under Articles 6.10 and 9.2 of the AD Agreement. Thus, to the extent that the European Union seeks to justify the non-publication of the names of cooperating Chinese exporters/producers not included in the sample on the basis of imposition of a country-wide duty, we find this insufficient to establish compliance with Article 12.2.2. That said, however, we do not agree with China that Article 12.2.2 requires the publication of a complete list of the names of all Chinese exporters/producers who cooperated in the investigation. We fail to see how such a list would be material to the investigating authority, or considered to have led to the imposition of the anti-dumping duty. We do not share the view that Article 12.2.2 requires disclosure in detail of all facts and considerations throughout the entire proceeding. Rather, we consider that Article 12.2.2 is limited to

[1684] China, first written submission, paras. 1389-1390.
[1685] The European Union considers that obligations in this regard may arise under Article 6, in particular Article 6.9. European Union, first written submission, para. 868.
[1686] European Union, first written submission, para. 868.
[1687] China, first written submission, para. 1392.
[1688] European Union, first written submission, para. 869.

those issues of fact and law relevant to the final determination and material to the investigating authority in making that determination. Moreover, we note that the names of the companies in the sample, and whose information was therefore relevant to the determination, was, as China acknowledges, published. We therefore reject China's allegations in this regard.

5. price threshold for STAF

7.886 China asserts that the European Union did not provide an explanation as to why a price threshold was applied to STAF, i.e. the reason for which STAF having a CIF price of less than €7.50 was included in the investigation and the measures.[1689]

7.887 The European Union notes that this is part of the definition of the "product concerned", which need not be justified, and in any event, is addressed at recital 16 of the Definitive Regulation.[1690]

7.888 We recall that we have rejected China's claim that the European Union acted inconsistently with the AD Agreement in the determination of the product under consideration and/or like product. In our view, it follows from our finding that there is no violation of Article 12.2.2 in the fact that the European Union did not provide an explanation of why a price threshold was applied in deciding which STAF to exclude from the product under consideration, since this was part of an analysis and determination it was not required to make. Moreover, the Definitive Regulation sets forth the conclusions of the Commission as to the product under consideration.[1691] To the extent that Article 12.2.2 requires any explanation of aspects of a determination not required by the AD Agreement, we consider that the Definitive Regulation contains an adequate explanation of this aspect of the European Union's determination.

6. number of MET questionnaires received

7.889 China asserts that although it referred to the high number of companies requesting MET/IT, the European Union did not specify the number of MET/IT responses received.[1692]

7.890 The European Union asserts that since the issue concerns the capacity of the European Union to investigate the claims, the explanation that the number was so substantial that an individual examination was administratively impossible is completely sufficient.[1693]

7.891 We do not agree with China that Article 12.2.2 requires the publication of the number of MET/IT responses received by the European Union. We fail to see how "information" concerning the number of MET/IT responses received could be material to the investigating authority, or considered to have led to the imposition of the anti-dumping duty, and China makes no arguments in this regard. Moreover, the Definitive Regulation does explain that the number of responses was so large as to make it unfeasible for the Commission to consider them all, and therefore a sample was considered.[1694] To the extent the number of MET/IT claims may have been relevant in the European Union's determination, we consider that this was sufficient to satisfy the requirements of Article 12.2.2. We therefore reject China's allegations in this regard.

[1689] China, first written submission, para. 1392.

[1690] European Union, first written submission, para. 870.

[1691] Definitive Regulation, Exhibit CHN-3, recitals 11-19. We note that this issue is also addressed in the Provisional Regulation, Exhibit CHN-4, at recitals 12-27.

[1692] China, first written submission, para. 1393.

[1693] European Union, first written submission, para. 871.

[1694] Definitive Regulation, Exhibit CHN-3, recitals 60-61. We note that this discussion was in response to arguments from interested parties asserting an obligation to consider each MET/IT claim individually. In addition, we note that this issue is also addressed in the Provisional Regulation, Exhibit CHN-4, recitals 66-77.

7. dumping margin calculation

7.892 China asserts that the European Union failed to provide information in the Definitive Regulation regarding the quantification, *e.g.* in terms of percentages, for allowances in the form of adjustments for differences in transport costs, ocean freight and insurance costs, handling, loading and ancillary costs, packing costs, credit costs, warranty and guarantee costs, commissions, and R&D and design costs, or the methodology applied for the exclusion of STAF.[1695]

7.893 The European Union notes that it does not, as a normal practice, publish figures in this regard, asserting that the relevant data are confidential to the individual producers, but that where an across-the-board adjustment is made the figure will be published, as was the case for the adjustment for differences in the quality of leather used by Brazilian and Chinese exporters.[1696]

7.894 We note that it is clear that the European Union did explain the nature of the allowances made in order to undertake a fair comparison of normal value and export price, at recitals 126-145 of the Definitive Regulation.[1697] It is true, as China alleges, that the actual value of those adjustments is not set forth in the Definitive Regulation. However, we share the European Union's view, which China has not disputed, that the relevant information may well be confidential, and therefore could not be included in the public notice under Article 12.2.2. In any event, while it is clear that whether adjustments were made in the calculation of dumping margins is significant in the calculation of dumping margins, China has not demonstrated that the precise level of those adjustments, while no doubt of interest to the parties, should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duties.[1698] We therefore reject China's allegations in this regard.

8. alleged failure to provide reasons for the rejection of arguments made by interested parties on a number of issues

7.895 China asserts that the European Union did not provide reasons for the rejection of arguments (i) concerning the selection of Brazil as analogue country; (ii) questioning the accuracy of the information provided by the complainant; (iii) requesting clarifications concerning the removal of information from the standing file and disclosure of data in the standing file and complaint; (iv) requesting access to 585 declarations of support; (v) that STAF shoes be excluded even if they did not reach the €9.00 price threshold established in the Provisional Regulation; (vi) that counterfeiting was a factor other than the dumped imports which had caused injury; (vii) that the Complainants should provide a breakdown per country of the information on consumption; (viii) that the decisions to reject the MET applications of certain companies were unjustified; (ix) requesting confirmation concerning the deadline that was granted to the Brazilian producers to respond to the questionnaire; (x) submitting that sampled producers should be considered non-cooperating as one questionnaire

[1695] China, first written submission, paras. 1394-1396.

[1696] European Union, first written submission, para. 872.

[1697] We note that this issue is also addressed in the Provisional Regulation, Exhibit CHN-4, recitals 131-133.

[1698] Moreover, we note the statement in the Definitive Regulation, which China has not disputed, that

> "Some parties argued that the Commission did not disclose the exact figures on which basis the adjustment was calculated and why leather adjustment had to be revised after the provisional determination … However, the revision on the leather adjustment is explained above. Furthermore, the Commission disclosed to all companies concerned by this proceeding the necessary details on the basis of which it is intended to recommend the imposition of definitive measures."

Definitive Regulation, Exhibit CHN-3, recitals 130-131. As we understand EU practice, confidential information on such matters as adjustments is often a part of individual disclosures to companies participating in the investigation. See footnote 1668 above.

response was not made accessible in the non-confidential file and the other companies did not respond to certain questions, had not requested confidential treatment or shown good cause for such treatment or submitted an explanation as to why summarization was not possible; and (xi) submitting, *inter alia*, that all footwear that complied with the STAF criteria should be excluded, without a price threshold.[1699]

7.896 The European Union notes first that recitals 105-122 of the Definitive Regulation address arguments concerning the choice of the analogue country. In the European Union's view, China's criticisms would require that every demand for explanation or justification by an exporter or importer must be addressed in the public notice. The European Union asserts that Article 12.2.2 requires the authorities to give reasons for acceptance or rejection of "relevant" information and arguments, which implies that not every communication requires a response. Moreover, the European Union contends that there is no obligation to give an explanation as to why an argument is not relevant. Finally, the European Union contends that requests for information are not "relevant arguments or claims", and therefore their rejection does not require published justification.

7.897 We consider that China's allegations with respect to the failure of the European Union to address certain arguments is based not on a lack of understanding as to information or clarity of reasons set out in the European Union's determination, but on substantive disagreements with various elements of that determination. Thus, for instance, the bases for the selection of the analogue country are clear from the Definitive Regulation at recitals 105 to 122, and the Provisional Regulation at recitals 98-124. Similarly, the basis for the treatment of STAF, the decision to reject the MET applications of certain companies, and the treatment of sampled producers as cooperating are all explained in the Definitive Regulation. That China disagrees with the investigating authorities' actions and the substance of its decisions in these matters does not establish that a greater level of detail was required, and does not mean that the European Union was required to respond in detail to each argument made with respect to these issues. China has not demonstrated that these matters should have been considered material by the investigating authorities, and as having led to the imposition of the anti-dumping duty. We agree with the European Union that "requests" for clarification of actions of the investigating authority, for access to documents, or for confirmation concerning deadlines, are not within the scope of Article 12.2.2. We fail to see how this "information" could be material to the investigating authority, or considered to have led to the imposition of the anti-dumping duty, and China makes no arguments in this regard. We therefore reject China's arguments in this regard.

7.898 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Article 12.2.2 by failing to provide adequate explanations with respect to the matters raised by China in the Review and Definitive Regulations.

8. Claims III.6 and III.16 – Alleged violations of Articles 3.1, 3.2, 9.1, 9.2 and 17.6(i) of the AD Agreement – Imposition and collection of duties

7.899 In this section of our report, we address China's claims that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, 9.2 and 17.6(i) of the AD Agreement in the original investigation in its determination of the amount of lesser duty to impose on dumped imports from China and in the collection of anti-dumping duties.

[1699] China, first written submission, paras. 1397-1402.

(a) Arguments of the parties

(i) China

7.900 China claims that, in the original investigation, the European Union violated Articles 3.1, 3.2, 9.1, and 17.6(i) of the AD Agreement in determining the amount of lesser duty to impose on imports from China by (i) failing to undertake an objective examination in the adjustment of injury margins; (ii) not basing the "underselling" calculation on all export sales; and (iii) failing to properly establish the reasonable rate of profit for the EU industry. In addition, China claims that the European Union violated Articles 3.1 and 9.2 of the AD Agreement by discriminating against China in the collection of anti-dumping duties.[1700]

7.901 China asserts that, while Article 9.1 of the AD Agreement states only a "preference" for application of a lesser duty, the European Union has implemented a mandatory lesser duty rule in its legislation.[1701] In China's view, once an authority chooses to apply a lesser duty, "an authority is bound to interpret the term '*injury*' in terms of Article 3."[1702] China submits that the implementation of a lesser duty rule necessarily involves a determination of injury, which implies that Article 3.1 is relevant, and that the concept of injury must be the same for lesser duty.[1703]

7.902 China considers that Articles 3.1, 3.2, 9.1, 9.2 and 17.6(i) of the AD Agreement provide guidance for the determination of an appropriate lesser duty, application of which is mandatory under EU law,[1704] and bases its claims on Articles 3.1 and 17.6(i) of the AD Agreement, asserting that "this is the only way that a lesser duty assessment could be challenged." China rejects as an impermissible interpretation of Article 9.1 the view that since the only expressed maximum duty level is the amount of the dumping margin, WTO Members using the lesser duty rule are free to set any duty level below that amount. China argues that to allow investigating authorities to set any duty level up to the maximum of the dumping margin could open the door to "discriminatory and non-objective setting of anti-dumping duty levels".[1705]

7.903 China emphasizes that it understands the European Union's lesser duty calculation methodology, including that "non-injurious price represents '*the price that would be adequate to remove the injury to the domestic industry*'."[1706] China recognizes that there are no definitions of the concepts or methodologies relevant to application of a lesser duty rule in either the AD Agreement or EU law. Nonetheless, China considers that certain principles "might be useful in interpreting the lesser duty rule provision", including the concept of price undercutting in Article 3.2.[1707] China concludes that the European Union's price underselling methodology, used in its lesser duty calculation, is conceptually similar to Article 3.2 of the AD Agreement.[1708]

7.904 According to China, the European Union applies its lesser duty rule by calculating a price which represents the price that would be adequate to remove the injury to the domestic industry, the "non-injurious price", usually by taking the cost of production of the EU industry, and adding a

[1700] China, first written submission, paras. 1102-1145.
[1701] China, first written submission, para. 1088.
[1702] China, second written submission, para. 1376 (italics in original).
[1703] China, second written submission, para. 1382.
[1704] China, answer to Panel question 98, para. 651.
[1705] China, second written submission, paras. 1374-1375, referring to European Union, first written submission, para. 659.
[1706] China, second written submission, para. 1364, quoting China, first written submission, para. 1090 (italics in original).
[1707] China, second written submission, para. 1365.
[1708] China, first written submission, para. 1092; second written submission, paras. 1368-1371.

reasonable rate of profit.[1709] It then compares the non-injurious price to the price of the dumped imports, and the difference, expressed in percentage terms, is referred to by China as the margin of "price underselling", "injury elimination level" or "injury margin".[1710] The anti-dumping duty is set at a rate that will enable the domestic industry to cover its costs and obtain the profit that could reasonably be expected in the absence of dumped imports.

7.905 China contends that the European Union originally followed its usual methodology in this case, but then changed its methodology to take account of the fact that imports from China were limited by a quota for most of the period of investigation. China states that the European Union first calculated injury margins, following its usual practice, of 29.5 per cent for Viet Nam and 23 per cent for China, but then, stating that the investigation was characterized by "distinct and exceptional features", notably the existence of a quota on Chinese imports for much of the period of investigation, the European Union adjusted the injury margins to give consideration to the "quantitative element of injurious dumping." The adjustment resulted in injury margins for China and Viet Nam respectively of 16.5 per cent and 10 per cent. As a result, China contends that "the definitive anti-dumping duty imposed on China was significantly higher than that imposed on Viet Nam, despite the fact that Viet Nam's dumping, price undercutting, and injury margins were all higher than those applied to China."[1711]

7.906 China asserts that the European Union did not adequately explain the rationale behind the methodology used to calculate the adjusted injury margins. China recalls that the Panel's "evaluation of the methodology can only be made on the basis of the public notice or any other document of public or confidential nature from the time of the original investigation", and asserts that the two relevant documents in this regard are the Definitive Regulation and the Additional Final Disclosure Document. According to China, the European Union determined that the 2003 volume of imports from China and Viet Nam was non-injurious and calculated the non-materially injurious value amount of imports ("NIV") on the basis of that volume of imports. Subsequently, the European Union allocated 62 per cent of the NIV to Viet Nam and 38 per cent to China, reflecting import volumes during the period of investigation. China considers that this allocation was not adequately explained, as China asserts that the actual split in import volume for 2003 was 76 per cent for Viet Nam and 24 per cent for China, and in 2005, the first year with no quota on Chinese imports, the split was 65 per cent for Viet Nam and 35 per cent for China.[1712] China asserts that by allocating the NIV based on the ratio of imports in the period of investigation, the European Union "effectively 'freezes' the quota-distorted import situation,"[1713] and the European Union failed to explain how the choice of period "even[ed] out distortions due to differences in average per unit values of Chinese and Vietnamese imports" as stated in the Definitive Regulation.[1714] According to China, the European Union later selected 2005 as the denominator in the adjustment calculation, without adequately explaining the logic behind using data from different periods.[1715] China contends that had data from only one period been used consistently, the result would have been a lower anti-dumping duty for China than for Viet Nam.[1716] China claims that the adjustment of the underselling margin by applying a volume-based reduction ratio to the originally calculated price-based margin, and the allocation of

[1709] China, first written submission, para. 1093.
[1710] China, first written submission, para. 1090.
[1711] China, first written submission, paras. 1095-1098, 1101; referring to and quoting Definitive Regulation, Exhibit CHN-3, recitals 298, 301.
[1712] China, first written submission, paras. 1102-1109. China contends that the difference between 2003, the period of investigation, and 2005 reflect the fact that the quota applied to Chinese imports for the entire year 2003, for 8 months of the 12-month period of investigation, and not at all in 2005.
[1713] China, first written submission, para. 1112.
[1714] China, first written submission, para. 1111, quoting Definitive Regulation, Exhibit CHN-3, recital 309.
[1715] China, first written submission, paras. 1115, 1119.
[1716] China, first written submission, para. 1120.

the non-injurious import value in relation to import values for 2005, which was outside the investigation period, constitute violations of Articles 3.1 and 17.6(i) of the AD Agreement.[1717]

7.907 In addition, China notes that the injury margin was calculated based on a weighted-average to weighted-average basis, as the dumping margin had been calculated. However, only some of the Chinese exporters' sales were used in calculating underselling.[1718] China asserts that this approach raises two problems: i) the use of different export price datasets for the dumping and injury margin calculations and ii) the fact that not all export prices were used in the latter. China asserts that for the lesser duty rule, a direct comparison is made between the dumping and injury elimination margins, and that unless the same set of export sales is used the dumping and injury margins could not be compared.[1719] China refers to the findings of the panel in *EC - Bed Linen* with respect to zeroing as guidance for assessing whether the European Union's injury margin determination was unbiased and objective, and concludes that if the injury margin had been calculated on the basis of all export prices, the rate of anti-dumping duty "may have been significantly different."[1720] China claims that by relying on different approaches in calculating the dumping and injury margins and by not including all export sales in applying the lesser duty rule, the European Union violated Articles 3.1 and 17.6(i) of the AD Agreement.[1721]

7.908 China also challenges the European Union's determination of the reasonable rate of profit used in determining the injury margin on the basis of sales of footwear not affected by injurious dumping. China asserts that "[f]ootwear not subject to materially injurious dumping is not product concerned and the rate of profit achievable may be much higher for footwear not subject to investigation." China also considers that the European Union did not act even-handedly by taking into account only the profitability of one segment of the domestic industry. China claims that the European Union's calculation of the profit margin for the EU industry was not objective, and thus violated Article 3.1 of the AD Agreement.[1722]

7.909 Finally, China asserts that imports from China cannot have caused more injury than imports from Viet Nam, as the dumping, price undercutting, injury, and original underselling/injury margins[1723] calculated for Viet Nam were higher than those calculated for China.[1724] In addition, Viet Nam had a significantly higher market share than China during the injury investigation period, including during the period of investigation.[1725] China considers that the Article 9.2 "obligation not to discriminate between "*imports … from all sources found to be dumped and causing injury*" applies equally in case an anti-dumping duty is imposed at a level "*[that] would be adequate to remove the injury to the domestic industry*.""[1726] Moreover, China asserts that even though the European Union's methodology may appear reasonable, the result is discriminatory.[1727] Therefore, China argues that

[1717] China, first written submission, para. 1122; second written submission, para. 1388.

[1718] China, first written submission, paras. 1123 and 1124. China notes that the European Union indicated "that only 46.6% of the Chinese exporters' sample export sales were used in calculating the injury margin". China explains that "[t]he exports of the Chinese sample were 7.3 million pairs, while the matching sales in the injury margin calculation were 3.4 [million] pairs. The matching sales accounted for 46.6% of the total export sales of the sample." China, first written submission, fn. 757.

[1719] China, first written submission, paras. 1125-1126.

[1720] China, first written submission, paras. 1129-1131.

[1721] China, first written submission, para. 1134; second written submission, para. 1391 (and drafting correction to China, first written submission, para. 1134, pursuant to China, second written submission, fn. 844).

[1722] China, first written submission, paras. 1138-1141; second written submission, para. 1393.

[1723] China, second written submission, para. 1400, clarifying that China, first written submission, para. 1143 refers to China, first written submission, para. 1100.

[1724] China, first written submission, para. 1143.

[1725] China, first written submission, para. 1143.

[1726] China, answer to Panel question 98, para. 653.

[1727] China, second written submission, para. 1397.

taking into account the European Union's adjustment of the price underselling margin and the impact of adjustment on the level of duty to be collected, the anti-dumping duties applied to Chinese exports were imposed and collected on a discriminatory basis, in violation of Article 9.2 of the AD Agreement.[1728]

(ii) European Union

7.910 The European Union contends that China's claims concerning the application of the lesser duty rule in this case are based on fundamental misunderstandings about the WTO provisions it invokes. The European Union notes that the lesser duty principle in Article 9.1 of the AD Agreement is implemented by many Members, but that this is the first time that the implementation of this principle has been challenged. Moreover, the European Union maintains that China does not understand the purpose of the European Union's methodology in applying the lesser duty rule under EU legislation.[1729]

7.911 The European Union first asserts that China's claim under Article 9.1 of the AD Agreement is not within the Panel's terms of reference, because it was not included in China's consultations request, but was first mentioned in China's request for establishment of a panel.[1730] Moreover, the European Union argues, China failed to develop arguments in support of its claim on the basis of Article 9.1, and therefore has abandoned this claim. The European Union contends in this regard that China frames its arguments concerning the application of the lesser duty rule in terms of Articles 3.1 and 17.6(i) of the AD Agreement. In addition, the European Union asks the Panel to conclude that insofar as China focuses on the stage of the proceeding at which the level of duties is set, the Panel should find the claim outside its terms of reference.[1731]

7.912 With respect to substance, the European Union contends that the first sentence of Article 9.1 explicitly envisages that, where all requirements for the imposition of an anti-dumping duty have been fulfilled, a WTO Member may nevertheless decide not to impose such duties or may impose them at a lower level than the margin of dumping. The European Union contends that with respect to the imposition at a lower level than the margin of dumping, there is no qualification as to the level at which the duties could be set.[1732] The European Union contends that while the second sentence of Article 9.1 provides that imposition of a lesser duty adequate to remove the injury is desirable, the option of imposing a lesser duty is not limited to this situation. The European Union asserts that

> "even if the expression 'adequate to remove the injury' was capable of being given a particular meaning in the light of Article 3 [of the AD Agreement], there is no obligation on a Member to adopt that meaning if it operates a system for imposing 'lesser duties'."[1733]

The European Union concludes that there is no principle in WTO law which could result in the imposition of such an obligation on a WTO Member merely because it describes its lesser duty system as one involving lesser duty adequate to remove the injury.[1734]

7.913 With respect to China's claims under Article 17.6(i) of the AD Agreement, the European Union reiterates its objections to these claims. Moreover, the European Union contends

[1728] China, first written submission, paras. 1142 and 1145; second written submission, para. 1401.
[1729] European Union, first written submission, paras. 651-653.
[1730] European Union, first written submission, paras. 654-655; request for preliminary ruling, para. 127.
[1731] European Union, first written submission, para. 659.
[1732] European Union, opening oral statement at the second meeting with the Panel, para. 403.
[1733] European Union, opening oral statement at the second meeting with the Panel, para. 404.
[1734] European Union, opening oral statement at the second meeting with the Panel, para. 404.

that, even if a claim under Article 17.6(i) were properly before the Panel, China's claim is based on the assumption that the lesser duty principle is linked to the notions of injury and price undercutting in Article 3 of the AD Agreement.[1735] In the European Union's view, Members are under no obligation to apply Article 3.1 in the context of lesser duty.[1736] In addition, the European Union contends that a claim that a Member has adopted the wrong calculation method under the AD Agreement cannot constitute a challenge to that Member's evaluation of facts.[1737]

7.914 Assuming that the claim is within the Panel's terms of reference, the European Union submits that the calculation and imposition of a lesser duty is entirely voluntary, and is not addressed by Article 3.1 of the AD Agreement.[1738] According to the European Union, Article 3.1 concerns the determination of injury for purposes of Article VI of the GATT 1994. Article VI contains no reference, express or implied, to the notion of lesser duty. While Articles VI:1 and VI:6 of the GATT 1994 establish the notion of injury as a precondition for the levying of an anti-dumping duty, only Article VI:2 refers to a limit on the amount of duty, stating that the duty should not be greater than the margin of dumping. Accordingly, the European Union argues that concepts such as objective examination in Article 3.1, applicable to the determination of injury, could only apply to the calculation of a lesser duty as a consequence of some other provision of the AD Agreement, but China has proffered no indication in this regard.[1739] Accordingly, the European Union considers that there is no basis for China's claim under Article 3.1, since the calculation of a lesser duty is not subject to the obligations of Article 3.1.[1740]

7.915 Moreover, the European Union argues that even if the clear wording of Article 3.1 did not make this point evident, its context would. In the European Union's view, the voluntary character of lesser duty confirms that "the WTO rules impose a maximum limit on the quantity of anti-dumping duties that may be imposed, but below this level Members are free to set whatever amount of duty they wish." The European Union asserts that these same arguments refute China's invocation of Article 3.1 with respect to the range of export sales used in calculating price underselling, and the determination of a reasonable profit margin. Moreover, the European Union maintains that in order to determine a reasonable profit level for the domestic industry for purposes of calculating an injury margin, it is entirely rational and objective for an investigating authority to look at the profit level in a segment of the footwear industry that was not the victim of the dumping.[1741]

7.916 The European Union does consider that the calculation of lesser duty is subject to Article 9.2 of the AD Agreement, which requires the collection of anti-dumping duties on a non-discriminatory basis.[1742] The European Union asserts that China's arguments under Article 9.2 refer entirely "to the effects of the European Union's methodology rather than the methodology itself".[1743] The European Union contends that China has not established that the European Union's methodology for calculating the lesser duty in this case was discriminatory towards Chinese producers, since China failed to articulate any effective argument in support of its claim, or demonstrate discrimination on the part of the Commission.[1744] The European Union argues that the reasons for departing from its normal practice in calculating lesser duty in this case were fully explained in the Definitive

[1735] European Union, first written submission, paras. 669-670.
[1736] European Union, first written submission, para. 677.
[1737] European Union, first written submission, paras. 674 and 676. See also opening oral statement at the second meeting with the Panel, para. 405.
[1738] European Union, first written submission, para. 664.
[1739] European Union, first written submission, paras. 662-663.
[1740] European Union, answer to Panel question 99, para. 268.
[1741] European Union, first written submission, paras. 664-667.
[1742] European Union, answer to Panel question 99, para. 269; opening oral statement at the second meeting with the Panel, para. 402.
[1743] European Union, first written submission, para. 683.
[1744] European Union, first written submission, paras. 685, 687 and 691.

Regulation, and rest on the unusual circumstance that Chinese exports of footwear were subject to a quota limit during most of the injury investigation period.[1745] Further, the European Union argues that it is not clear to what China is referring when it argues that, according to "all objective measures" the injury from Vietnamese imports was greater than that from Chinese imports.[1746] The European Union maintains that such a broad assertion cannot form the basis of a viable claim, and must be judged against the basic notion of discrimination, and not on the particular interpretation China wishes to accord to it.[1747] Therefore, the European Union considers that China's claim based on Article 9.2 of the AD Agreement must also be rejected.[1748]

(b) Arguments of third parties

(i) Colombia

7.917 Colombia explains that its investigating authority analyses all variables for the determination of injury provided for in Article 3 of the AD Agreement, when determining the application of a lesser duty. Therefore, the investigating authority in Colombia analyses the "adequacy of the lesser duty in light of Article 3.1 and all of the paragraphs in Article 3 of the AD Agreement", and in accordance with Article 9.1 of the AD Agreement, the investigating authority "undertakes a comparison between the prices of the dumped products under investigation and the like domestic product, during the period where the dumping took place."[1749]

(ii) United States

7.918 The United States maintains that Article 9.1 of the AD Agreement does not obligate WTO Members to apply a lesser duty, and "for those Members that do apply a lesser duty rule, neither Article 9.1 nor any other provision of the AD Agreement provides any guidance on how to calculate a lesser duty". In addition, the United States notes that Article 9 does not cross-reference Article 3 of the AD Agreement, and contends that the latter provision is not definitional in nature. Therefore, according to the United States, there is no textual basis to incorporate Article 3.1 requirements for making an injury determination to the application of a methodology that Members are under no obligation to apply. Moreover, the United States asserts that "while a lesser duty analysis under Article 9.1 presupposes that an authority has made an affirmative injury determination under Article 3, a lesser duty analysis is not the equivalent of an injury determination". In other words, the United States considers that, on the one hand, for purposes of a lesser duty, the investigating authority calculates the level of duty that will serve to "remove the injury", but on the other hand, Article 3 addresses how an investigating authority should determine the existence of injury. Finally, the United States asserts that nothing in Article 3 directs an investigating authority to quantify the "amount" of injury or even provides a basis for the calculation of the duty level that would be sufficient to eliminate the injurious effect of dumped imports.[1750]

(iii) Viet Nam

7.919 Viet Nam notes that although the application of the lesser duty principle is encouraged by the text of Article 9.1 of the AD Agreement, WTO Members are not obliged to apply the lesser duty principle. Consequently, Viet Nam understands that "a Member may use the notion of injury in its lesser duty rules without thereby incurring a new WTO obligation or extending an existing one."

[1745] European Union, first written submission, para. 684.
[1746] European Union, first written submission, para. 686.
[1747] European Union, first written submission, paras. 686 and 690.
[1748] European Union, first written submission, para. 691.
[1749] Colombia, third party written submission, paras. 27-28.
[1750] United States, third party written submission, paras. 38-40.

Viet Nam concludes that "it is groundless to claim that either the lesser duty rule itself or methodology used in application of the rule is inconsistent with the WTO regulations."[1751]

(c) Evaluation by the Panel

7.920 Before addressing China's claims, we consider it useful to set out our understanding of the facts. In the original anti-dumping investigation at issue, the European Union determined that dumped imports from China and Viet Nam caused material injury to the then-EC footwear industry, and therefore that definitive anti-dumping measures should be imposed.[1752] As required by EU law, the Commission went on to consider the level of the definitive anti-dumping measures to be applied, noting that it should be

> "sufficient to eliminate the material injury to the Community industry caused by the dumped imports without exceeding the dumping margins found. When calculating the amount of duty necessary to remove the effects of the materially injurious dumping, it was considered that any measure should allow the Community industry to recover its costs and obtain a profit before tax that could be reasonable achieved under normal conditions of competition, i.e. in the absence of dumped imports taking into account the existence of a quota regime covering imports from PRC until the end of 2004."[1753]

To calculate the amount of duty necessary to achieve these aims, the Commission first established a profit margin which the domestic industry could be expected to obtain in the absence of materially injurious dumping and explains how the applicable profit margin was determined to be 6 per cent on turnover. It next determined the price increase that would be necessary in order to bring the prices of imports to a non-injurious level, that is, a level which would allow the industry to achieve the profit rate established in the first step. This resulted in the calculation of "underselling" margins of 23 per cent and 29.5 per cent for China and Viet Nam, respectively.[1754] The Commission next addressed certain "particularities" of the proceeding, notably the fact that until January 2005, imports from China were subject to quantitative restrictions. The Commission stated that this called for a "closer consideration of the adequate level of definitive anti-dumping measures" and concluded that "non-materially injurious import quantities had to adequately be reflected in the injury elimination levels". In order to do so, the Commission adjusted the "injury elimination levels" for China and Viet Nam on the basis of import volumes for 2003, which were considered not materially injurious. The resulting "non-materially injurious amounts" were then set in proportion to the imports in 2005, the first year not affected by quantitative restrictions. Finally, the duty levels established were reduced. This resulted in the determination of "injury thresholds" of 16.5 per cent and 10 per cent for China and Viet Nam respectively.[1755] Finally, the Commission responded to the comments of interested parties made in response to the additional disclosure of this methodology.[1756] The definitive duties were established at the lower of the dumping or injury margins for both China and Viet Nam,

[1751] Viet Nam, third party written submission, paras. 23-24.

[1752] The Commission first considered, as required by EU law, whether the imposition of definitive measures was in the Community (now Union) interest, and determined that it was. Definitive Regulation, Exhibit CHN-3, recitals. 248-283.

[1753] Definitive Regulation, Exhibit CHN-3, recital 288.

[1754] Definitive Regulation, Exhibit CHN-3, recitals 289-295. As we understand it, this "price underselling" margin is the difference, expressed as a percentage of the total CIF import value, between the weighted average import price and the non-injurious price of imports from China and Viet Nam.

[1755] Definitive Regulation, Exhibit CHN-3, recitals 296-301. The same methodology was applied to determination of an injury threshold for Golden Step, the only Chinese company to receive market economy treatment. However, as its dumping margin was lower than the injury threshold so calculated, the definitive duty was applied at the level of the dumping margin. *Id.*, recitals 302 and 322.

[1756] Definitive Regulation, Exhibit CHN-3, recitals. 303-314.

resulting in the injury elimination levels being established as the ceiling for the country-wide duty rates established for both countries.[1757]

7.921 China claims that, as a result of establishing the level of lesser duty on imports from China at a rate higher than the rate of lesser duty established for imports from Viet Nam, the European Union's imposition and collection of duties violates Articles 3.1, 3.2, 9.1, 9.2 and 17.6(i) of the AD Agreement. We note that China has made two separate claims in this regard. Claim III.6 concerns alleged violations of Articles 3.1, 3.2, 9.1 and 17.6(i) of the AD Agreement in the European Union's calculation of the lesser duty, specifically with regard to the adjustment of the "injury margin", the calculation of "underselling", and establishment of a "reasonable profit margin" for the EU industry. Claim III.16 concerns alleged violations of Articles 3.1 and 9.2 of the AD Agreement by discriminating against China in the collection of anti-dumping duties. Since China's arguments under these two claims are largely similar and overlapping, we address the issues raised without distinction.[1758]

7.922 The European Union objects to the inclusion of Article 9.1 in China's claims. We recall that we have found that this aspect of China's claim is within our terms of reference.[1759] However, China's only reference in its first written submission to Article 9.1 was in the context of describing the factual background, and simply stated that while Article 9.1 expresses a preference for application of a lesser duty, EU legislation establishes a mandatory lesser duty rule.[1760] The European Union argued that China had abandoned its claim under Article 9.1.[1761] In its second written submission, China argued further that the European Union was asserting an impermissible interpretation of Article 9.1 with respect to the lesser duty principle.[1762]

7.923 In our view, China has not made out a *prima facie* claim of violation of Article 9.1. China itself acknowledges that its legal arguments are based "in terms of the interpretation of Articles 3.1 and 17.6(i)."[1763] While China argues that the European Union puts forward an impermissible interpretation of Article 9.1, China makes no specific arguments explaining the alleged violation of Article 9.1. We therefore make no finding with respect to Article 9.1 in the context of China's claim III.6.[1764]

7.924 Nonetheless, we consider that Article 9.1 of the AD Agreement is the appropriate starting point for our examination of China's claims, as it contains the only reference to the concept of lesser duty in the AD Agreement. Article 9.1 is in the AD Agreement under the heading "Imposition and Collection of Anti-Dumping Duties", and provides:

[1757] Definitive Regulation, Exhibit CHN-3, recitals 322-324. The duty rate for Golden Step, the only Chinese company granted market economy treatment, was set at the level of its dumping margin, which was lower than the injury elimination level. *Id.*, recitals 302 and 322.

[1758] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[1759] See paragraphs 7.51-7.61 above.

[1760] See China, first written submission, para. 1088.

[1761] European Union, first written submission, para. 659.

[1762] China, second written submission, paras. 1373-1377.

[1763] China, second written submission, para. 1374.

[1764] However, we note that we find it difficult to see how this provision could be understood to establish obligations with respect to the adjustment of injury margins, the underselling calculation, and the establishment of profit margins, as Article 9.1 does not set out any methodological guidance or any criteria, even implicitly, with respect to the calculation of a lesser duty.

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

While the term "lesser duty" is not defined in the AD Agreement, it is clear that this term refers to the concept of an anti-dumping duty less than the full amount of the margin of dumping, as described in Article 9.1. It is also clear from the text of Article 9.1, and China does not dispute, that the imposition of a lesser duty is "desirable", but is not an obligation for WTO Members.[1765] Beyond stating that a lesser duty is desirable, if such lesser duty would be "adequate to remove the injury to the domestic industry", Article 9.1 says nothing about how the amount of a lesser duty should be established. Moreover, Article 9.1 also establishes that a Member may choose **not** to impose any anti-dumping duty at all, even where all the requirements for imposition have been fulfilled, suggesting that there is no lower limit on the amount of duty that a Member may impose if all the requirements for imposition have been fulfilled. Article 9.3 of the AD Agreement, on the other hand, establishes a clear upper limit on the amount of anti-dumping duty that may be imposed. It requires Member to ensure that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This is consistent with Article VI:2 of the GATT 1994, which provides that "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." There is no equivalent to Article 9.1 in the GATT 1994, which does not even mention the possibility of levying an anti-dumping duty in any lesser amount.[1766] In our view it is clear, and indeed, China does not contend otherwise, that Article 9.1 does not prescribe any methodology or criteria for the determination of the amount of a lesser duty, should a Member choose to apply one.

7.925 Article 3.1 of the AD Agreement, which is the principal basis of China's claims,[1767] provides:

> "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products."

As several panels and the Appellate Body have noted, Article 3.1 informs the more detailed obligations with respect to determination of injury set out in the subsequent paragraphs of Article 3 of the AD Agreement.[1768] It is clear from Article 3.1 that investigating authorities must ensure that a "determination of injury" is made on the basis of "positive evidence" and an "objective examination"

[1765] See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 122, and fns. 150 and 156; Panel Report, *US – Steel Plate*, para. 7.116.

[1766] Clearly, however, Article VI of the GATT 1994 does not preclude the possibility of a lesser duty. We note that whether or not the application of a "lesser duty" is mandatory under Article 9(5) of the Basic AD Regulation, or any other EU law or practice, is irrelevant to our consideration of China's claims, as our jurisdiction extends only to the WTO covered agreements under which those claims are made.

[1767] We recall that we have concluded that Article 17.6(i) does not establish obligations on investigating authorities in the conduct of anti-dumping investigations, and have dismissed China's claims under that provision. See paragraphs 7.35-7.44 above. We therefore do not address China's claim under that provision further here.

[1768] Appellate Body Report, *Thailand – H-Beams*, para. 90; and Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345, para. 7.119.

of the volume and effect of dumped imports.[1769] Thus, Article 3.1 establishes criteria and standard for an investigating authority's determination of injury, which, as set out in footnote 9, means material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry. However, Article 3.1 does not prescribe a particular methodology that must be followed making that determination.[1770]

7.926 Nothing in Article 3.1 refers to the concept of a lesser duty, much less to any methodology or criteria for determining the amount of such a lesser duty, should a Member choose to apply one. China's argument rests on the premise that, because Article 9.1 of the AD Agreement refers to the imposition of a lesser duty "if such lesser duty would be adequate to remove the injury to the domestic industry", that reference to "injury" in Article 9.1 means that "[i]mplementation of a lesser duty rule necessarily involves a determination of injury which implicitly means that Article 3.1 is relevant."[1771] The European Union, on the other hand, asserts that the option of imposing a lesser duty is not limited to a situation where the amount of the lesser duty is adequate to remove the injury, and therefore Article 3.1 has no bearing on the determination of a lesser duty.[1772]

7.927 We agree with the European Union, and consider that while the imposition of a duty at a level adequate to remove the injury is clearly contemplated by Article 9.1, this does not limit the basis on which an investigating authority may choose to apply a duty less than the full amount of the margin of dumping. Even assuming that, as in this case, an investigating authority's stated basis for application of a lesser duty is to impose a duty at a level adequate to "eliminate the material injury to the … industry caused by the dumped imports without exceeding the dumping margins",[1773] this does not, in our view, establish that Article 3.1 is relevant to the establishment of the level of lesser duty to be applied. There is, in our view, no basis in the text of Article 3.1 for the conclusion that it requires any particular approach to the calculation of a level of duty that will be sufficient to remove the injury determined to exist.

7.928 We recall that an injury determination made in conformity with the requirements of Article 3 of the AD Agreement, including Article 3.1, is one of the prerequisites for the establishment of a WTO Member's right to impose a definitive anti-dumping measure. The option of applying a lesser duty only arises once this phase of an anti-dumping investigation has been concluded, and the Member has concluded that an anti-dumping duty may be imposed. That is, the question of determining the level of duty less than the margin of dumping to be imposed only arises (if, indeed, it arises at all, given that application of a lesser duty is not mandatory), after the right to impose an anti-dumping duty has been established. Therefore, in our view, Article 3.1, which does not even provide guidance concerning methodologies for the determination of injury, cannot be stretched to provide guidance for the calculation of a lesser duty, which is not required in any case.[1774] Certainly, in the case of an investigating authority which seeks to establish a level of duty "adequate to remove the injury", the injury referred to is the injury determined under Article 3. However, we do not agree that this suffices to establish that the requirements of Article 3 for the determination that such injury exists are necessary elements of the calculation of the amount of lesser duty to be applied.

[1769] Appellate Body Report, *EC – Bed Linen*, para. 110.

[1770] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.

[1771] China, second written submission, para. 1382.

[1772] European Union, opening oral statement at the second meeting with the Panel, para. 37; answer to Panel question 99, para. 268.

[1773] Definitive Regulation, Exhibit CHN-3, recital 288.

[1774] In this regard, we note that there is nothing in Article 3.1, or indeed, anywhere in Article 3 of the AD Agreement, that would require a quantification of the injury found to exist. While an investigating authority might choose to employ some form of quantitative analysis, which might result in some estimation of the "amount" of injury, in the absence of any requirements in this regard, it seems even less possible that Article 3.1 could be understood to provide guidance to the calculation of an amount of duty "adequate to remove the injury to the domestic industry" as indicated in Article 9.1.

7.929 China also asserts a violation of Article 3.2 of the AD Agreement, which provides:

> "With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

Article 3.2 thus establishes specific requirements, expanding on Article 3.1, with respect to the consideration of the volume and prices of dumped imports in making a determination of injury.[1775] However, again, nothing in Article 3.2 prescribes a particular methodology for the considerations that the investigating authority must undertake, including consideration of whether there has been "significant price undercutting".[1776] China's arguments with respect to Article 3.2 simply assert a conceptual similarity between "price undercutting" referred to in Article 3.2, and the notion of "price underselling" in the European Union's calculation of the lesser duty to be applied.[1777] Even assuming that the two are similar concepts, we fail to see how this can establish that, in considering the question of price underselling, the European Union is required to comply with Article 3.2, which as noted, establishes no specific guidelines for the consideration of price undercutting.

7.930 China also claims a violation of Article 9.2 of the AD Agreement, which provides in relevant part:

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

Article 9.2 clearly requires an investigating authority to collect an anti-dumping duty in "the appropriate amounts" on all imports found to be dumped and causing injury without discriminating between different sources of those imports. While this is generally understood to prohibit discriminatory collection of anti-dumping duties as between imports found to be dumped and causing injury from different sources within a single WTO Member,[1778] China's argument is that the European Union discriminated between imports from China and Viet Nam with respect to the rate of lesser duty imposed. China argues that the European Union discriminated against China in adjusting the injury margin, resulting in a higher duty rate for China than for Viet Nam, since Viet Nam's market share

[1775] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 113.

[1776] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.

[1777] China states that "this point is only being made in order to establish the correct context within which the European Union's price underselling calculation takes place." China, second written submission, para. 1371.

[1778] See, for example, Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* ("*US – Softwood Lumber V (Article 21.5 – Canada)*"), WT/DS264/RW, adopted 1 September 2006, as reversed by Appellate Body Report WT/DS264/AB/RW, DSR 2006:XII, 5147, para. 5.38. ("It is not clear that collection of duty only on imports into certain regions, to certain purchasers, or during certain time-periods, even if otherwise possible, would be consistent with [Article 9.2]." (footnote omitted)).

was higher than China's, Viet Nam's dumping margin was higher than China's, and by "all objective measures" imports from Viet Nam caused more injury to the EU industry than imports from China.[1779]

7.931 In our view, China's argument does not state a claim that falls within the scope of Article 9.2. Even assuming that Article 9.2 applies to the collection of anti-dumping duties from sources in different WTO Members, a question we need not and do not address,[1780] there is no dispute that the European Union did collect duties, in what it had determined to be the "appropriate amounts", on imports from "all sources" found to be dumped and causing injury, that is, on imports from both China and Viet Nam.[1781] That the rate of duty on imports from different sources is different does not establish a violation of Article 9.2 – indeed, this is to be expected.

7.932 China argues that the European Union discriminated against China because several indicators demonstrated that imports from China were causing less injury to the EU industry than imports from Viet Nam were causing, but the rate of lesser duty on import from China was higher than the rate of lesser duty on imports from Viet Nam. However, in our view, these "indicators" do not demonstrate that the lesser duty applied to imports from China should have been lower than the lesser duty applied to imports from Viet Nam, given that we have found that the AD Agreement provisions relied upon by China do not establish any requirements for the determination of the amount of a lesser duty at all.

7.933 Based on the foregoing, we conclude that China has failed to demonstrate that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, 9.2 and 17.6(i) of the AD Agreement in the imposition and collection of anti-dumping duties on imports from China.

9. Claims II.14 and III.21 – Alleged consequential violations of Articles 1 and 18.1 of the AD Agreement

7.934 We now turn to the consequential claims raised by China.[1782] With respect to both the Review Regulation and the Definitive Regulation, China alleges violations of Articles 1 and 18.1 of the AD Agreement as a consequence of the violations it alleges with respect to the dumping, injury, and procedural aspects of both regulations.[1783] More specifically, with respect to the Review Regulation, China claims violation of Articles 1 and 18.1 as a consequence of alleged violations of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.1.2, 6.2, 6.3, 6.5, 6.5.1, 6.5.2, 6.8, 6.10, 12.2.2 and 17.6(i) of the AD Agreement.[1784] With respect to the Definitive Regulation, China claims violations of Articles 1 and 18.1 as a consequence of alleged violations of Articles 2.2.2, 2.4, 2.6, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1,

[1779] China, first written submission, para. 1143; second written submission, paras. 1400-1401; answer to Panel question 117, paras. 65-69.

[1780] We recall that China's claim of discrimination in this context is made only under Article 9.2 of the AD Agreement.

[1781] China has made no claim under Article 9.2 of the AD Agreement challenging the amount of lesser duty collected on imports from China as not "appropriate", although it does challenge the European Union's methodology in calculating that amount under Articles 3.1, 3.2, 9.1 and 17.6(i) of the AD Agreement, a claim we have rejected. To the extent that China is arguing that the appropriate amount of duty was not imposed because imports from China caused less injury than imports from Viet Nam, we have concluded above that the AD Agreement does not contain any obligations with respect to the calculation of a lesser duty, and therefore we see no basis for a claim of violation of Article 9.2 in this regard.

[1782] We recall that we have addressed a number of consequential claims of violation, in particular with respect to Article 6.2 of the AD Agreement, in the course of our findings above.

[1783] We note that China requested findings on these claims with respect to the Review Regulation at paragraphs 817(n) and 1224(n) of its first and second written submissions, respectively, but did not specifically request findings on these claims with respect to the Definitive Regulation.

[1784] China, first written submission, para. 816; second written submission, para. 1221.

6.1.1, 6.2, 6.4, 6.5, 6.5.1, 6.5.2, 6.9, 6.10, 6.10.2, 9.2, 9.3, 12.2.2, and 17.6(i) of the AD Agreement.[1785]

7.935 We note that China has presented no specific arguments in support of these consequential claims. In its first written submission, China simply quotes the text of Articles 1 and 18.1 of the AD Agreement.[1786] In its second written submission, China again quotes these provisions, and in addition refers to the rulings of the panels in *US – 1916 Act* and *US – Customs Bond Directive*. However, China does not connect these rulings to its claims of consequential violations of Articles 1 and 18.1 of the AD Agreement. Nor does China advance any arguments on the basis of these panel reports.[1787] In these circumstances, in light of the detailed findings we have made above, we see no need to rule on these consequential claims. To do so would add nothing to our findings, and would not assist in understanding them. Moreover, as the measures at issue, the Review and Definitive Regulations, have expired, findings on these consequential claims can have no effect on implementation. We therefore consider it appropriate to exercise judicial economy in respect of China's consequential claims of violation of Articles 1 and 18.1 of the AD Agreement.

VIII. CONCLUSION AND RECOMMENDATIONS

A. CONCLUSIONS

8.1 Having considered the European Union's preliminary objections, we conclude that:

(a) China's "as such" claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement and X:3(a) of the GATT 1994 against Article 9(5) of the Basic AD Regulation are within our terms of reference;

(b) China's claim under Article 3.5 of the AD Agreement with respect to the causation analysis in the expiry review is within our terms of reference;

(c) China's claims under 12.2.2 of the AD Agreement with respect to the adequacy of the explanation of the determinations in the original investigation and expiry review are within our terms of reference;

(d) China's claim under Article 9.1 of the AD Agreement with respect to the lesser duty determination in the original investigation is within our terms of reference; and

(e) Article 17.6(i) of the AD Agreement does not impose any obligations on the investigating authorities of WTO Members in anti-dumping investigations that could be the subject of a finding of violation, and we therefore dismiss all of China's claims of violation of Article 17.6(i) of the AD Agreement.

8.2 In light of the findings we have set out in the foregoing sections of our Report, we conclude that China has established that the European Union acted inconsistently with:

(a) Articles 6.10, 9.2 and 18.4 of the AD Agreement, Article I:1 of the GATT 1994, and Article XVI:4 of the WTO Agreement, with respect to Article 9(5) of the Basic AD Regulation "as such";

[1785] China, first written submission, para. 1406; second written submission, para. 1536.
[1786] China, first written submission, paras. 814-815 and 1404-1405.
[1787] China, second written submission, paras. 1222-1223 and 1537.

(b) Articles 6.10 and 9.2 of the AD Agreement with respect to Article 9(5) of the Basic AD Regulation "as applied" in the original investigation;

(c) Article 2.2.2(iii) of the AD Agreement with respect to the determination of the amounts for SG&A and profit for Golden Step in the original investigation;

(d) Article 6.5 of the AD Agreement in connection with the original investigation with respect to:

(i) the non-confidential questionnaire response of one sampled EU producer; and

(ii) missing declarations of support.

(e) Article 6.5.1 of the AD Agreement in connection with the original investigation with respect to:

(i) the individual production data of domestic producers for the first quarter of 2005;

(ii) certain information in the non-confidential questionnaire responses of the sampled EU producers;

(iii) the non-confidential questionnaire response of one sampled EU producer; and

(iv) missing declarations of support.

(f) Article 6.5 of the AD Agreement in connection with the expiry review with respect to:

(i) the non-confidential responses to the standing form of four EU producers;

(ii) Table C4 of the questionnaire response of Company H; and

(iii) certain information in the non-confidential analogue country questionnaire responses of specific producers.

(g) Article 6.5.1 of the AD Agreement in connection with the expiry review with respect to:

(i) certain information in the expiry review request;

(ii) declarations of support; and

(iii) Section B2 of the non-confidential questionnaire response of Company F.

8.3 In light of the findings we have set out in the foregoing sections of our Report, we conclude that China has **not** established that the European Union acted inconsistently with:

(a) Article 6.10.2 of the AD Agreement with respect to the examination of the four Chinese producers who requested individual treatment in the original investigation;

(b) Articles 2.4 and 6.10.2 of the AD Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, and Paragraphs 151(e) and (f) of China's Accession Working

Party Report, with respect to the examination of the non-sampled cooperating Chinese exporting producers' MET applications in the original investigation;

(c) Article 6.10 of the AD Agreement with respect to the selection of the sample for the dumping determination in the original investigation;

(d) Article 11.3 of the AD Agreement with respect to the analogue country selection procedure and the selection of Brazil as the analogue country in the expiry review;

(e) Articles 2.1 and 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 with respect to the analogue country selection procedure and the selection of Brazil as the analogue country in the original investigation;

(f) Article 11.3 of the AD Agreement with respect to the PCN system used by the Commission in the expiry review;

(g) Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 with respect to the PCN system used and the adjustment for leather quality made by the Commission in the original investigation;

(h) Article 2.6 of the AD Agreement, read together with Articles 3.1 and 4.1 of the AD Agreement, with respect to the Special Technology Athletic Footwear (STAF) in the original investigation;

(i) Articles 3.1 and 6.10 of the AD Agreement and Article VI:1 of the GATT 1994 with respect to the procedure for sample selection and the selection of the sample for the injury analysis in the original investigation and the expiry review;

(j) Article 11.3 of the AD Agreement with respect to the procedure for sample selection and the selection of the sample for the injury determination in the expiry review;

(k) Article 3.3 of the AD Agreement with respect to the determination to undertake a cumulative assessment in the original investigation;

(l) Article 11.3 of the AD Agreement with respect to the finding of likelihood of continuation or recurrence of injury in the expiry review;

(m) Articles 3.4, 3.1 and 3.2 of the AD Agreement with respect to the evaluation of injury indicators in the original investigation;

(n) Articles 3.5 and 3.1 of the AD Agreement with respect to the causation determination in the original investigation;

(o) Article 6.1.1 of the AD Agreement and Paragraph 15(a) of China's Accession Protocol with respect to the MET/IT claim forms in the original investigation;

(p) Article 6.1.2 of the AD Agreement with respect to the non-confidential injury and Union Interest questionnaires responses of certain sampled EU producers in the expiry review;

(q) Article 6.4 of the AD Agreement, and as consequence or independently, Article 6.2 of the AD Agreement, with respect to certain information in the original investigation and expiry review;

(r) Article 6.5 of the AD Agreement, and as a consequence or independently, Article 6.2 of the AD Agreement, in connection with the original investigation with respect to:

(i) the names of the complainants, supporters, sampled EU producers, and all known producers;

(ii) the methodology and data used for the selection of the sample of EU producers;

(iii) adjustments for differences affecting price comparability;

(iv) certain information in the complaint;

(v) certain information in the Note for the File dated 6 July 2005; and

(vi) certain information in the non-confidential questionnaire responses of the sampled EU producers;

(s) Article 6.5.1 of the AD Agreement, and as a consequence or independently, Article 6.2 of the AD Agreement, in connection with the original investigation with respect to:

(i) certain information in the complaint;

(ii) certain information in the Note for the File dated 6 July 2005; and

(iii) certain information in the non-confidential questionnaire responses of the sampled EU producers;

(t) Article 6.5.2 of the AD Agreement, and as a consequence, Article 6.2 of the AD Agreement, in connection with the original investigation with respect to certain information in the non-confidential questionnaire responses of the sampled EU producers;

(u) Article 6.5 in connection with the expiry review with respect to:

(i) the names of the complainants, supporters, sampled EU producers in the review, and sampled EU producers in the original investigation that completed the Union Interest questionnaire in the review;

(ii) certain information in the expiry review request and CEC submissions;

(iii) certain information in the non-confidential questionnaire responses of the sampled EU producers;

(iv) the non-confidential Union Interest questionnaire responses of certain EU producers;

(v) certain information in the declarations of support; and

(vi) certain information in the non-confidential analogue country questionnaire responses of specific producers;

(v) Article 6.5.1 of the AD Agreement in connection with the expiry review with respect to:

(i) certain information in the non-confidential questionnaire responses of the sampled EU producers;

(ii) certain information in the expiry review request and CEC submissions;

(iii) the non-confidential Union Interest questionnaire responses of certain EU producers; and

(iv) certain information in the non-confidential analogue country questionnaire responses of specific producers;

(w) Article 6.5.2 of the AD Agreement in connection with the expiry review with respect to:

(i) the names of the complainants, supporters, sampled EU producers in the review, and sampled EU producers in the original investigation that completed the Union Interest questionnaire in the review; and

(ii) certain information in the non-confidential questionnaire responses of the sampled EU producers;

(x) Article 6.2 of the AD Agreement in connection with the expiry review with respect to:

(i) the names of the complainants, supporters, sampled EU producers in the review, and sampled EU producers in the original investigation that completed the Union Interest questionnaire in the review; and

(ii) certain information in the non-confidential questionnaire responses of the sampled EU producers.

(y) Articles 3.1 and 6.8 of the AD Agreement with respect to the failure to apply facts available in the expiry review;

(z) Article 6.9 of the AD Agreement with respect to the time provided for submission of comments on the Additional Final Disclosure in the original investigation;

(aa) Article 12.2.2 of the AD Agreement in connection with the information and explanations provided in respect of specific issues in the original investigation and expiry review; and

(bb) Articles 3.1, 3.2, 9.1 and 9.2 of the AD Agreement with respect to the imposition and collection of anti-dumping duties in the original investigation;

8.4 In light of the findings we have set out in paragraphs 8.2 and 8.3 above, we make no findings, based on judicial economy, with respect to China's claims under:

(a) Articles 9.3 and 9.4 of the AD Agreement and Article X:3(a) of the GATT 1994 with respect to Article 9(5) of the Basic AD Regulation "as such";

(b) Article 9.3 of the AD Agreement with respect to Article 9(5) of the Basic AD Regulation "as applied" in the original investigation;

(c) Article 6.2 of the AD Agreement with respect to the questionnaire response of one sampled EU producer, missing declarations of support, and certain information in the non-confidential questionnaire responses of the sampled EU producers, in the original investigation;

(d) Article 6.2 of the AD Agreement with respect to the non-confidential responses to the standing form of four EU producers and with respect to Table C4 of the questionnaire response of the sampled EU producer (Company H), in the expiry review;

(e) Article 6.5.1 of the AD Agreement with respect to certain information the non-confidential analogue country questionnaire responses of specific producers in the expiry review; and

(f) Articles 1 and 18.1 of the AD Agreement with respect to the original investigation and the expiry review.

B. RECOMMENDATION

8.5 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Union has acted inconsistently with certain provisions of the AD and WTO Agreements and the GATT 1994, it has nullified or impaired benefits accruing to China under these agreements.

8.6 On 28 March 2011, the European Union informed the Panel that, as of 31 March 2011, the anti-dumping measures on certain footwear from China at issue in this dispute would be terminated, and requested that the Panel refrain from making any recommendation pursuant to the first sentence of Article 19.1 of the DSU with respect to the expired measures.[1788] China did not dispute that the anti-dumping measures would expire as indicated by the European Union. However, China opposes the European Union's request that the Panel refrain from making a recommendation, noting that Article 19.1 of the DSU provides that "[w]here a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement."[1789] In addition, China notes the overall function of panels as set out in Article 11 of the DSU. China also takes note of the fact that the Notice of Expiry indicates that the Commission considered it "appropriate to monitor for one year the evolution of the imports of footwear" from China, and asserts that this is a "highly exceptional measure which effectively prolongs certain effects of the challenged measures beyond the period of application of anti-dumping duties". China asserts that it "maintains a legal interest in obtaining findings from the Panel, [and] also to have a *recommendation* from the Panel, in order to avoid a repetition of the lapsed measures in future and to obtain removal of the monitoring of the imports of

[1788] European Union, letter dated 28 March 2011, page 1, referring to Notice of the expiry of certain anti-dumping measures, *Official Journal of the European Union* C 82/4, of 16 March 2011, citing Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("*Dominican Republic – Import and Sale of Cigarettes*"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425, paras. 7.363, 7.393 and 7.419; and Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, paras. 81 and 129.

[1789] China, letter dated 30 March 2011, page 1 (footnotes omitted, emphasis added by China).

footwear."[1790] China further recalls that the other measure at issue in this dispute, Article 9(5) of the European Union's Basic AD Regulation, remains in force, and that it has requested the Panel to suggest that "the European Union … refund the anti-dumping duties paid thus far on imports of the product concerned from China."[1791]

8.7 There is no dispute that two of the measures at issue in this dispute, the Review and Definitive Regulations, expired as of 31 March 2011. In this situation, we conclude that there is no basis for a recommendation to "bring the [expired] measure into conformity" under Article 19.1 of the DSU. We note that the Appellate Body and panels have taken this approach in a number of reports.[1792] Indeed, in one case, the Appellate Body specifically criticized a panel for making a recommendation with respect to a measure that panel had concluded was no longer in existence, and the Appellate Body itself declined to make a recommendation in that case.[1793] We do not agree with China's view that the monitoring of imports of footwear from China by the Commission "prolongs certain effects" of the expired measures. If anything, such monitoring is a distinct measure, which, if a Member believes it to be inconsistent with a provision of the AD Agreement or another covered Agreement, may be the subject of a new dispute. However, this monitoring does not in our view suffice to establish that we could, or should, make a recommendation with respect to the expired measures. The fact that China requested the Panel to make a suggestion under the second sentence of Article 19.1 does not affect our conclusion. First, as discussed further below, it is clear that the making of a suggestion is at the discretion of a panel. Moreover, at least one panel has ruled that, where it makes no recommendation to the DSB on a claim in dispute, it cannot make any suggestion under Article 19.1.[1794] We take the same approach in this case.

[1790] China, letter dated 30 March 2011, page 2 (emphasis in original). In this regard, China asserts that if the Panel were to rule that the measures were inconsistent with the European Union's obligations, the European Union would "necessarily also have to immediately stop monitoring imports of footwear pursuant to the [Notice of expiry]". *Id.*, footnote 4.

[1791] China, letter dated 30 March 2011, page 3.

[1792] Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States* ("*EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*"), WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, para. 479, ("As the measure at issue in this dispute is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU"); Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* ("*Thailand – Cigarettes (Philippines)*"), WT/DS371/R, circulated to WTO Members 15 November 2010 [appeal in progress], para. 8.8 ("We do not make a recommendation for the December 2005 MRSP Notice as it is not disputed that it has expired and does not continue to exist for purpose of Article 19.1 of the DSU".); Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China* ("*US – Poultry (China)*"), WT/DS392/R, adopted 25 October 2010, para. 8.7 ("given that the measure at issue, Section 727 has expired, we do not recommend that the DSB request the United States to bring the relevant measure into conformity with its obligations under the *SPS Agreement* and the GATT 1994.")

[1793] Appellate Body Report, *US – Certain EC Products*, paras. 80-81 and 129 ("the Panel, on the one hand, found that "the 3 March Measure is no longer in existence" and, on the other hand, recommended "that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the WTO Agreement." … there is an obvious inconsistency between the finding of the Panel that "the 3 March Measure is no longer in existence" and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. **The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists**. … As we have upheld the Panel's finding that the 3 March Measure, the measure at issue in this dispute, is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.") (emphasis added).

[1794] Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report

8.8 As a consequence, the only measure as to which we make a recommendation is Article 9(5) of the Basic AD Regulation. Pursuant to Article 19.1 of the DSU, having found that the European Union acted inconsistently with provisions of the AD and WTO Agreements and the GATT 1994 as set out above, we recommend that the European Union bring this measure into conformity with its obligations under those Agreements.

8.9 China requests that the Panel recommend that the DSB request the European Union to withdraw Article 9(5) of the Basic AD Regulation.

8.10 Article 19.1 of the DSU provides:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations". (footnote omitted)

Pursuant to Article 19.1, a panel "shall" recommend that a Member found to have acted inconsistently with a provision of a covered agreement "bring the measure into conformity" and "may" suggest ways in which a Member could implement that recommendation. Thus, a panel is not required to make a suggestion should it not deem it appropriate to do so.[1795]

8.11 We also note that Article 21.3 of the DSU, which requires Members to inform the DSB regarding implementation of panel and Appellate Body recommendations, provides:

> "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". (footnote omitted).

8.12 Previous panels have emphasized that Article 21.3 of the DSU gives the authority to decide the means of implementation, in the first instance, to the Member found to be in violation.[1796] In this case, although we have found the contested measure inconsistent with the AD and WTO Agreements and the GATT 1994 in a number of respects, we do not find it appropriate to make a suggestion with respect to implementation of our recommendation, and we therefore deny China's request in this respect.

WT/DS344/AB/R, DSR 2008:II, 599, para. 8.5 ("We note that by virtue of Article 19.1 of the DSU, a panel has discretion to ("may") suggest ways in which a Member could implement the recommendation that the Member concerned bring the measure into conformity with the covered agreement in question. Having made no recommendations to the DSB on Mexico's claims with respect to which Mexico seeks a suggestion, however, we cannot, and do not, make any suggestion under Article 19.1 of the DSU in these proceedings.").

[1795] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.

[1796] E.g. Panel Reports, *EC – Fasteners (China)*, para. 8.8; and *US – Hot-Rolled Steel*, para. 8.13.

ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. On 4 February 2010, China requested consultations with the European Union. Consultations between China and the European Union were held on 31 March 2010 but failed to result in a mutually satisfactory solution. On 8 April 2010, China requested the establishment of a Panel. The Panel was established on 18 May 2010 and was composed on 5 July 2010.

2. In its first written submission, China presented its view of the facts and legal issues pertinent to this case and at the same time responded to the European Union's Request for a Preliminary Ruling filed on 22 July 2010. The extent to which this summary treats certain facts and legal issues should not be taken as any indication of the relative importance that China attaches to them.

II. CHINA'S RESPONSE TO THE EU'S REQUEST FOR A PRELIMINARY RULING

3. In its Request for a Preliminary Ruling (PR Request), the European Union claimed the following regarding China's Panel Request: a) that China's "as such" claims concerning Article 9(5) of the *Basic AD Regulation* do not meet the specificity requirements of Article 6.2 of the DSU; 2) that China's claims based on Article 17.6(i) of the Anti-Dumping Agreement also fail to satisfy the requirements of Article 6.2 of the DSU, and that in any case Article 17.6(i) cannot form the basis of a claim; 3) that some of China's claims concerning the Review Regulation and Definitive Regulation lack the required specificity regarding the measure that they were attacking, and 4) that certain claims should be excluded from the Panel's terms of reference for "having no basis in the request for consultations".

4. With respect to the European Union's allegations of lack of specificity in the Panel Request as required by Article 6.2 of the DSU, similar allegations were made with respect to disparate claims in three different sections of its PR Request, to which most of China's arguments in response were equally applicable.

5. With respect to the allegations that China has not identified the *specific measures* at issue, China considers that the measures at issue were unambiguously identified with sufficient precision. The three measures are, as they were identified in the Panel Request, (1) Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community as amended, codified and replaced by Council Regulation (EC) No. 1225/2009, (2) Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 and (3) Council Regulation (EC) No. 1472/2006 of 5 October 2006.

6. With respect to the allegations that China failed, in its Panel Request, to provide a brief summary of the legal basis of several of its claims, also made in various sections of the PR Request, China considers that the European Union has erroneously considered that the provision of *legal arguments* with respect to claims is what is required to meet the "summary of the legal basis" standard, when in fact the mere listing of provisions of agreements violated has been held to be sufficient to meet the Article 6.2 DSU standard. Furthermore, China considers that it had generally

gone well beyond the minimum standard of what is considered to constitute a "summary of the legal basis" by explaining which specific parts of the various provisions on which it bases its claims it considered to have been violated. In addition, China considers that the European Union did not demonstrate that its ability to defend its interests has been prejudiced by the alleged lack of specificity with respect to the various claims. Lastly, the European Union ignored the fact that, in order to clarify the meaning of claims made in a panel request, reference may be made to a party's first written submission, which in this case should certainly clarify any ambiguities in the Panel Request, to the extent that there were any.

7. With respect to the assertion that certain of China's claims should be excluded from the Panel's terms of reference because they were not adequately expressed in the request for consultations, China considers that there is no WTO requirement of continuity between the claims in a consultations request and a panel request, and to the extent that there is, the European Union has drastically overstated it. With respect to the addition of Article 9.1 of the Anti-Dumping Agreement that the European Union has identified specifically in claim III.6 concerning the determination of injury in the original investigation, China considers that the addition of the claim under that article cannot be said to have changed the nature of the dispute as a whole, and it can reasonably be said to have evolved from the legal basis indicated in its request for consultations, thus meeting the minimum standard.

8. In the context of the European Union's contention that Article 17.6(i) of the Anti-Dumping Agreement cannot be the basis of a claim because it does not impose an obligation on investigating authorities, and thus China's claims made on the basis of that article should be excluded from the Panel's terms of reference, China considers that, viewed in the context of the relevant agreements and the AB's rulings that a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement when it does not act in conformity with the standards established by that Article, it does indeed impose an obligation on investigating authorities. China has further noted the undesirable practical consequences of considering otherwise, as well as the fact that in this case the Panel should consider China's claims based on Article 17.6(i) of the Anti-Dumping Agreement.

III. CHINA'S CLAIMS CONCERNING ARTICLE 9(5) OF THE *BASIC AD REGULATION*

9. Chinese exporting producers can obtain an individual dumping margin and duty if they obtain Market Economy Treatment (MET). In the event that they do not qualify for MET, they can obtain an individual dumping margin and duty only if they get Individual Treatment (IT), subject to compliance with the five criteria listed in Article 9(5) of the *Basic AD Regulation*. If, however, the non-MET exporting producers fail to demonstrate that they satisfy the five IT criteria of Article 9(5), they cannot obtain an individual dumping margin and duty rate and are automatically subject to the country-wide duty rate. China considers that Article 9(5) of the *Basic AD Regulation* violates Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the Anti-Dumping Agreement, as well as Articles I.1 and X:3(a) of the GATT 1994 and Article XVI:4 of the WTO Agreement. As a result of these violations, China requests that the Panel find Article 9(5) to be inconsistent with the aforementioned provisions and recommend that it be withdrawn.

10. With respect to Article 6.10, China considers that Article 6.10 provides that as a mandatory rule individual dumping margins be determined for each known exporter or producer, except when sampling is applied. Article 6.10.2 further requires that as a rule an individual dumping margin be established for a producer that is not initially sampled if it provides the necessary information and the only exception is when the number of producers/exporters is so large that it would be unduly burdensome to do so and it would prevent the timely completion of the investigation. However, Article 9(5) creates an additional exception, with no counterpart in the Anti-Dumping Agreement, in violation of Article 6.10, that in order to benefit from an individual dumping margin, an exporter from China must fulfil the specific IT conditions.

11. With respect to Article 9.2, China considers that this article is violated in that exporting producers in non-market economy countries that do not obtain MET and fail to qualify for IT will not be subject to an individual anti-dumping duty based on their individual dumping margin which in fact is determinant of the 'appropriate amount' of duty that should be collected from such exporting producers. The Article 9.2 the requirement to specifically name the supplier/s read together with Article 6.10 leaves no room for any other interpretation except that the duty be established on an individual basis for each producer/exporter involved except where it is impracticable to do so because of the large number of producers/exporters involved.

12. With respect to Article 9.3, China submits that Article 9(5) of the *Basic AD Regulation* is inconsistent with that article because if a non-market economy exporting producer fails to meet the IT criteria, the dumping margin for such an exporting producer is not established in accordance with Article 2 of the Anti-Dumping Agreement, and it follows that the anti-dumping duty based on such a dumping margin will lead to the collection of duty in amounts exceeding the individual dumping margin of some of the exporting producers concerned.

13. With respect to Article 9.4, China considers that on account of the Article 9(5) criteria, the dumping margin for the sampled non-market economy exporting producers that fail to obtain IT is not established on an individual basis and is not calculated in accordance with the requirements of Article 2. Consequently, the weighted average dumping margin including the dumping margin for non-IT exporting producers, applicable to the non-sampled exporting producers, is not consistent with the requirement of Article 9.4 of the Anti-Dumping Agreement. Furthermore, contrary to Article 9.4, non-MET exporting producers that are granted individual examination can only obtain an individual duty only if they satisfy the IT criteria.

14. With respect to Article I:1 of GATT 1994, China considers that the advantage of obtaining an individual dumping margin and an individual duty is not accorded by the European Union unconditionally to like products originating in the territories of all WTO Members, notably on account of the additional Article 9(5) IT criteria applicable only in case of imports from non-market economy countries. In case of imports from market economies, exporting producers are automatically *i.e.* without being subject to any conditions or additional criteria, notably the IT criteria, granted an individual dumping margin and individual duty rate and this constitutes an 'advantage' or 'favour' within the meaning of Article I:1 of the GATT 1994, not granted in the context of imports from what the European Union terms as non-market economy countries, including China.

15. With respect to Article X:3(a) of GATT 1994, China considers that the European Union violates that article because it does not administer the provisions of Article 9(5) in a uniform, impartial and reasonable manner. The European Union does not administer Article 9(5) in a 'uniform' manner insofar as it applies different methodologies to establish the country-wide dumping margins and duty rates for non-IT exporting producers depending on the level of cooperation of exporting producers in a given case being high or low and even within these subsets, notably when the cooperation is low, it uses a host of different methodologies to determine the country-wide dumping margin and the country-wide duty rate. The European Union does not administer Article 9(5) in a 'reasonable' manner in anti-dumping investigations concerning non-market economy countries notably China, because the country-wide dumping margin and country-wide duty are established for non-IT exporting producers in an unreasonable manner and often through the inappropriate application of 'facts available'.

16. In light of the foregoing, China considers that the European Union violated Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organisation and Article 18.4 of the Anti-Dumping Agreement.

IV. CHINA'S CLAIMS CONCERNING THE REVIEW REGULATION

17. China considers that the Review Regulation is inconsistent with the European Union's obligations under the below-mentioned provisions of the Anti-Dumping Agreement and GATT 1994 and China requests that the Panel find that the Review Regulation is inconsistent with the below-mentioned provisions and recommend that it be withdrawn.

18. China submits that in the current case, the European Union violated the substantive disciplines of Articles 2.1 and 2.4 of the Anti-Dumping Agreement as well as Article VI:1 of the GATT 1994 in establishing continued dumping which was the basis of its determination of the likelihood of continuation of dumping under Article 11.3 of the Anti-Dumping Agreement.

19. China considers that on account of the analogue country selection procedure and the resulting selection of Brazil as the analogue country, the European Union precluded a fair comparison between the export price and normal value in violation of Articles 2.1, 2.4 and 17.6(i) of the Anti-Dumping Agreement, as well as VI:1 of GATT 1994. Furthermore, the analogue country selection process was such that it did not amount to a proper establishment of the facts and an unbiased and objective evaluation of those facts, in violation of Article 17.6(i) of the Anti-Dumping Agreement.

20. Additionally, the European Union violated Articles 2.1 and 2.4 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 by using the PCN classification system used in the original investigation which led to the grouping of completely different footwear types together, disregarding the technical differences, market realities and consumer perceptions of the distinction between divergent footwear types. Moreover, the mid-investigation re-classification of footwear categories further made an already overly broad and hence defective definition of the product concerned (and like product) even broader and precluded sufficient and accurate comparability between footwear manufactured in the European Union, footwear imported from China and footwear produced in the analogue country, Brazil.

21. China posits the applicability of the Article 3 provisions in the present case taking into account – (i) the interpretation accorded by the Panels and AB on this issue; (ii) in light of the facts of this case; and (iii) the approach of the European Union made known in WTO disputes.

22. With regard to the various claims, China first submits that by not soliciting sampling information from only one interested party, *i.e.* the complainant European Union producers comprising the domestic industry, while all the other interested parties were required to complete detailed sampling forms in order to be sampled, the European Union violated the obligation of conducting the expiry review investigation in an objective and unbiased manner as required by Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement. The mere fact that the complainant European Union producers had presented aggregate data in the expiry review request/complaint, had provided declarations of support, and that the CEC had sent a letter on behalf of the complainant producers mentioning their agreement to be included in the sample is not a substitute for the normal sampling procedure that should have been applied because the information solicited through the sampling forms was not only significantly more detailed but would have provided the relevant data that was not otherwise provided to the European Union for the selection of the European Union producers' sample, which in turn could be considered positive evidence.

23. The European Union violated Articles 3.1and 17.6(i), 6.10 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 - (i) by selecting the European Union producers' sample comprising of eight complainants in the absence of *affirmative, objective, credible and verifiable* data and evidence. Consequently, the European Union could not have conducted an objective examination of the facts which were not at its disposal. Moreover, as the sample was not based on credible and affirmative data and was selected in the absence of the requisite data in violation of Articles 3.1 and 17.6(i), it is not consistent with the sampling criteria of Article 6.10 of the Anti-Dumping Agreement.

It follows that the European Union's evaluation of injury to the domestic industry based on such a sample notably with regard to the price-undercutting calculation and the analysis of the microeconomic indicators was inconsistent with Article 3.1 of the Anti-Dumping Agreement as well as Article VI:1 of the GATT 1994; (ii) the European Union producers' sample was neither statistically valid nor represented the largest percentage of volume that could reasonably be investigated, and the European Union failed to cover the largest percentage of volume that could be investigated, thus violating Article 6.10. Consequently, the injury determination of the European Union based on such a sample was not the result of an 'objective examination' of 'positive evidence' and was thus inconsistent with Articles 3.1, 17.6(i) of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994; (iii) the inclusion of a company in the sample that was no longer a European Union producer of the like product, is inconsistent with the provisions of Articles 3.1, 17.6(i) of the Anti-Dumping Agreement that require the investigating authorities to conduct an injury determination on the basis of an 'objective examination' of 'positive evidence' and Article 6.10 that requires the sample to be either statistically valid or account for the 'largest representative volume' of the production, sales of the domestic industry. As a result the injury determination of the European Union for the entire domestic industry to the extent it was based on such a sample was inconsistent with Articles 3.1, 17.6(i) and Article 6.10 of the Anti-Dumping Agreement as well as Article VI:1 of the GATT 1994; (iv) the use of an overly broad PCN classification system and the subsequent mid-investigation re-classification of footwear categories by the European Union precluded an objective examination of both the volume of the allegedly 'dumped' Chinese imports and the effect of these imports on prices in the domestic market for like products and the consequent impact of these imports on domestic producers of such products within the meaning of Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement and Article VI of the GATT 1994.

24. China submits that the European Union violated Article 3.4 of the Anti-Dumping Agreement because it analysed the macroeconomic injury indicators on the basis of data that included the data of producers not part of the European Union industry, *i.e.*– (i) producers that were not included amongst the complainants representing 35 per cent of the European Union production of the like product, *i.e.* the domestic industry in this case. These producers were part of the European Union production but not part of the European Union industry in this case, but their data was taken into account as the European Union used the data for the '*whole [European]Union production*'; (ii) producers that either ceased production in the European Union, outsourced majority of their production outside the European Union, are major importers of the product concerned and/or are related to exporters in China. The data of such producers was included in the Prodcom data as well as the aggregate data reported by the various national Member States' producer associations, which was the basis of the European Union's evaluation of the macroeconomic injury indicators. Moreover, the European Union's evaluation of these injury indicators was not based on 'positive evidence' and an 'objective' evaluation of such evidence and was thus inconsistent with Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement.

25. With respect to the causation analysis, China considers that the European Union violated Articles 3.1, 3.5 and 17.6(i) of the Anti-Dumping Agreement by - (a) failing to ensure that injury caused by certain other known factors was not attributed to the imports of the product concerned from China; (b) failing to analyse several other factors 'known' to it as these were consistently pointed out by the interested parties in their comments and therefore attributed the injury caused by such factors to the Chinese imports; and (c) failing to make an objective examination based on positive evidence demonstrating that Chinese imports are through the effects of dumping, causing injury to the European Union industry.

26. With respect to Article 6.1.2 of the Anti-Dumping Agreement, China considers that the European Union did not make available 'promptly' the evidence provided by all the sampled European Union producers in their injury as well as Community interest questionnaire responses to all interested parties and thereby violated that article. More specifically, the injury questionnaire responses of four out of the eight sampled producers were not made available to the interested parties 'promptly' on the

grounds that the responses contained confidential information, even though the producers concerned did not request confidentiality. The non-confidential Community interest questionnaire responses of five European Union producers sampled in the expiry review were not made available at all.

27. China further considers that in violation of Article 6.4 of the Anti-Dumping Agreement, the European Union failed to provide timely opportunities for interested parties to see all non-confidential information that was relevant to the presentation of their case and was used by the European Union in the expiry review investigation with regard to the– (i) information used for establishing the sample of the European Union producers including the information pertaining to the procedure used and concerning the data of the sample and the amended data concerning one sampled producer that discontinued the production of the like product during the RIP; (ii) information regarding the revised production and sales data of the complainant producers and the sampled producers pursuant to the discovery that one sampled producer had discontinued the production of the like product during the RIP; (iii) information regarding the analogue country selection procedure, the cooperation of the analogue country producers and the data submitted by some of them; and (iv) information regarding the Community interest questionnaire responses of five European Union producers sampled in the expiry review investigation. Consequently, Chinese exporters were denied opportunities to defend their interests in violation of the first sentence of Article 6.2 of the Anti-Dumping Agreement, which requires that "*[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.*"

28. China considers that the European Union violated Article 6.5 of the Anti-Dumping Agreement by - (a) granting confidential treatment to names of the European Union producers including complainants, supporters, sampled producers and producers sampled in the original investigation; by granting confidential treatment to some information in the expiry review request, standing forms, CEC submissions, questionnaires of sampled EU producers; and analogue country questionnaires, which were not confidential; and (b) granting confidential treatment to some of the information in these documents and to the names of the European Union producers including complainants, supporters, sampled producers and producers sampled in the original investigation that completed the Community interest questionnaire, in the absence of 'good cause'. The European Union violated Article 6.5.1 of the Anti-Dumping Agreement by - (a) failing to require the parties concerned to provide non-confidential summaries of the confidential information submitted and/or to give a statement of reasons as to why summarization was not possible; and (b) by failing to ensure that the non-confidential summaries provided permitted a reasonable understanding of the confidential information submitted.

29. Furthermore, the European Union violated Article 6.5.2 by failing to find that confidentiality of the European Union producers' names (including that of complainants, supporters, sampled producers and producers sampled in the original investigation that completed the Community interest questionnaire) was not warranted in this case on account of several reasons. Consequently, Chinese exporters and other interested parties were denied the right to defend their interests as per Article 6.2. Furthermore, it was the European Union's obligation to find that confidentiality of information for which non-confidential summaries were not provided in the non-confidential injury questionnaire responses by each of the eight sampled European Union producers was unwarranted because - (i) such information was amenable to non-confidential summarization; (ii) no request for confidentiality of the information was made by these producers; (iii) there was no explanation from these producers why only specific producers could not provide non-confidential summaries for responses to particular questions while other sampled producers had provided the non-confidential summaries of their responses to the very same questions. Thus the European Union should have disregarded such information and by not doing so it violated Article 6.5.2. Moreover the Chinese exporters could not have a complete picture based on the responses of all the eight sampled producers to adequately and in a timely manner defend their interests within the meaning of Article 6.2 of the Anti-Dumping Agreement.

30. China further considers that the European Union by failing to apply facts available within the meaning of Article 6.8 when faced with incorrect and misleading information from the sampled European Union producer that discontinued the production of the like product during the RIP in its confidential and non-confidential injury questionnaire responses and from some or all sampled producers regarding the PCNs produced by them, acted inconsistently with Article 6.8 and did not conduct the injury determination in an objective and unbiased manner in accordance with Article 3.1 of the Anti-Dumping Agreement.

31. China considers that the European Union violated Article 12.2.2 of the Anti-Dumping Agreement by failing to provide in the Review Regulation relevant information on matters of fact and law, as well as the reasons for its determinations, with respect to various key points throughout the investigation including (i) the data used for the selection of the European Union producers' sample; (ii) the granting of confidential treatment to the names of the complainants, supporters, sampled producers and producers sampled in the original investigation; (iii) determination concerning the evaluation of the macroeconomic injury indicators; (iv) the difference in the figures concerning the representativeness of the sampled European Union producers at different stages of the investigation; (v) extent to which the data of the sampled producer that discontinued production in the European Union of the like product during the RIP was used for the purpose of the injury determination; (vi) how the re-classification of PCNs was achieved for the Chinese exporters and the sampled complainant producers; and (vii) quantification of allowances in the form of adjustments made for differences affecting price comparability.

32. Based on the violation of the aforementioned provisions of the Anti-Dumping Agreement and the GATT 1994, China submits that as a consequence, the European Union also violated Articles 11.3, 1 and 18.1 and of the Anti-Dumping Agreement.

V. CHINA'S CLAIMS CONCERNING THE DEFINITIVE REGULATION

33. China considers that as a result of the determinations made in the European Union's original investigation, it has violated various provisions of the Anti-Dumping Agreement, GATT 1994, China's Protocol of Accession (Protocol) and the Report of the Working Party on the Accession of China.

34. By not examining the non-sampled cooperating Chinese exporting producers' MET applications, China considers that the European Union violated Part I, paragraph 15 (a)(ii) of the Protocol, Paragraph 151(e), (f) of the Report, and Articles 2.4, 6.10.2 and 17.6(i) of the Anti-Dumping Agreement. Part I, paragraph 15 (a)(ii) of China's Protocol of requires individual examination of and findings regarding all MET questionnaire responses that have been submitted, as in order to apply the "analogue country" procedure, the importing WTO Member must first determine whether the producers cannot clearly show that they operate under market economy conditions.

35. China considers that by failing to provide a disclosure on the merits of the MET questionnaire responses, the European Union failed to provide Chinese producers a full opportunity for the defence of their interests as required by Paragraphs 151 (e) and (f) of the Working Party's Report. Furthermore, the European Union has not established facts in a "proper" manner and has not evaluated those facts in an unbiased and objective way within the meaning of Article 17.6(i) Anti-Dumping Agreement, as it requested massive amounts of information and, once provided, rejected that information outright, without any analysis whatsoever. China considers that an investigating authority must examine individual MET forms as the MET determination is based on the information provided by individual producers.

36. China considers that the European Union violated Article 2.2.2 of the Anti-Dumping Agreement as the amounts for SG&A and profits established for one Chinese company granted MET were not calculated on the basis of a "reasonable method," as the European Union used the SG&A and

profits of Chinese exporters in other anti-dumping cases involving a radically different industry from that of the product concerned when it was clearly more reasonable to use figures reported by other Chinese companies producing footwear. Furthermore, the European Union did not calculate a benchmark to ensure that the "cap" (*i.e.* the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin) was not exceeded.

37. China considers that the European Union violated Articles 2.4 and 17.6 of the Anti-Dumping Agreement, as well as Article VI:1 of the GATT 1994 by having precluded a fair comparison between the export price and the normal value with respect to three issues – (i) with respect to the analogue country selection procedure, the European Union showed the same sort of bias toward the selection of Brazil as it did in the review investigation, mentioned above. Among other reasons, it granted only minimal extensions to certain companies located in Thailand and Indonesia to submit the response to the questionnaire for producers in potential analogue countries, whereas several Brazilian companies were granted more time, and the European Union did not objectively evaluate all the information made available by interested parties, despite repeated requests from those interested parties. As a result, the European Union violated the standard set forth by Article 17.6(i) requiring lack of bias, and precluded a "fair comparison" per 2.4 as well.

38. Constituting a further violation of the fair comparison obligation of Article 2.4, and similar to the scenario described above, the European Union ignored several factors which should have made it obvious that Brazil was an inappropriate analogue country selection, among others, that costs of production are different in the two countries and the vast differences in per capita GNP.

39. China considers that the PCN methodology was too broad to allow for a fair comparison, thus violating Article 2.4. Despite requests from interested parties, the PCN did not take into account the type, quantity or quality of the leather used, nor the differences between the production processes. Furthermore, the European Union failed to identify footwear designed for sporting activities and STAF, thereby mixing footwear used for sports and casual footwear. As the European Union excluded STAF above a certain price threshold after the PCN had been established, it used a methodology not based on the PCN, which did not allow for a fair comparison.

40. With respect to adjustments for differences in production costs, China considers that fair comparison obligation under Article 2.4 and proper establishment obligation under Article 17.6(i) were violated because the European Union made an upward adjustment to the Brazilian normal value on the basis of the data of the sampled Chinese exporting producers that were not granted MET. At one point in the investigation the European Union did not grant MET to 11 sampled Chinese exporting producers and considered that these Chinese exporting producers did not operate under market economy conditions with regard to the manufacture and sales of the like product in China, but at another point the European Union saw fit to use the very data of the sampled Chinese exporting producers that it otherwise disregarded, and to make significantly high adjustments of 21.6 per cent to the normal value based on the Brazilian producers' costs.

41. China considers that because the European Union wrongly established the like product/product concerned by not excluding STAF below €7.5/pair, even though conceptually and technically there is no difference between STAF below and above €7.5, it violated Article 2.6 of the Anti-Dumping Agreement. The European Union should not have been permitted to sub-categorize STAF into lower priced and higher priced categories, which are respectively included and excluded from the investigation. Since price cannot be the determining factor in what constitutes a "product" within the meaning of Article 2.6 of the Anti-Dumping Agreement the European Union violated that Article.

42. China considers that the European Union violated Article 6.10 of the Anti-Dumping Agreement because the sample of the Chinese exporting producers selected was not based on the

largest percentage of export volumes of the product concerned. This is assuredly the case as the sample was established before the exclusion of STAF from the product scope of the investigation; and the domestic sales volumes of the sampled companies were also wrongly taken into account for sample selection, while the key determining factor should have been the volume of export sales.

43. China considers that the European Union violated Articles 6.10, 9.2 and 9.3 of the Anti-Dumping Agreement with respect to the denial of Chinese exporters of the calculation of individual dumping margins and duty for the same reasons that it considers that the Article 9(5) of the Basic AD Regulation violates those articles *as such*. China notes, however, that the facts of this case are not such that the European Union could claim that it would be exempt from calculating individual dumping margins as a result of the number of producers being so large that individual examinations would be unduly burdensome.

44. China considers that the European Union violated Articles 3.1, 6.10 and 17.6(i) of the Anti-Dumping Agreement and Article VI:1 of GATT 1994 because it did not solicit sampling information from one category of interested party, *i.e.* the producers. The European Union therefore impermissibly discriminated between the complainant and exporting producers with respect to the sample selection procedure and therefore did not perform an "objective examination," and act in an unbiased manner as required by Articles 3.1 and 17.6. By making its injury assessment partially on the basis of unverified data of producers including those not part of the domestic industry, it did not comply with the requirement of Article 3.1 that it make the relevant determination on the basis of "positive evidence".

45. China considers that the European Union violated Articles 3.1, 3.2, 9.1 and 17.6(i) of the Anti-Dumping Agreement because it wrongly calculated the underselling margin by applying a volume-based reduction ratio to the originally calculated price-based margin and by allocating the non-injurious import value in relation to import values for 2005, *i.e.* a period outside the investigation period. Furthermore the underselling calculation was based on only 46.6 per cent of exports of the sampled Chinese exporting producers. Finally, for the calculation of the non-injurious price for the European Union industry, the European Union established a rate of profit based on data relating to footwear that was not part of the product subject to the investigation and concerning only one segment of the domestic industry.

46. The European Union violated Articles 3.1 and 9.2 of the Anti-Dumping Agreement as the anti-dumping duty on Chinese exports was not imposed and collected on a non-discriminatory basis as required by Article 9.2, since the duty rate established for China was higher than that for Vietnam, although both the dumping and injury margins found for Vietnamese exporters were higher than those for Chinese exporters.

47. China considers that the European Union violated Article 3.3 of the Anti-Dumping Agreement because the cumulative assessment of imports from China and Vietnam was inappropriate and it failed to recognize important differences between China and Vietnam concerning import volumes, market shares and prices, most notably the sudden increase of imports from China caused by the lifting of the quota on imports of footwear as of January 2005.

48. China considers that the European Union violated Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement because, among other reasons, (1) it failed to use the verified figures on production capacity and capacity utilization provided by the European Union producers and instead based the examination of production capacity and the capacity utilization on the employment figures, (2) it did not sufficiently consider various injury factors, such as sales values or market share analysis based on turnover, (3) several sampled producers did not show any signs of injury, and (4) it failed to adequately assess the extent by which the 2005 import increase was due to the lifting of the quota on imports of footwear from China.

49. With respect to the causation analysis, China considers that the European Union violated Articles 3.1, 3.5 and 17.6(i) of the Anti-Dumping Agreement as it failed 1) to abide by the non-attribution obligation of Article 3.5 with respect to, among other factors, the lifting of the quota on Chinese imports, the changing trends in demand and Euro-U.S. dollar exchange rate, 2) to take into account factors which had a clear impact on the domestic industry, and 3) to conduct an objective examination based on positive evidence, thereby violating Articles. 3.1 and 17.6(i).

50. China considers that the European Union violated Article 6.1.1 of the Anti-Dumping Agreement and Part I, paragraph 15 the Protocol because the MET questionnaire is a "questionnaire" within the meaning of Article 6.1.1, and thus the respondents should have had 30 days to respond to it. In addition, the extremely high burden imposed by the breadth of information requested in the questionnaire makes it such that parties did not have full opportunity for the defence of their interests, as required by the Protocol, given the 15 day deadline to respond.

51. China considers that the European Union violated Articles 6.2, 6.4, 6.5, 6.5.1 6.5.2, with respect to the treatment of confidential information, as well as Article 12.2.2 of the Anti-Dumping Agreement, with respect to the failure to adequately explain the reasons for its determinations, in very similar ways to those described above with respect to the review investigation. The differences in the facts are detailed in the First Written Submission, to which China refers.

52. China considers that the European Union violated Article 6.9 of the Anti-Dumping Agreement because the additional definitive disclosure regarding a change in the form of the measures was not made in sufficient time for the interested parties to defend their interests, namely only three working days which is not a sufficient time period to analyse and comment on the substantial change in the form of the measures and the modifications in the underlying calculations of the injury margins, and on the appropriateness of using data that relate to a period subsequent to the IP.

53. China considers that the European Union violated Articles 1 and 18.1 of the Anti-Dumping Agreement because based on the violation of the aforementioned Anti-Dumping Agreement and GATT 1994 provisions, the European Union applied an anti-dumping duty in breach of Article VI of the GATT 1994 and the provisions of the Anti-Dumping Agreement.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

PRELIMINARY ISSUES

1. **China misunderstands Article 17.6(i) of the *ADA***. In China's view, "the Article should not only be regarded as imposing an obligation, but imposing one of substance beyond that otherwise contained in the *ADA*". China acknowledges that its interpretation of Article 17.6(i) likely does not correspond to the original intent of the drafters. In EU's view, supported by Appellate Body case law, Article 17.6(i) serves as a reminder (or evidence) that the duties of proper establishment of facts and their unbiased and objective evaluation are indeed contained in other provisions of the *ADA*. China's claims based on Article 17.6(i) should be excluded from the Panel's terms of reference because they fail to satisfy the requirements of Article 6.2 DSU.

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

2. The EU maintains that China's Panel Request failed to meet the requirements of Article 6.2 of the *DSU* with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the *ADA* and Article X:3(a) of the *GATT 1994*. The EU considers that when the description of a legal claim does not relate to the specific result of the operation of the measure at issue as described by the complainant's panel request, the explanation provided as to how or why the measure challenged violates the various provisions is insufficient to present the problem clearly, as required by Article 6.2 of the *DSU*, and more so in case of "as such" claims. In order for the Panel to examine whether China's Panel Request meets the requirements under Article 6.2 of the *DSU*, the EU submits that the Panel should first examine the measure on its face. Once the scope or operation of Article 9(5) of the Basic AD Regulation has been established, the Panel should proceed to examine whether China's Panel Request complies with the requirements under Article 6.2 of the *DSU*. Otherwise, the requirement to "plainly connect" the measure at issue and the legal claims under Article 6.2 of the *DSU* in a sufficient manner to present the problem clearly will be meaningless. Indeed, it would amount to a mere exercise of "ticking boxes" (i.e. whether the panel request contains a measure, a legal claim and a description of what is at issue), leaving the respondent Member wondering how the measure at issue can be the source of the alleged nullification or impairment of benefits.

3. The text of Article 9(5) of the Basic AD Regulation leaves no doubt that the issue contained in that provision refers to the imposition of anti-dumping duties. When Article 9(5) of the Basic AD Regulation is seen in the context of other provisions of the Basic AD Regulation, the same conclusion is reached about its meaning and content. Since the meaning and content of Article 9(5) are clear on its face, then the Panel should assess the consistency of this measure "as such" on that basis alone.

4. Should the Panel find that China's Panel Request plainly connects the challenged measure with the provisions of the covered agreements in accordance with Article 6.2 of the *DSU* (*quod non*), the EU submits that the Panel should refrain from examining China's claims under Articles 6.10, 9.2, 9.3 and 9.4 of the *ADA* and Article X:3(a) of the *GATT 1994* since the specific measure described by China in its Panel Request (i.e. Article 9(5) of the Basic AD Regulation) does not fall within the scope of the obligations contained in the provisions of the covered agreements invoked by China.

5. The EU requests the Panel to reject China's claims that Article 9(5) of the Basic AD Regulation is "as such" inconsistent with Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the *ADA*, Articles I:1 and X:3(a) of the *GATT 1994* and Article XVI:4 of the *WTO Agreement*. The relevant part of Article 9(5) of the Basic AD Regulation that China is challenging in the present dispute is meant to address an issue which is not new in the context of the application of anti-dumping rules: how to impose anti-dumping measures on imports from non-market economy countries. In the context of anti-dumping proceedings, the application of Article 9(5) amounts to a purely threshold question: does the supplier meet the five criteria? Or, put in substantive terms, can the applicant company be considered as a supplier acting independently from the State? If the answer by the EU authorities is positive, that IT supplier is considered an independent exporter or producer and the source of the alleged price discrimination, and an individual anti-dumping duty will be specified for that IT supplier. In contrast, if the answer is negative, that non-IT supplier is not considered a genuine exporter or producer, but an entity which does not act independently from the State (which is ultimately the actual producer and the source of the alleged price discrimination) and, thus, that non-IT supplier will be subject to the actual supplier, country-wide duty rate. In other words, Article 9(5) serves to identify the relevant supplier (i.e. an independent supplier or the State and its related export branches) for the purpose of examining whether dumping occurs and then addressing accordingly the actual source of price discrimination.

6. As a non-market economy country, the EU investigating authorities apply Article 9(5) to imports from China. The fact that China is a non-market economy country is very relevant for the present case. In a non-market economy country, State control over the means of production and State intervention in the economy, including international trade, imply that all the means of production and natural resources belong to one entity, the State. All imports from non-market economy countries are therefore considered to emanate from a single supplier, the State. The State (in this case, China) in this sense can be considered as one supplier whose dumping behaviour can be identified and addressed in accordance with the disciplines in the *ADA*. In view of the State's control over international trade, it would not be relevant to name exporting companies which do not act independently from the State separately since they collectively constituted one single supplier or exporting entity, i.e. the State. The application of a single duty rate then also becomes necessary to avoid circumvention of the duties (i.e. the channelling of exports through the supplier with the lowest duty rate). Article 9(5) is therefore addressing this specific situation.

7. China's claims against Article 9(5) of the Basic AD Regulation are based on a misinterpretation of the relevant provisions in *the ADA* as well as China's Protocol of Accession, and fundamentally ignore the relevance of China being a non-market economy country in the present dispute. First, Article 6.10 does not contain a strict rule requiring investigating authorities to always determine dumping margins on an individual basis. Second, contrary to what China asserts, Article 6.10 does not contemplate only one exception (i.e. sampling) where investigating authorities are permitted to depart from the general principle of determining dumping margins on an individual basis. The interpretation that Article 6.10, first sentence, does not contain a strict obligation and sampling is just but one situation where the preference for the individual determination of dumping margins does not need to be followed is supported by the existence of other situations where the preference mentioned in Article 6.10, first sentence, may not apply. Third, as the relevant case-law has clarified, Article 6.10 should not be interpreted as requiring the determination of dumping margins for each legal entity in all cases, regardless of whether they are economically related to each other. Article 9(5) aims at identifying the relevant supplier and the actual source of price discrimination in the context of imports from non-market economy countries (i.e. an IT supplier which acts independently from the State or the State and its related export branches). The EU considers that the relationship between non-IT suppliers and the State is similar to that addressed by the panel in *Korea – Certain Paper*, and thus the reasoning followed by that panel may be applied by analogy in the present case.

8. China also submits that Article 9(5) of the Basic AD Regulation violates Article 9.2 of the *ADA* in that exporting producers in non-market economy countries that do not obtain MET and fail to qualify for IT will not be subject to an individual anti-dumping duty. The EU observes that, in the context of its Article 9.2 claim, China also ignores that, in the case of imports from non-market economy countries, the State and those companies which do not act independently from the State, can be considered as one single supplier of the product concerned and the actual source of any alleged price discrimination. Thus, the imposition of anti-dumping duties "on a country-wide basis" pursuant to the operation of Article 9(5) would imply the imposition of duties on the actual supplier (i.e. "China Inc.") for which injurious dumping is found pursuant to an investigation conducted in accordance with the requirements of the *ADA*. On this basis, China's observations about the terms "appropriate", "amounts", "sources" as well as other contextual considerations would fall. In addition, assuming that Article 9.2 of the *ADA* lays down the principle that anti-dumping duties are applied on an individual basis for each supplier involved, the EU submits that China's interpretation that the only exception to this principle is where it is impracticable to do so "because of the large number of suppliers involved", as provided by Article 9.4 of the *ADA*, i.e. when sampling is used, is incorrect. Indeed, sampling is not the only situation where investigating authorities can depart from the general principle contained in Article 6.10, first sentence. Likewise, Article 9.2 expressly permits the imposition of duties on a country-wide basis in other cases than the sampling scenario, in particular when it is "impracticable" to do so on an individual basis. Moreover, Article 9.4 of the *ADA* cannot be the only exception to the individual imposition of duties, as China argues, because, by definition, that would deprive the third sentence of Article 9.2 of the *ADA* of any meaning. In fact, this interpretation would make that sentence ("impracticable") redundant and unnecessary, contrary to the principle of effectiveness in treaty interpretation, since the only exception would already be mentioned in Article 9.4. The EU considers that Article 9.2 of the *ADA*, third sentence, in view of its text, context, and object and purpose leads to the conclusion that Members are allowed to impose anti-dumping duties on a country-wide basis in cases where the specification of individual anti-dumping duties per supplier would be ineffective. This would be the case, in particular, when the imposition of individual anti-dumping duties per supplier could result in the anti-dumping measure being deprived of any effect on the source of the price discrimination. The EU submits that Article 9(5) of the Basic AD Regulation falls under that category.

9. The EU considers that China's claims under Articles 9.3, 9.4 and 18 of the *ADA* as well as Article XVI:4 of the *WTO Agreement* are entirely dependent on a finding that Article 9(5) "as such" infringes Article 9.2 and, to some extent, Article 6.10. Moreover, the EU notes that China's claim under Article I:1 of the *GATT 1994* depends on a finding as to whether the *ADA* permits an investigating authority to require suppliers in case of imports from non-market economy countries to prove that certain conditions are met in order to obtain an individual anti-dumping duty. If the *ADA* so permits, in view of the *lex specialis* principle, and Article II:2(b) of the GATT 1994, no violation of Article I:1 of the *GATT 1994* can be found. Finally, the EU fails to see how Article 9(5) can fall within the scope of Article X:3(a) of the *GATT 1994*. Thus, the Panel should reject China's claim.

REVIEW REGULATION

10. **Claim II.1 and II.13.** Paragraph 151 of the Working Party Report on the Accession of China creates no obligations for other WTO Members. The purpose of choosing an analogue country is to secure a comparable price as the normal value. China's accusation of bias in the selection of the analogue country is entirely unfounded. The obligation on a Member making the choice of such a country is to find one that is 'appropriate' under the circumstances, not the one that is 'most appropriate'. Competitiveness of the domestic market is a factor to be considered in making the selection, and was amply satisfied by Brazil. Differences in economic development are not relevant. The Commission placed significant, but not exclusive reliance on the representativeness of domestic sales. China's complaints about the lack of specificity of the EU's PCN system of product classification are unfounded.

11. **China errs by disregarding Article 11.3 of the *ADA***. There is a *difference* between saying that Article 3 of the *ADA applies* to an expiry review measure – which is what China argues and what the Appellate Body in the *US – Oil Country Tubular Goods Sunset Reviews* case *explicitly* said is not the case – and saying that Article 3 of the *ADA* may provide "*guidance*" for a consideration of claims raised under Article 11.3 "*where appropriate*". The Panel is asked to review claims II.2 to II.5 in light of the various provisions of Article 3 cited by China, in *isolation* from the disciplines set out in Article 11.3 of the *ADA*. Such an approach constitutes a legal error which should be avoided. For this reason alone, the Panel should not consider China's claims. China's approach is also not justified by the facts of the case.

12. **Claim II.2**. China's claim is legally and factually mistaken. Contrary to China's understanding, the domestic industry for the purposes of the review has been defined as the totality of the EU producers. On law, China effectively argues that a compliance with the requirements of Article 3.1 of the *ADA* depends on the conduct of the sampling procedures pursued for the purpose of establishing dumping under Article 2 of the *ADA*. In the EU's view, Article 3.1 sets up an objective standard (instead of a relative or a comparative standard) the compliance with which has to be considered on the merits of what happened in the injury investigation. Contrary to what China tries to imply – the panel in *EC – Salmon (Norway)* never stated that the disciplines of Article 6.10 of the *ADA* should be followed in an injury analysis. Rather, it stated: "… we see no basis to impose the criteria of Article 6.10 on sampling in the context of injury." In any event, no EU producer was "considered automatically eligible to be sampled" without having to provide detailed information.

13. **Claim II.3**. China's claims are based on legal and factual misunderstandings. On law, the issue of whether an injury analysis based on sampling is consistent with the *ADA* is subject to an examination based on Article 3.1 of the *ADA* (and not Article 6.10 thereof, as China argues). On facts, China's concern is not, in reality, with the availability of data and their presence on the file, but rather with the access of China's interested parties to this data. This is not, however, an issue which arises, legally, under Article 3.1 of the *ADA*. The selection of the sample has in any event been described in several notes available in the non-confidential version of the file. With respect to the producer who discontinued production during the RIP, only the real level of production in the EU during the RIP was taken into account, as explained in the Review Regulation.

14. **Claim II.4**. Contrary to what China asserts, the "domestic industry" in the review investigation did not comprise only the complaining producers. China's claim thus does not correspond to the facts. Further, given that the "domestic industry" was defined as the entire domestic industry (rather than merely the complainants), it was not overly difficult to adjust the Prodcom data to take account of the two companies which were excluded as related (recital 19 of the Review regulation) and the one company which discontinued production (recital 23). The EU submits that in the circumstances of this case, the approach adopted by the EU investigating authority (namely seeking data at the macro-level from Prodcom and producer associations, with subsequent verification), together with subsequent cross-checking of the information received from these various sources, including information obtained from the sample and specialised sectoral studies, was entirely reasonable and perhaps yielded even the highest level of accuracy possible.

15. **Claim II.5**. China's claim is insufficiently specific to qualify under Article 6.2 of the *DSU*. The *ADA* lays down no methodology for determining causation. China's fails in its attempt to show that the EU wrongly attributed to the dumped imports injury caused by other factors. The examination of the issue of 'structural inefficiency' shows that the condition of the EU industry did not break the causal link between the dumped imports and the injury to the industry. Appropriate consideration was given to the effects of non-dumped imports from third countries, contraction in demand, and changes in pattern of consumption; furthermore high labour costs, outsourcing, and exchange rate fluctuations were properly addressed.

16. **Claim II.6**. The EU was correct in removing uncertainties as to the confidential status of submissions, and these explained the delays in making information available in the various instances raised by China.

17. **Claim II.7**. In Article 6.4 of the *ADA* the notion of information is a narrow one, and the provision regulates the period following the provision of information. The various instances raised by China either fell outside the scope of this provision or involved circumstances where its requirements were fulfilled by the EU authorities, both as regards the selection of the sample of EU producers, and of the analogue country.

18. **Claim II.8**. That a particular company is supporting a complaint is a fact that is capable of being kept confidential. The *ADA* does not provide for weighing the importance of protecting confidentiality, and the complainants gave adequate grounds for protecting their identities. The EU's treatment of the annexes to the Review Request and of responses of the sampled EU producers respected the rules on confidentiality. Good cause for protecting information that is 'by nature' confidential is provided by demonstrating that the information falls into this category.

19. **Claim II.9**. Neither Article 6.2 nor Article 6.5.2 of the *ADA* provide a basis for making claims in this context. The complainants' demand for confidentiality was justified.

20. **Claim II.10**. Article 6.8 of the *ADA* does not impose an obligation on national authorities to reject information; it is permissive in character. The company referred to by China ultimately supplied correct data to the EU authorities. The same is true of China's claim regarding the allocation of products to PCNs.

21. **Claim II.11**. China's invocation of Article 11.3 of the *ADA* in a consequential role misunderstands its place in the Agreement as regards expiry reviews.

22. **Claim II.12**. China's invocation of Article 12.2.2 of the *ADA* is so vague as to place its claim outside the limits set by Article 6.2 of the DSU. In the instances cited by China the information published by the EU was sufficient to satisfy the requirements of the *ADA*. The EU was not engaged in 'reconciling diverging information and data' and so did not publish an evidentiary path. The justification for protecting identities was adequately explained as was the evaluation of macroeconomic injury indicators, the representativeness of the sample, the discontinuation of production and several other topics raised by China.

23. **Claim II.14**. China's claim of consequential breach is redundant.

DEFINITIVE REGULATION

24. **Claim III.1/Claim III.20**. The EU considers that China's claims are based on a wrong understanding of the implication of the use of sampling in the present case. Contrary to what China argues, the examination of the MET applications is not required with respect to exporting producers which do not fall within the sample and do not qualify for individual examination. On this basis, the Panel should reject China's claim in their entirety.

25. **Claim III.2**. The third option in Article 2.2.2 of the *ADA* for setting the SG&A and profits in a constructed price requires reasonableness and imposes a cap. The former implies three elements for matching the analogue sales with the original sale – similarity of product, same market, ordinary course of trade. The EU had to balance these, and China has not shown that the EU's decision was unreasonable. The conditions assumed in the cap could not be applied in the circumstances of this case.

26. **Claim III.3 / Claim III.20**. There is no evidence that the Commission was biased in the procedures that it adopted in choosing an analogue country. In this choice the EU was right to place considerable emphasis on the possibility of making comparisons with sales prices. The EU's gave correct consideration to the factors of competition, labour costs, and the representativeness of sales. China has presented no arguments or evidence that call into question the suitability of the EU's PCN system for comparing prices. The adjustment for leather was necessary, and possible because the cost differences could be determined on the basis of the international market.

27. **Claim III.4**. China confuses the notion of 'product concerned' with that of 'like product'; there is no rule that limits the scope of anti-dumping proceedings to like products. China has established no legal rule governing that scope. Nor has China shown that the EU may not use a value limit on its definition of the product scope.

28. **Claim III.5**. China's claim, grounded in Article 6.10 of the *ADA*, is based on an erroneous understanding of the *ADA*. The EU refers to its explanations on this issue provided in the section addressing China's claim II.2. The information on the macroeconomic indicators with respect to the Community industry was obtained from the complaint and the standing forms sent to the complainants. Hence, China is incorrect in submitting that the EU relied on data from associations which included companies that were not parts of the industry. With respect to the issue of verification, China's argumentation is based on a legal error.

29. **Claim III.6 / Claim III.16**. China fails to understand that the purpose of the EU's lesser duty rule is to determine what price increase would be necessary to remove the injury. China's invocation of Article 9.1 of the *ADA* and its shift of focus to the EU's lesser duty rule are not permitted by the DSU because they were not raised in consultations. Article 3.1 of the *ADA* addresses the existence of injurious dumping, not the calculation of the 'lesser duty', which in any case is an entirely voluntary matter. Hence, with respect to the claim at issue, a Member which takes such action is not obliged to observe the legal concepts found in Article 3. There is no basis for claiming that the EU failed properly to evaluate the facts. China has not established that the EU's methodology for calculating the lesser duty was discriminatory.

30. **Claim III.7**. Claims of failure to make an objective examination should be framed under Article 3.1 of the *ADA*. The EU's description of volumes of imports having developed 'in parallel' was clearly not intended as a mathematical expression. The right to cumulate does not depend on the existence of normal conditions of competition. China has not refuted the EU finding that the market shares of China and Vietnam developed similarly.

31. **Claim III.8**. China's interpretation of the notion of production capacity (as an injury factor) is too restrictive; it has not shown that in the circumstances of the footwear industry the EU was not justified in linking it to employment. The combination of data from the whole industry with those from sampled companies is an acceptable, indeed commendable practice. Furthermore, relying on data from all the sampled companies (rather than just three) would have produced the same result. The injury finding involves an overall appreciation of factors, and is not determined by any single factor. Since profit figures are themselves usually small margins, an index of annual change can produce very large figures. Proper account was taken of the margin of dumping.

32. **Claim III.9**. Exporters are not eliminated as a cause of injury merely because some circumstance, such as removal of a quota, has given them the opportunity to dump. The EU fully examined the role of changes in consumer preferences as a potential cause of injury, and its evaluation of consumption is not open to criticism. Exporters cannot escape responsibility for injury by blaming exchange rate movements. The methodology adopted by the EU for injury assessment discounted the effects of changes in export performance.

33. **Claim III.10 / Claim III.11 / Claim III.12**. The complainants made a reasoned application for confidentiality regarding the identities of themselves and their supporters, and the EU justifiably accorded them that treatment. Good cause was given by all these parties. Several of China's claims cover information about which it had invoked no duty of disclosure. Other claims concerned data that were properly accorded confidential treatment. On several matters it appears that no request for the data was made by interested parties. Some of China's claims are stated with insufficient precision to be clearly understood. Its claims of insufficient summarization of confidential information are not justified.

34. **Claim III.13**. The document sent to exporters regarding possible MET was not a 'questionnaire' in the sense of Article 6.1.1 of the *ADA*. That term is reserved for the main, comprehensive list of questions sent to interested parties. Paragraph 151 of China's Accession Working Party Report provides no basis for a claim. The EU gave adequate time for exporters to respond to its queries.

35. **Claim III.14**. The document explaining the changed basis for calculating the 'lesser duty' was a follow-up to the disclosure made by the EU under Article 6.9 of the *ADA*. As such, the EU was under no obligation to allow interested parties the opportunity to comment, although it did in fact do so.

36. **Claim III.15**. China is mistaken is saying that one company was removed from the list of the sampled exporters. Rather, the removal of STAF from the 'product concerned' had consequences for the export volumes of the firms in the sample. The selection criterion of the 'largest volume of the exports from the country in question' allows for consideration to be given to the level of domestic sales because it is qualified by the phrase 'that can reasonably be investigated'. In any event, China agreed with the EU on the composition of the sample.

37. **Claim III.17/Claim III.18**. By it is own admission, China's claim is based on the assumption that the application of Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10, 6.10.2, 9.2 and 9.3 of the *ADA* in all cases. As the EU has shown before, China's "as such" claim is without merit and, thus, the Panel should reject it also in the specific context of the original investigation at issue.

38. **Claim III.19**. The EU published sufficient information about the selection of the sample. In other respects China exaggerates the amount of information that must be published, or includes topics where there is no obligation to publish. Not every argument that is raised by an interested party need be addressed.

39. **Claim III.21**. China's claim of consequential breach is redundant.

CONCLUSION

40. The EU requests the Panel to reject all of China's claims.

ANNEX B

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

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF BRAZIL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. PRODUCT UNDER CONSIDERATION

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

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

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

E. SAMPLING FOR INJURY DETERMINATION

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

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

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

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

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

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF COLOMBIA

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. DOMESTIC INDUSTRY

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

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

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

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

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

VII. LIKENESS UNDER THE ADA AGREEMENT

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

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

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

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

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

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

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

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

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

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

IX. CONCLUSION

25. Colombia considers that this case raises important questions on the interpretation of several provisions of the ADA and the GATT 1994. While not taking a final position on the merits of the case, Colombia requests this Panel to carefully review the scope of the claims in light of the observations made in this submission. Colombia reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

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

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Applicability of Article 3 to Sunset Reviews

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

4. China's Arguments on Specific Factual Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Condition of "Not Confidential"

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

(d) Condition of "Used by the Authorities"

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

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

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

3. Conclusion

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

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

ANNEX B-4

THE THIRD PARTY WRITTEN SUBMISSION OF TURKEY

A. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. ANALOGUE COUNTRY SELECTION

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

17. A plain interpretation of Article 2.1 clearly indicates that an investigating authority has to work on two data groups (normal value and export price) to determine whether dumping is present for the product under consideration. Accordingly, the investigating authority is legally obliged to make a fair comparison based on the rules and standards stipulated in Article 2.4 of the Anti-Dumping Agreement between normal value and export price.

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

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

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

[4] EU First Submission, para. 86.

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

> *"It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."*

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

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

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

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

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

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

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

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

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

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

D. SAMPLING

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

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

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

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

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

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

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

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

E. CONCLUSION

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

ANNEX B-5

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

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

1. China argues that Article 9(5) of Council Regulation No. 1225/2009 ("Basic AD Regulation") of the European Union is inconsistent as such with Article 6.10 and, as a consequence, with Articles 9.2, 9.3, and 9.4 of the AD Agreement. The United States disagrees with China's legal arguments because they are based on misunderstandings of the relevant provisions of the AD Agreement.

2. According to China, Article 6.10 of the AD Agreement requires an investigating authority to calculate an individual margin of dumping for every interested party that identifies itself as an exporter or producer. China misunderstands the obligations found in Article 6.10 of the AD Agreement. Article 6.10 requires that an investigating authority calculate an individual margin of dumping in respect of each known "exporter" or "producer." Before assigning an individual dumping margin to a particular firm, however, the investigating authority must decide whether that firm is an "exporter" or "producer." The AD Agreement neither defines "exporter" or "producer", nor sets out criteria for the investigating authority to examine to determine whether a particular entity constitutes an "exporter" or "producer." Therefore, there is nothing in the text of Article 6.10 that requires an investigating authority to calculate an individual margin of dumping for each company solely on the basis of the company's assertion that it is an exporter or producer. Instead, an investigating authority is permitted to conclude, based on the facts on the record, which entities constitute an individual "producer" or "exporter" as a condition precedent to calculating an individual dumping margin. The facts of a particular case may therefore support a finding that the nature of the relationship or operations of two or more legally distinct entities are so closely connected that the entities effectively constitute a single "exporter" or "producer" within the meaning of Article 6.10. The reasoning of the panel in *Korea – Paper* directly supports this interpretation of Article 6.10 of the AD Agreement.

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

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

5. Article 9 discusses the *imposition* of anti-dumping duties with respect to *products*, not individual exporters or producers, and the concept of *imposing* anti-dumping duties on an individual exporter or producer, as advanced by China, is found nowhere in Article 9 of the AD Agreement. Furthermore, as in the case of its Article 6.10 claim, China fails to recognize that the decision as to whether a group of companies functions as a single entity is one that an investigating authority must make *before* it can know how duties should be applied to those companies' imports. If it concludes that multiple companies are closely related and function as a single entity, an investigating authority may apply a single duty to all of those companies' imports, even under China's reading of Article 9. Nothing in Article 9 prohibits such treatment; nor does Article 9 set out criteria for an investigating authority to examine before concluding that a particular firm or group of firms constitutes a single entity.

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

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

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

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

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

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

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

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

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

III. CHINA'S PROCEDURAL CLAIMS UNDER ARTICLE 6 OF THE AD AGREEMENT

13. China claims that the EU violated certain disclosure and procedural requirements found in Article 6 of the AD Agreement. The United States agrees with China that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation. Failure to provide such access would not only be inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, an interested party is necessarily denied "a full opportunity for the defense of their interests."

14. China claims that the EU acted inconsistently with Article 6.1.1 of the AD Agreement by providing less than 30 days for interested parties to submit responses to MET and IT claim forms. China appears to assume that the term "questionnaires" in Article 6.1.1 encompasses *any* request for information made by an investigating authority, as a result of which an exporter or foreign producers should be given at least 30 days to respond to every such request made in the course of an investigation. However, as the panel in *Egypt – Rebar* explained, the context of Article 6.1.1 reveals that the term "questionnaire" for purposes of the AD Agreement refers to one *particular* request for information made by the investigating authority. The original anti-dumping questionnaire in an investigation is the single document contemplated by the term "the questionnaire" in paragraphs 6 and 7 of Annex I. The opportunity provided by an investigating authority to permit Chinese companies to claim market economy treatment or individual treatment is a precursor to the issuance of the actual anti-dumping questionnaire, and therefore not subject to the obligations in Article 6.1.1. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, China's investigating authorities appear to recognize that the 30-day time period for reply does not apply to every request for information made by an investigating authority. Article 12.1.1 of the SCM Agreement is worded almost identically to Article 6.1.1 of the AD Agreement, setting out the requirement of a minimum 30-day response period to questionnaires in CVD investigations. In a recently completed countervailing duty investigation on grain-oriented electrical steel from the United States, the Chinese investigating authorities issued multiple requests for information to the U.S. Government following the original questionnaire, including new subsidy allegation and supplemental questionnaires. For *none* of these requests for information, attached as Exhibit US-1, did China provide an initial period of 30 days to respond.

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

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

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

ANNEX B-6

THIRD PARTY WRITTEN SUBMISSION OF VIET NAM

I. INTRODUCTION

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

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

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

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

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

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

A. CLAIMS ON ARTICLE 9.5 OF THE AD BASIC REGULATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. Article 9.4 ADA provides that:

> *"When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:*

> *(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,*
>
> *(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,*

provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6." (emphasis added)

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

13. In addition, Article 9.4 of the ADA provides that, the authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation. But Article 9.5 of the AD Basic Regulation provides that unless such exporters or producers prove that they meet the additional conditions (IT criteria), exporters or producers shall not be applied individual duties. Therefore, it is inconsistent with Article 9.4 of the ADA.

(v) Article I.1 of GATT 1994

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

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

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

A. CLAIMS ON SELECTION OF BRAZIL AS THE ANALOGUE COUNTRY

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

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

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

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

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

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

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

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

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

B. VIET NAM'S VIEWS

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

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

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

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

ANNEX C

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

ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA

I. THE REQUEST FOR PRELIMINARY RULING OF THE EUROPEAN UNION

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

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

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

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

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

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

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

II. CLAIMS CONCERNING THE ORIGINAL AND REVIEW REGULATIONS

II.1 CLAIMS CONCERNING DUMPING

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

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

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

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

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

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

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

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

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

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

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

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

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

II.2 CLAIMS CONCERNING INJURY AND CAUSATION

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

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

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

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

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

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

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

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

[14] Recital 21, Review Regulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.3 CLAIMS CONCERNING PROCEDURAL ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-2

OPENING STATEMENT OF THE EUROPEAN UNION

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARTICLE 17.6(I) ADA

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

[1] EU First Written Submission, footnote 123.

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

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

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

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

IV. GENERAL REMARKS

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

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

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

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

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

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

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

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

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

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

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

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

V. LEGAL INTERPRETATIONS ADVANCED BY THIRD PARTIES

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

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

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

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

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

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

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

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

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

28. At this point in its Submission Japan addresses the scope of this obligation and concludes that:

> information, on which an authority did not base its decision and thus was not required to disclose under Article 6.9, still falls within Article 6.4's disclosure requirement.'

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

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

VI. CONCLUSION

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

ANNEX C-3

CLOSING STATEMENT OF CHINA

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-4

CLOSING STATEMENT OF THE EUROPEAN UNION

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

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

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

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

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

ANNEX D

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

ANNEX D-1

THIRD PARTY STATEMENT OF BRAZIL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX D-2

THIRD PARTY STATEMENT OF COLOMBIA

I. INTRODUCTION

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

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

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

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

4. Among China's claims against Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 (the "AD Review Regulation"), Colombia finds specially interesting the legal debate surrounding claims II:2 to II:5, relative to how the EU reviewed the anti-dumping duties imposed through Council Regulation (EC) No. 1472/2006 of 5 October 2006.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

ANNEX D-3

EXECUTIVE SUMMARY OF THE THIRD PARTY STATEMENT OF JAPAN

I. INTRODUCTION

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

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

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

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

II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] See China FWS, para. 812.

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

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

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

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

III. CONCLUSION

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

ANNEX D-4

THIRD PARTY STATEMENT OF TURKEY

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

I. ANALOGUE COUNTRY SELECTION

2. Article 2.1 of the Anti-Dumping Agreement ("ADA") provides under what circumstances a product is considered as being dumped. A plain interpretation of Article 2.1 clearly indicates that an investigating authority has to work on two data groups namely normal value and export price to determine whether dumping is present for the product under consideration. Accordingly, the investigating authority is legally obliged to make a fair comparison based on the rules and standards stipulated in Article 2.4 of the ADA between normal value and export price.

3. Most of the time, the normal value is determined by looking at sales of the like product in the ordinary course of trade in the domestic market of the exporting country. However, as envisaged in Article 2.2 of the ADA, in some situations domestic prices and the exporting prices do not permit a proper comparison. In order to overcome these difficulties, the ADA provides alternative ways to find a comparable price.

4. Furthermore, Ad. Article VI.2 of GATT1994 together with paragraph 15(a) of the Accession Protocol of China provides derogation from the provisions of the ADA regarding the determination of normal value. In this context a WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the investigated producers cannot clearly show that they are operating in market economy conditions.

5. Turkey considers that selecting an analogue country is the most reasonable method for determining the normal value when the investigated companies are not operating under market economy conditions. In fact from the submission of the Parties, Turkey understands that the use of the analogue country procedure is not disputed between the parties.

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

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

8. The critical question here is whether the selected analogue country should be an appropriate or the most appropriate country. Taking into account the difficulties regarding the selection of analogue country and the fact that the rules and procedures on this issue is not prescribed in the ADA, Turkey considers that the standard applied in regard to the selection of the analogue country should be "an appropriate country" standard, not "the most appropriate country" standard. Therefore, if it can be determined that the selected country is appropriate in order to determine the normal value, then the investigating authorities are not required to search for the most appropriate country to select as analogue country.

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

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

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

II. SAMPLING

12. It is clearly understood from Article 6.10 of the ADA that while the general rule is to calculate individual dumping margin for every known exporter/producer, sampling is an exception to that general rule when the number of exporters/producers/importers/types of products is too large to make such an individual treatment.

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

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

15. Therefore once the sampling is applied, the investigating authorities make the examination of whether dumping exists according to the data of the only sampled companies. This means that the investigating authorities limit their examination only to a group of companies. The MET/IT determinations constitute the part of this examination that is limited to group of sampled companies.

In other words the investigating authorities have to examine only the MET/IT application of the companies that are included in the sample.

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

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

III. CONCLUSION

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

ANNEX D-5

EXECUTIVE SUMMARY OF THE THIRD PARTY STATEMENT OF THE UNITED STATES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. As the United States explained in its written submission, the specific requirements imposed by Article 3 of the AD Agreement for original investigations do not apply to sunset reviews under Article 11.3. The Appellate Body has explained this on two occasions, noting that the AD Agreement distinguishes between "determinations of injury" addressed in Article 3 and determinations of

likelihood of "continuation or recurrence . . . of injury" addressed in Article 11.3. Moreover, turning to the text of the Agreement, Article 11.3 contains no cross-references to Article 3 that would make Article 3 provisions applicable to sunset reviews. Nor does the text of Article 3 mandate that whenever the term "injury" is used in the AD Agreement, a determination of injury pursuant to the provisions of Article 3 is required.

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

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

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

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

24. China claims that the EU acted inconsistently with Article 3.3 of the AD Agreement by cumulating imports from China and Vietnam because the conditions of competition between the imports from China and Vietnam were not equivalent. China's claim is based on the erroneous legal premise that an investigating authority must establish that imports from different countries have similar volume and market share trends in order to demonstrate that cumulation is appropriate in light of the conditions of competition pursuant to Article 3.3.

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

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

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

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

ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. The extent to which this summary treats certain facts and legal issues should not be taken as any indication of the relative importance that China attaches to them.

II. PRELIMINARY RULING REQUEST ISSUES

2. First, China notes that it is its view that the drafters *did* intend to have Article 17.6(i) set limits on authorities' discretion to act in an unfair manner. After the inclusion in the *Anti-Dumping Agreement* of Article 17.6(i), it seems as though it would have gone without saying that if Members did not conduct investigations in accordance with the broad standards set by the Article, then they would be liable to have the determinations not made in conformity therewith overturned.

3. China also notes, as it did in its response to question 29 by the Panel, that even if the Panel were to consider that Article 17.6(i) were not capable of forming the basis of a claim, the Panel should still consider China to have made its *prima facie* case in respect of its procedural fairness claims through the Article 2.4 fair comparison obligation. The facts which China has said violate the 17.6(i) standards are the same facts which would violate the fair comparison obligation, and for the same reasons (it is noteworthy that the EU responded to these allegations on their merits).

4. With respect to the EU's DSU Article 6.2 arguments in connection with China's Article 17.6(i) claims, China refers to Paragraphs 116 to 135 of its First Written Submission ("FWS") for a general overview of how WTO panels and the AB have interpreted Article 6.2 of the DSU, as well as Paragraphs 149 to 155 of its FWS for its argument as to why China's Article 17.6(i) claims, specifically, satisfied the requirements of that Article.

5. China does not have much substance to add to those arguments in connection with the rest of the EU's DSU Article 6.2 arguments pertaining to the Definitive and Review regulation claims. The *claims*, as China has explained, were properly made in the panel request as they identified the measures at issue and provided a brief summary of the legal basis of the complaint, as those terms have been defined by consistent case law. An elaboration of the *arguments* was provided in China's FWS.

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

6. As an initial matter, China would note that up to this point, it has not relied upon the conclusions of the panel in the *EC - Steel Fasteners* dispute as they relate directly to each of China's as such claims. As of four days before the due-date of this submission, however, the final report of the panel in that dispute has been made public, and China considers that the holdings of the panel in that dispute should henceforth be duly taken into account by the panel in this one.

7. Notably, with respect to China's *as such* claims, the panel in that dispute ruled in favour of China with respect to every claim on which it made an affirmative finding. Specifically, the panel held that Article 9(5) of the Basic AD Regulation violates Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, along with the MFN principle contained in Article I:1 of the GATT 1994, Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement.[1] In addition, it is noteworthy that the panel considered, in the context of a virtually identical panel request in both cases, that each of China's *as such* claims fell within the scope of Article 9(5) such that they could be considered on their merits, and none failed to meet the requirements of DSU Article 6.2.

8. China additionally notes that in light of the identical nature of the as such claims at issue in the two disputes and the close temporal relationship between them (i.e. no AB report has made any statement which would cast doubt upon the validity of the panel's reasoning in the *EC - Steel Fasteners*), as well as the common parties, China considers the issue of whether or not Article 9(5) is inconsistent with Article 6.10, 9.2 and I:1 of the GATT to have been resolved such that any major contradiction with respect to the result in the two disputes would be difficult to accord with Article 3.2 of the DSU the AB's holding that, while not binding, panel reports create legitimate expectations among Members.

9. As to the substance, China considers that the EU clearly has no legal basis on which to consider that the actual status of China's economy is relevant for the purposes of this dispute, and the Panel report in *EC - Steel Fasteners* has effectively rejected any form of the proposition that either the Working Party report, the Protocol, or any of the EU's "evidence" as to the current state of China's economy can form the basis of a justification to institute a rebuttable presumption which applies to China on a discriminatory basis and has nothing to do with the calculation of normal value.

10. It is on this basis that the Panel held for China with respect to the GATT I:1 claim. It is also noteworthy, as a foundational issue that equally undermines the EU's defenses with respect to *each* of the provisions at issue, that the Panel in *EC - Steel Fasteners* held that in determining whether a company is related to the state as a factual matter, be it in the context of whether the state is a single producer for Article 6.10 purposes or a supplier for Article 9.2 purposes, the burden of proof shall not be shifted to the exporters, irrespective of the economy from which that producer comes. In China's view, the panel held the same burden of proof issue to, in itself, constitute a violations of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, as well as GATT I:1.

IV. CHINA'S CLAIMS CONCERNING THE REVIEW REGULATION

11. China recalls that the analogue country selection process falls within the scope of the fair comparison obligation of Article 2.4, first sentence. In paragraphs 154-193 of China's replies to the questions of the Panel in connection with the first meeting with the Panel, China provided a detailed response to the Panel's request that China respond to the EU's argument in its FWS, paragraph 171, that the obligation in Article 2.4 of the AD Agreement to make a fair comparison comes into play after such a normal value has been identified, but not before.

12. China's principal argument in that respect is that the fair comparison obligation contained in Article 2.4, first sentence, is an independent, overarching obligation which stands alone from the more specific obligations relating to the examples of due allowances which follow it. China considers that the analogue country selection and selection process effectively precluded a fair comparison, and therefore the EU is in violation of that obligation. China finds support for this argument in various AB reports' interpretation of the fair comparison obligation, as well as the drafting history of the Article and the wording of China's Protocol of Accession, which considers the "comparison" to be essentially synonymous with the establishment of normal value.

[1] See generally *EC - Steel* Fasteners, paras. 7.11-7.50 for holdings on preliminary issues and 7.51 to 7.137 for holdings on substantive issues relating to the as such claims.

13. Along with the substantive criteria in making the selection and the result, the Fair Comparison obligation informs the procedural fairness aspects of analogue country selection. It would be difficult to imagine that the "comparison" could be truly "fair" in a situation where the substantive criteria used to derive the normal value on which the comparison was based were fair (which is not the case here either), but the actual *procedure* were effectively rigged so as to favour the interests of the domestic producers such that the final normal value were sure to be unrealistically high.

14. Article 2.1 of the *Anti-Dumping Agreement* may form the basis of a claim. In response to the EU's reliance on the AB in *US - Zeroing (Japan)*, China notes that it is not reading Article 2.1, and particularly what it considers to be the necessity to establish a *comparable price*, in isolation. Rather, the obligation to establish a comparable price is in fact found throughout various provisions of the *Anti-Dumping Agreement* such that it cannot be said that Article 2.1 independently imposes it, and the independent imposition of an obligation by a provision is not a necessary prerequisite to its being capable of citation as the basis of a claim.

15. Certain procedural fairness issues must be considered to fall within the scope of Article 2.1. even though there is no embedded due-process language contained within Article 2.1, as is the case with Article 2.4. Nevertheless, China considers that if there is an obligation to secure a comparable price, a process by which that price is secured which is effectively rigged in such a way that the resulting price will not be, or will be far less likely to be "comparable," then that obligation is violated. At the least, China would consider that certain of the facts of this case, which evidence blatant bias in favour of the domestic producers throughout the selection of the analogue country, should violate the general principle of good faith.

16. As to the actual way in which Article 2.1 and 2.4 place limits on authorities' discretion with respect to the analogue country selection process, China considers that the EU's interpretation of the significance of the silence of the contracting parties as to the specific criteria to be used in the analogue country selection is misplaced, and the AB report in *US-Hot Rolled Steel* lends clear support to this view. A reasonable analogue country selection process undertaken in the event of a finding of distortion of domestic prices must *at least aim in the direction* of finding a proxy normal value for that which would have prevailed if not for the distortion. The EU's argument that the only "inferred requirement" is that the country operate under market conditions is not tenable in light of the object and purpose of the *Anti-Dumping Agreement*.

17. In that respect, China considers that the actual criteria which the EU used *in this case* to select the analogue country were, taken as a whole, inappropriate as a means to find a comparable price which could permit a fair comparison because they did not include *any factor* which could evidence an intention to find a proxy normal value for the actual country under investigation.

18. That conclusion notwithstanding the criteria in this case were analysed in an unreasonable manner because the EU placed a manifestly unreasonable amount of importance on sales volume as an analogue country selection criterion, and this was primarily responsible for the inappropriate selection of Brazil. Furthermore, the sales volumes analysed were derived as the result of a violation of the interested parties' due process rights, and thus the procedural fairness issues tainted those analyses.

19. Those arguments notwithstanding, China also considers that the EU's analysis of the "competition" criterion was unreasonable because the effects of the protection of a market must be considered as a counterweight to the fact that there are a significant number of producers in that market. Furthermore, the analysis of the "like product" criterion was unreasonable because Brazilian producers did not even produce one of the major subsets of the product concerned.

20. With regard to the claim concerning the PCN classification system, China has explained that the existence of an overly broad PCN system with broad PCN categories precluded a fair comparison in the review investigation. The differences on account of the physical characteristics and technical differences which affected the production costs and sales prices were not captured by the PCN system used in the review investigation. Chinese producers could not possibly quantify these differences for the hundreds of extremely different footwear types classified under the same PCN in order to be able to request specific adjustments within the PCN. China has also established that there was a change in the methodology of classification of sports, sports-like and trekking footwear from one category to another, contrary to the EU's claim in the FWS that there was merely a rectification of the classification errors. The changed classification further prevented a fair comparison between the PCN-based Chinese export prices and Brazilian normal value within the meaning of Article 2.4 and consequently the EU's evaluation of 'dumping' was inconsistent with Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994.

21. Having mentioned the foregoing, China notes that the legal basis of its claims II.1 and II.13 are Articles 2.1, 2.4, and 17.6(i), and Article VI:1 GATT and Article 11.3. China first established the legal basis for the applicability of Article 2 provisions in the expiry review with reference to Article 11.3; then it provided detailed factual and legal arguments establishing the violation of the provisions of Articles 2.1, 2.4, 17.6(i) and GATT Article VI:1. Thereafter, China argued the breach of Article 11.3 based on the establishment of the violation of the provisions of Article 2 and Article VI:1 GATT 1994.

22. With regard to claims II.2-II.5, China submits that the EU's assertion of a legal error by China is incorrect and must be rejected. China claims that an investigating authority is not required to or mandated to make an injury determination again in the context of a likelihood of injury determination under Article 11.3. However, as was the case in the review investigation, if an investigating authority makes an injury determination and relies upon it for the likelihood of injury determination, then the provisions of Article 3 would be relevant in the context of that injury determination and the violation of the provisions of Article 3 can be alleged in the context of that injury determination.

23. Article 11.3 being termed as a consequential claim in China's FWS does not indicate that it is not the legal basis of China's claim.[2]

24. In China's view, if a panel finds that an investigating authority conducted an injury determination which is inconsistent with the Article 3 provisions, and relied upon that injury determination for its likelihood-of-injury determination, then the latter determination of the investigating authority is also defective and inconsistent with Article 11.3. Such a likelihood of injury determination cannot form a proper foundation for the continuation of the anti-dumping duties under Article 11.3.[3]

25. China has established that the EU made an injury determination in this case based on the provisions of Article 3. The scheme of the injury determination in the review investigation mirrored that of the original investigation. This injury determination then became the essential basis of the EU's finding of a likelihood of continuation of injury. The EU's assertion that "*[t]he determination of likelihood of injury that is made in the Review Regulation is based… **also on an examination of the individual factors pertaining to both injury and causation that are relevant to such a determination. In fact, by far the greatest emphasis is placed on this examination***"[4] is factually incorrect. The likelihood determination of the EU was simply based on a finding of continued dumping and injury to

[2] Panel Report, *US - OCTG Sunset Reviews*, paras. 7.273-7.274.

[3] AB in *US - OCTG Sunset Reviews* also held that the requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" is equally relevant to likelihood determinations under Article 11.3.

[4] Para. 93, EU's response question 43 from the Panel.

the exclusion of any additional analysis. The alleged likelihood-of-injury causation analysis was not a part of the likelihood-of-injury analysis of the EU but merely its response to the arguments raised by interested parties. Thus, to the extent the EU made an injury determination in the review investigation, it was required to comply with the Article 3 provisions.

26. As regards the sampling of the EU producers, China considers that since some information for the complainant producers was available to the EU-which was (a) not the relevant information nor the kind of evidence which is necessary for sampling and can be considered "positive evidence"; and (b) not at the same level and to the extent as that solicited for the purpose of sampling through a sampling form and was solicited from the other interested parties including non-complainant producers – the EU did not comply with the objective examination and positive evidence requirement of Articles 3.1 and 17.6(i) in selecting the eight complainant producers in the sample. By not sending the sampling forms to the complainant producers only, the EU did not gather the requisite "positive evidence" and did not 'identify' the facts for the purpose of sample selection and consequently the injury determination, on the basis of an objective examination. China notes that by soliciting sampling information through sampling forms an investigating authority in addition to gathering the relevant data ensures to a certain extent that the data qualifies as "positive evidence".

27. If the Panel were to accept the EU's new definition of the domestic industry, it would only lend further support to China's assertions in the context of the present claim because while the EU claims to have investigated the existence of injury both with respect to the complaining and non-complaining producers, it solicited the information relevant for sampling, i.e. positive evidence, exclusively from the non-complainant producers.

28. The EU's entire defence is based on an assumption unsupported by any evidence, that the "positive evidence", i.e. the information relevant for sampling, that would have been obtained through completion of sampling forms by each individual complainant, was available to it for all the complainant producers individually at the time of sample selection, i.e. before 10 October 2008. This assumption has been refuted by China. With regard to the complaint, the EU's response to question 45 from the Panel makes clear that the data for the full RIP was not available in the complaint; information regarding the sales data for the years 2006, 2007 and the RIP, and information about the product types produced were not provided by each complainant. The declarations of support provided only the production data for 2007 and January 2008 and no information was solicited for sales or sector/product segments. Additionally, the standing forms requested the production and sales volume for the years 2006, 2007 and first half of 2008 and were allegedly completed by 'some' complainants. Even if two, five or ten complainants completed the standing form, clearly the EU did not have the data from each complainant. The EU's assertion that the aggregate data for majority of the complainants that did not complete the standing forms was obtained from the national associations is irrelevant as desegregation of the data of individual producers from the aggregate data of all companies that were members of the national associations is impossible. Aggregate data of the national associations is neither the same as the individual data that the complainants would have provided if they would have completed the sampling forms, nor can that aggregate data be considered "positive evidence". Simply considering the full year 2007 data provided by some complainants in the standing form responses, equal to or representative of the data for the last six months which were part of the RIP amount to extrapolation and not "positive evidence". Product/sector segment information was not sought in the standing form. Last, the EU's use of estimates provided by CEC in the letter of 29 October 2008, to further confirm estimates provided in the complaint, cannot be considered relevant "positive evidence" for sampling. In any event, the reference to the CEC letter of 29 October 2008 which post-dated the sample selection, i.e. 10 October 2008, does not establish that the selection of the eight producers sampled on 10 October 2008 was based on positive, credible and affirmative data relevant for sample selection.

29. China has explained the basis on which it posits the applicability of Article 6.10 for sampling in the context of injury in this case. Based on that reasoning and the interpretation of the panel ruling

in *EC - Salmon*, China considers that if an investigating authority claims to have based the sample principally on the volume of production of the domestic producers, it is obliged to follow the criteria prescribed in Article 6.10 and there is no other methodology which would ensure that the domestic industry as a whole is represented by the sample. The contrary would lead to anarchic situations like the present case where the EU industry's sample comprises of only eight companies of which one completely outsourced production in the RIP to a non-EU country, and in total the sampled companies account for only 8.2 per cent of the domestic industry production if the domestic industry were to be accepted as comprising of the complainants and 3.1 per cent of the total production of the EU industry should the Panel consider that the domestic industry comprises of complainants and non-complainants.

30. Additionally, if the Panel were to accept the new definition of the domestic industry, China considers that the sample of the EU producers selected from a pool of complainant producers only is biased and unrepresentative of the domestic industry as whole which includes non-complainant producers representing 65 per cent of the total domestic industry production. In violation of Articles 3.1 and 17.6(i) of the *Anti-Dumping Agreement*, the EU ensured that only one segment of the domestic industry, notably the complainants that claimed the existence of injury to begin with, were represented in the sample.

31. China submits that the inclusion of a company in the domestic industry sample that definitively ceased EU production and outsourced its entire production at some point during the RIP to a third country and was no longer representative of the entire domestic industry as a whole after that point in time, cannot be justified on the ground that it represented an important business model because such business model pertained to an importer and representativity of business models was not one of the criteria for sample selection as admitted by the EU in the FWS. Even if the data of this company pertaining only to its activity as a producer was taken into account for the injury determination, China considers that the effect of outsourcing on this company would be attributed to the allegedly dumped imports and transposed to the situation of the other EU producers. Consequently an injury analysis based on a sample including such a producer cannot be considered objective and based on positive evidence.

32. China requests the Panel not to accept the EU's ex-post definition of the 'domestic industry' as consisting of complainants and non-complainants. The contrary would make the provisions of Articles 3.1 and 3.4 practically ineffective. Ample evidence on the record as noted by China in the SWS disproves the EU's new definition. The Review Regulation and the Notes for the File show that the EU represented since the beginning of the review investigation that the domestic industry consisted of the complainant producers only, as is indeed standard EU practice. Thus, the EU violated Article 3.4 because it analyzed the macroeconomic injury indicators on the basis of data that included the data of non-complainant producers accounting for around 65 per cent of the EU production.

33. If however, the domestic industry were to be considered by the Panel as consisting of complainants and non-complainants then also China's claim stands as the Prodcom data as well as the data of the national associations for the various macroeconomic indicators used by the EU included the data pertaining to the domestic producers that had delocalized production to the countries concerned; or were related to Chinese exporters or imported significant quantities of the product concerned from China and/or Viet Nam. An unsubstantiated assumption forms the basis of the EU's evaluation of the macroeconomic indicators that only three EU companies out of 18,000 producers outsourced production outside the EU and/or were related to Chinese producers. Additionally, irrespective of the domestic industry definition, China has established in the SWS that the EU's assessment of the injury indicators was not based on "positive evidence" and an "objective examination" of evidence. Notably, Prodcom data is an un-objective source of data, it is available only for calendar years (not the RIP) and at the CN code level; and the data of the national associations contained significant estimates and represented only 80 per cent of the EU production.

34. With regard to causation, China considers that the EU did not objectively separate and distinguish the injurious effects of certain duly demonstrated factors and made boilerplate statements without analyzing the nature and extent of the injury caused by those factors. This is evident from the explanations provided by the EU in the Review Regulation. The EU simply attributed the injurious effect of those other known factors to the dumped imports in violation of Article 3.5. Additionally, with respect to certain other known factors, the EU admittedly refused to analyze the injurious effects of those factors. Consequently, the EU did not comply with its overarching obligation to demonstrate causation and the non-attribution analysis was not done in compliance with Article 3.5.

35. With regard to the procedural issues, in the context of the violation of Article 6.1.2 by the EU, China considers that in the absence of any proof that would establish that the five sampled EU producers did not submit Community interest questionnaire responses, China's claim stands. Concerning the delay in making available the injury questionnaire responses of four sampled EU producers, China notes that the condition in Article 6.1.2, i.e. "subject to the requirement to protect confidential information", which is the basis of all the arguments of the EU, does not come into play as the subject questionnaires were the properly filed non-confidential versions. Investigating authorities have no obligation to ascertain whether the submitted evidence labelled 'non-confidential' is indeed non-confidential. It is the party submitting evidence/a document that has to request confidentiality and demonstrate good cause for confidentiality and in the absence thereof, it is the investigating authority's obligation to promptly make available the evidence submitted by one interested party to another. If the EU's interpretation of Article 6.1.2 were to be accepted, investigating authorities will virtually never have to bother to make promptly available any evidence to interested parties.

36. In the context of claim II.7, China's notes that its claims under Article 6.2 are <u>not</u> merely consequential to its claims under Article 6.4. China has also established an independent violation of Article 6.2. Based on the panel ruling in *Guatemala–Cement II* China considers that there may be cases in which a panel will nevertheless need to make additional findings under Article 6.2, although the more specific provision has not been violated. In the specific context of Article 6.4, China has refuted the misconceived interpretation of the terms 'information', information 'used' by investigating authorities, and timeliness, forwarded by the EU. If the EU's interpretation of Article 6.4 were to be accepted, procedural issues among others concerning the sample selection and analogue country selection cannot be challenged under this Article.

37. With regard to the violation of Articles 6.5 and 6.5.1, China has refuted at length the erroneous interpretations and factually incorrect arguments of the EU in the FWS and in response to the Panel questions. The EU violated Article 6.5 (a) by granting confidential treatment to the names of the EU producers including complainants, supporters, sampled producers and producers sampled in the original investigation; by granting confidential treatment to some information in the expiry review request, standing forms, CEC submissions, injury questionnaires of sampled EU producers; and analogue country questionnaires, which were not confidential; and (b) by granting confidentiality to certain information in the above-mentioned documents on its own accord in the absence of "good cause" showing by the parties concerned. The EU also violated Article 6.5.1 (a) by failing to require the parties concerned to provide non-confidential summaries of the confidential information submitted and/or to give a statement of reasons as to why summarization was not possible; and (b) by failing to ensure that the non-confidential summaries provided permitted a reasonable understanding of the confidential information submitted.

38. China reiterates its claims II.9-II.12 and refers to its detailed rebuttal in the SWS of the EU's arguments in the context of these claims.

V. CHINA'S CLAIMS CONCERNING THE DEFINITIVE REGULATION

39. China considers that sampling does not apply to the MET determination because Article 6.10 and 6.10.2 do not concern the methodology and data to be used for calculating the margin of dumping. The EU was under an obligation to base the margin of dumping on prices or costs in China even to non-sampled exporting producers which can show to operate under market economy conditions.

40. Alternatively, the criterion "largest volume of export sales" does not guarantee that the sample is representative for a determination whether producers operate under market economy conditions, as it excludes small and medium-sized exporters. Also, by requesting non-sampled companies to respond to MET questionnaires in a very short deadline and then not looking at them, creating a reasonable expectation that they could be granted MET and granting no additional opportunity to apply for individual examination once it was decided to disregard the information supplied by them, the EU did not act in respect of the general principle of good faith and fundamental fairness and the "proper establishment" requirement of Article 17.6(i).

41. China considers that the EU was not excused from individually examining any subsequent submission of non-sampled companies because the size of the sample was extended at the request of the Chinese authorities. It is for the EU to provide evidence that its administrative capacities did not allow for the examination of four additional companies. In any event, in case of sampling, investigating authorities should always allocate some resources in case any company requests an individual examination as otherwise, Article 6.10.2 would be rendered meaningless.

42. China considers that the EU was not allowed to disregard the sales of companies not granted MET for the calculation of the cap for the establishment of the amounts for SG&A and profits for the Chinese company granted MET. In addition, the EU could have used the profit realized by exporting producers in the textile sector – which together with footwear belong to the broader category "Fashion and design industries" – to calculate the cap. In any event, that the method used was unreasonable, because the EU used criteria not provided in Article 2.2.2(iii) to arbitrarily restrict the amount of data that could be used.

43. With regard to the analogue country selection process, China refers to its arguments made in the context of the review regulation that (i) the EU places an unreasonable amount of weight on domestic sales volume as a means to select an analogue country, (ii) the criteria taken as a whole are manifestly unreasonable and necessarily cannot not accord with the obligations to secure and make a fair comparison as the EU does not seriously take into account any criterion which aims at finding a proxy normal value for that which would have existed but for the distortion in the Chinese market. With regard to instances of procedural bias China considers among others that (i) exporting producers did in fact request the EU to undertake more extensive and diligent efforts to secure producer cooperation and better assess the appropriateness of India and Indonesia as analogue countries, (ii) the burden of proving that there were fewer (known) producers in Indonesia lies with the EU and (iii) the EU has been unable to rebut the prima facie evidence that the several Brazilian companies were granted more time, (iv) and the failure to even consider the numerous and repeated arguments made by an interested party constitutes an improper establishment of the facts.

44. China considers that the PCN methodology was too broad to allow for a fair comparison, thus violating Article 2.4 because the EU only made one adjustment even though many differences affecting cost of production were not reflected in the PCN. The method used to exclude STAF was unreasonable because the EU "deemed to be STAF" all PCNs reported with a weighted average CIF price above a price threshold. China notes also that the EU is stating something else in the context of this dispute than what is contained in the published Regulation, namely that the leather cost adjustment was based only on world market prices, and that the EU refused as a matter of principle to make adjustments in previous investigations because the companies were not granted MET, while in

the footwear case, the EU was prepared to make an exception for the calculation of a significant adjustment upwards.

45. China considers that the EU effectively determined that STAF and non-STAF were not 'like products' because the test it applied effectively constitutes a 'like product' test or indeed an even stricter test than the 'like product' test. Given the absence of any production of STAF in Brazil and – or hardly any – in the EU, the EU violated Article 2.6 read together with Articles 3.1 and 4.1 by determining that the product concerned and all corresponding types of footwear produced and sold in Brazil, as well as those produced and sold by the Community industry on the Community market are alike.

46. With regard to the use of different sampling procedures for Chinese exporters and EU producers, China refers to its claim II.2. Also, the EU's conclusion that, in the case of relatively small and medium sized companies, losses cannot be sustained for a significant period without being forced to close down, was based on data from associations which included companies that were not parts of the industry. China considers that the requirement to conduct an objective determination of injury based on positive evidence in this case required a verification of the information provided, given that the information was collected at the complaint stage.

47. China considers that its description of the lesser duty calculation methodology is in line with the wording of Article 9.1, which is relevant to the dispute because it creates the possibility to have a lesser duty and sets the context within which such a rule would operate. While the lesser duty rule provision is voluntary, China submits that, once it is used, an authority is bound to interpret the term "injury" in terms of Article 3. China considers that the lesser duty calculation is covered by Article 17.6(i), as export prices are the facts to be evaluated.

48. China stands by the arguments and conclusions that (i) by mixing data from 2003, the IP and 2005, the EU did not conduct an unbiased and objective examination and this violated Articles 3.1 and 17.6(i), (ii) an unbiased and objective authority would not apply a different standard either (a) in terms of ensuring a fair comparison by not including all export sales when using the lesser duty rule or (b) by using different datasets for dumping and injury margin calculations, (iii) by basing the profitability on one part of the Community industry, especially in light of the fact that profit had never exceeded 2 per cent even in the 2003 non-injurious situation, the EU violated Article 3.1 by not conducting an objective examination, and (iv) by collecting a higher duty for China than Viet Nam when all objective measures indicated that the opposite was true, the EU violated Article 9.2.

49. China considers that the EU failed to consider an important asymmetry between the development of the import volumes from China and from Viet Nam, as the 2001 import volumes from China were much lower than for Viet Nam and the increase in imports from China occurred only towards the end of the IP, and thus the volume of imports did not develop "in parallel". The Definitive and Provisional Regulation do not contain any compelling explanation as to why, in light of the suppression of the quota in 2005 and the acceleration of imports during the first quarter of 2005 due particularly to the development of the Chinese imports, the EU still considered that a cumulative assessment of the imports was appropriate.

50. China did not purport to propose a definition of production capacity that would fit in all circumstances and in any event the EU cited an example which does not apply to the facts of this case or referred to figures which are not on record. In addition, by taking employment as a proxy for production capacity, the EU analysed this factor only for part of the Complainants. With regard to the analysis of "other factors" China considers that EU's arguments should be rejected.

51. Concerning causation, the one common theme is that the explanations given by the EU evidence the erroneous understanding of the non-attribution requirement as being an obligation

completely distinct from the obligation to demonstrate that the dumped imports are, through the effects of dumping causing injury as set forth by Article 3.5, first sentence.

52. As to the 15 days to reply to the MET questionnaire, a recent panel report has ruled that there may be a set of initial questionnaires. China reiterates that there is absolutely no bar to the consideration of an uncited provision (para. 151 of the WPR and Article 6.1) in support of a claim relating to a provision which was cited in a panel request.

53. China does not consider that specific and subjective valuations made by one party from Viet Nam, concerning the additional disclosure, could simply be extended to all parties. Furthermore, the *EC – Salmon (Norway)* applied to a reassessment of facts, while in the present case the disclosure used facts occurring after the period of investigation, namely in the calendar year 2005.

54. By including exports of STAF in the largest volume of exports of non-STAF from China, such as exports from the company PWC, the EU failed to base the sample on the largest percentage of the exports from the country in question which can reasonably be investigated. In addition, the consideration of domestic sales by the EU is based on a wrong interpretation of the notion of reasonableness as it appears in Article 6.10.

55. As regards the claims arising as a consequence of the fact that Article 9(5) of the Basic AD Regulation is inconsistent with the provisions as such, unless the panel disagrees with the clear holdings of the *EC – Steel Fasteners* panel with respect to China's Article 9.2 and 6.10 claims, then it must find that the EU violated those articles in the context of the as applied claims as well.

56. China reiterates its claims III.10 to III.12 and III.19 and refers to its detailed rebuttal in the SWS of the EU's arguments in the context of these claims.

ANNEX E-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

INTRODUCTION

1. Pending the Panel's response to the EU Request for a Preliminary Ruling, the EU notes that this Request has affected the way in which the European Union has been arguing its claims before the Panel. The fact that the European Union addressed in good faith (fully or at least partially) some other China's claims which were the subject of the Request does not mean that the European Union accepted that those claims had been brought properly within the Panel's terms of reference.

2. Instead of repeating the EU arguments, the European Union focuses on addressing those assertions and arguments brought by China at the First substantive meeting as well as in China's Responses to Questions from the Panel and the European Union. The fact that the European Union does not specifically comment on a certain statement or a response made by China does not mean that the European Union agrees with it. Rather, it means that the European Union considers those statements irrelevant to the claims at issue or rebutted by the arguments made by the European Union in previous submissions.

ARTICLE 17.6(I) OF THE ADA

3. There is no question that WTO Members should establish facts properly and evaluate them in an unbiased and non-objective way *when discharging their WTO obligations* in the conduct of domestic anti-dumping proceedings. The standard of review established in Article 17.6(i) achieves – from the practical perspective – just that objective. In essence, this standard reflects a corresponding obligation (obligations) which is (are) imposed on WTO Members by "other provisions" (Appellate Body Report, *US – Hot-Rolled Steel*, para. 56) of the *ADA*. It follows that to achieve China's objective to make WTO Members establish facts properly and evaluate them in an unbiased and non-objective way, it is not necessary to construe Article 17.6(i) as a separate legal basis. Conversely, doing so would be counterproductive and of concern for the WTO system.

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

4. The European Union observes that China has not yet addressed the arguments made by the European Union in its request for preliminary rulings and First Written Submission that China's Panel Request failed to meet the requirements of Article 6.2 of the DSU. Essentially, China seems to try to identify the specific measure in the description of the legal claims. This in itself implies that the identification of the specific measure, as required by Article 6.2 of the DSU, was insufficient. The European Union has also explained that Article 9(5) addresses a threshold question and provides for the imposition of anti-dumping duties on an individual basis (in the case of IT suppliers) or on a country-wide basis (in the case of non-IT suppliers). Other provisions of the Basic AD Regulation address the individual calculation of dumping margins, how those margins are calculated and how the level of anti-dumping duties is established. Likewise, the European Union recalls that the dumping margin does not serve in all cases as the basis for establishing the level of anti-dumping duties since the European Union has adopted the lesser duty rule (i.e., the anti-dumping duty may be based on an

injury margin). Thus, the explanations as to why Article 9(5) violates the covered agreements do not relate to the specific measure identified by China in its Panel Request; rather, those explanations seek to expand the measure at issue to other aspects of the Basic AD Regulation which were not identified by China in accordance with Article 6.2 of the DSU. The European Union further observes that compliance with the requirements under Article 6.2 of the DSU is not only a due process issue, but also a jurisdictional matter. What China cannot do is to specify Article 9(5) in its Panel Request, state that it "effectively" provides for one specific issue (in relation to the imposition of anti-dumping duties) and then allege violations of other provisions which relate to other aspects which may or may not derive from the Article 9(5) determination, alone or in combination with other provisions (not identified by China) of the Basic AD Regulation. This is therefore both a jurisdictional and a due process issue into which the Panel should look carefully. Consequently, for all the reasons mentioned in its previous submission, the European Union maintains that China's Panel Request failed to meet the requirements of Article 6.2 of the DSU with respect to its claims relating to Articles 6.10, 9.3 and 9.4 of the *ADA* and Article X:3(a) of the GATT 1994.

5. The European Union observes that China has not made any new arguments concerning its claims under Articles 9.4 and 18.4 of the *ADA*, Article X:3(a) of the GATT 1994 and Article XVI:4 of the WTO Agreement. Accordingly, the European Union will only address China's arguments concerning Articles 6.10, 9.2 and 9.3 of the *ADA* and Article I:1 of the GATT 1994. In particular, the European Union will divide its analysis into China's claims under the *ADA* and China's claims under Article I:1 of the GATT 1994.

6. With respect to China's claims under the *ADA*, the European Union has explained in detail in its submissions why China's claims are without merit. To recall, China's main argument is that Article 6.10 mirrors Articles 9.2 and 9.4 of the *ADA*. According to China, since sampling is the only exception to the individual determination of dumping margins contained in Article 6.10, first sentence, the imposition of anti-dumping duties in accordance with Article 9.2 must also be done on an individual basis. The European Union has shown that sampling is not the only exception to the general preference of individual determination of dumping margins. The European Union has provided examples taken from its own practice to show this. The European Union can also provide other hypothetical examples, such as the one already explained during the First Hearing. Indeed, in a case where sampling is not used (e.g. there are three known cooperating exporters representing almost the totality of exports), it may occur that the investigating authority has to construe the normal value for the three of them on the basis of the same information (facts available – e.g. because relevant information is not provided in the questionnaire responses), and may have to use the same export prices for all of them (e.g. if it finds double invoicing or the accounts/records of the company are not complete). In those circumstances, the investigating authority would calculate one single dumping margin for all three suppliers and would impose a single anti-dumping duty on all three. This is permitted by Articles 6.10 and 9.2. Needless to say, the three suppliers would be entitled to request a refund pursuant to Article 9.3.1 if they can show later on that the anti-dumping duty imposed does not reflect their specific level of dumping. This is the mechanism envisaged in the *ADA* to prevent abuses by Members while ensuring an adequate protection pursuant to an anti-dumping investigation.

7. Moreover, if other provisions of the *ADA* (such as Articles 6.8 or 9.5, as China recognises) directly and expressly permit to depart from the "mandatory rule" (as China posits) contained in Article 6.10, first sentence, the only conclusion that the treaty interpreter can reach is that Article 6.10 cannot be interpreted in such a rigid manner.

8. If anything, China's reaction to the examples posed by the European Union shows the weakness of its case. First, China recognises that, pursuant to Article 6.8, investigating authorities do not need to calculate an individual dumping margin (in the sense of specifying a duty rate for an exporter by name) when the exporter fails to cooperate in the middle of the investigation. In other words, even if the exporter or producer is "known", such an exporter or producer would fall under the category or group of non-cooperating suppliers/residual duty/all others rate. Its own data would not

be used to calculate an individual dumping margin and its name would not be specified in the anti-dumping measures (just as part of the residual duty or "all others" rate). Second, in the case of the trader, China ignores that the panel in *EC – Salmon (Norway)* already concluded that, according to Article 2.5 of the *ADA*, "investigating authorities may be entitled to focus their determination of the existence of dumping on a producer's pricing behaviour, notwithstanding the existence of a known exporter that is responsible for the export sales under investigation". In other words, even if there is a "known" exporter (i.e., trader), there is no need to calculate an individual dumping margin for that trader. Third, in cases where it is not possible to identify the actual producer of the product concerned, China argues that the producer is not known. While the identity of the producer may be known, the true problem is to relate specific transactions to the known producer. In any event, China fails to see that in those cases the "exporter" will be "known" and, despite of that, no individual dumping margin is calculated for that "known exporter" (yet again another exception to the strict rule posited by China in Article 6.10, first sentence). Fourth, with respect to the example where the information gathered does not allow to calculate individual dumping margins per supplier, China only asserts that just because the drafters did not envision and list other hypothetical scenarios which would necessarily call for a derogation of the general rule contained in Article 6.10, first sentence, this does not imply that the exception in Article 6.10 is one of many. The European Union disagrees. The recognition of other situations where investigating authorities can depart from the general rule contained in Article 6.10, first sentence, implies that such a rule is a general preference or principle that may not be followed in some cases. This further implies that Article 6.10, second sentence (i.e., sampling) is not the only exception to that general preference.

9. Moreover, the panel in *Korea – Certain Paper* identified situations where, even if there were several legal entities involved, all together could be considered as a single exporter or producer "for the purposes of the dumping determinations in anti-dumping investigations". In this respect, as the Appellate Body has acknowledged, it is well recognised in international economic and trade literature that "dumping" is "international price discrimination". As Article VI:2 of the GATT 1994 and Article 9.1 of the *ADA* further state, the purpose of imposing and collecting anti-dumping duties is to "offset or prevent dumping", that is, to address the source of price discrimination. Consequently, a proper identification of the single exporter or producer in a case where there are several related companies allows the imposition of anti-dumping duties on the "actual source of price discrimination" (or, in other words, on the supplier found to be the source of dumping). This also permits avoiding potential circumvention at a later stage. Article 9(5) follows the same logic and seeks to identify the relevant supplier (i.e., an IT supplier which acts independently from China, or China and its related export branches (non-IT suppliers) which are not acting independently from the State). The application of a single duty rate then also becomes necessary to avoid circumvention of the duties (i.e., the channelling of exports through the supplier with the lowest duty rate).

10. The differences in the elements examined in *Korea – Certain Paper* and the Article 9(5) criteria lie in the different context where the panel made its findings. The reversal of the burden of proof in cases on non-market economy countries, or put in different terms, the fact that NME exporters have to show that they comply with the Article 9(5) criteria, is further justified in the case of imports from China. Indeed, China has not contested the evidence provided by the European Union (which relies not only on two reports, but also on extensive findings made in the context of anti-dumping investigations and on China's constitution and institutional framework) showing how China interferes in the export activities of private companies in China. Moreover, under Section 15(d) of China's Protocol of Accession, the European Union is entitled to consider China as a non-market economy country until 2016, although it has the possibility to acknowledge that market economy conditions prevail in certain industries or sectors. The European Union has not made use of this possibility and, despite recognising the efforts made by China in this respect, still considers that China is not a full market economy for the purpose of anti-dumping proceedings.

11. There is specific wording in Section 15(a) of China's Protocol of Accession already providing for the reversal of the burden of proof when determining price comparability under Article VI of the

GATT 1994 and the *ADA*. "Price comparability" in the sense of Article VI of the GATT 1994 and Article 2.1 of the *ADA* refers to the dumping determination. As per Section 15(a)(ii), in determining the existence of dumping, the importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China "if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product". The term market economy "conditions" does not encompass the situation when State intervention in the economy including international trade is so substantial that operators cannot act independently from the State in their export activities. Likewise, the term "sale" also includes "export" sales. Thus, Section 15(ii) of China's Protocol of Accession allows investigating authorities to have recourse to "a methodology that is not based on a strict comparison with domestic prices or costs in China" when determining the existence of dumping if the producers under investigation fail to show the existence of market economy conditions.

12. With respect to China's claim under Article I:1 of the GATT 1994, the European Union notes that China's argument is based on the presumption that the *ADA* does not allow for treating suppliers from non-market economy countries differently. In other words, China assumes what it pleads for (i.e., that Article 9(5) violates certain provisions of the *ADA*) in order to conclude that there is no conflict with Article I:1 of the GATT 1994. Such a circular argument should be rejected. More so where there are other references in the *ADA* which allow WTO Members to treat non-market economy countries differently. What China seems to argue is that even in cases where there are recognised exceptions to the non-discrimination principle in the *ADA* (or elsewhere, such as Section 15 of China's Protocol of Accession), those exceptions are contrary to Article I:1 of the GATT 1994. That approach ignores the fundamental principle of *lex specialis* and the General Interpretative Note to Annex 1A of the WTO and reduces all exceptions to nullity.

13. Consequently, the European Union requests the Panel to reject China's claim that Article 9(5) is "as such" inconsistent with Articles 6.10, 9.2, 9.3, 9.4 and 18.4 of the *ADA*, Articles I and X:3(a) of the GATT 1994 and Article XVI:4 of the WTO Agreement.

REVIEW REGULATION

14. **Claims II.1 and II.13.** Members are free to use a PCN system when comparing export prices and normal values unless it prevents a fair comparison. Differences that are not reflected in the system can be taken account of when making comparisons. China has gone outside the terms of reference in complaining about the way particular comparisons were made. It can find no authority illustrating its argument that Article 2.4 applies to the choice of the normal value, and the case law points in the opposite direction. The terms of the Accession Protocol clearly establish that the only obligations arising from the Working Party Report are those binding China. China's new criterion for choosing the normal value – what the value would have been if sales had been made in the ordinary course of trade at the same level of trade in the domestic market – has no support outside one specific, limited context. Its attempts to justify this criterion by examining the relevant texts are unsuccessful. The term 'appropriate' is not explicitly attached to any rule governing how the choice of analogue country should be made, but that fact is not significant since there is no doubt that the choice is subject to implicit rules and principles, even if these cannot be stated with great certainty. The European Union took into account competitiveness and representativeness in choosing Brazil as the analogue country, and such rules may require consideration of this kind.

15. **Issues common to Claims II.2 to II.5 and II.11.** It seems that China, the European Union and the United States agree that errors or inconsistencies with Article 3 made in the finding of injury made in the context of an expiry review do not automatically or necessarily lead to a finding of a violation of Article 11.3 *ADA*. Rather, inconsistencies in the injury finding with Article 3 can lead to a violation of Article 11.3 of the *ADA* only "if the investigating authority bases its likelihood of injury determination entirely on the injury determination" (as phrased by China), or if "IA based its likelihood determination to *a decisive degree* on a defective finding of injury" (the European Union)

or if "defects in this new present injury finding are critical to the expiry review and undercut the factual basis underlying the determination of continuation or recurrence of injury" (the United States). The applicable legal test, described above, has profound implications for the ways in which the Panel should dispose of China's claims. First, these claims are, factually, based upon China's unsupported assertion that the European Union relied entirely in its determination of the likelihood-of-injury on its finding of injury. This is incorrect and the Panel can dismiss China's claim on this basis alone. Such a ruling would be fully consistent with the legal test that China itself considers applicable and with respect to which the evidentiary onus thus lies on China. Second, China asked the Panel to rule on its claim of a violation of Article 11.3 *ADA* as a mere *consequential* claim. This construction of claims contradicts China's own legal test concerning the applicability of Article 3 in the expiry reviews and invites (and mandates) the Panel to adopt the theory that some defects (regardless of their extent) in the finding of injury made in the context of an expiry review *automatically and necessarily* render the determination of the likelihood of injury inconsistent with Article 11.3 *ADA*. This is legally erroneous and, hence, the Panel should dismiss China's claims. As a final remark, the European Union stresses that what is at issue is whether the EU's determination of the likelihood-of-injury satisfied the obligations of Article 11.3 *ADA*. This is what China should be asked to prove in a claim against an expiry review. So far, however, all the debate before the Panel concerned the compliance with Article 3 of the *ADA*. China's way of framing its claims suggests that the Panel should review China's claims with respect to the injury finding in isolation from the disciplines of Article 11.3 of the *ADA*. Yet, the correct focus of the injury should be whether China has *established* that the EU IA's determination of likelihood of injury contradicted the requirements of Article 11.3 of the *ADA*. This is not the case.

16. **Claim II.2**.Instead of clarifying the issues, China's response to Question 39 obfuscates them by departing from the original claim set out in the Panel request and developed in China's First Written Submission. China's response includes contradictory statements which make it difficult for the European Union to understand what actually China's argument is.

17. **Claim II.3** With respect to applicability of Article 6.10 of the *ADA* to injury sampling, for careful readers of the *EC – Salmon (Norway)* case China's argumentation comes as a *déjà vu*. China does not bring any new element or idea into the discussion. When considered carefully in light of the facts of the present case, in effect, China is saying that in the circumstances at hand an investigation of injury cannot take place. Eventually, the Panel does not need to inquire into the representativeness of the sample. What China claims under its Claim II.3 is that the EU producers' sample was neither statistically valid nor represented the largest percentage of production as required by Article 6.10 *ADA*. Since there are no legal requirements to sample companies in an injury analysis in accordance with Article 6.10, China's claim can simply be rejected on law. The issue of whether the EU IA acted inconsistently with Article 3.1 *ADA* under Claim II.3 depends on whether there was sufficient information on the record for a selection of the sample in accordance with the requirements of Article 3.1 *ADA*. As the European Union explained also in its First Written Submission, in the context of a discussion under Article 3 of the *ADA*, there may indeed be very good reasons for keeping a company which discontinued production in the RIP in a sample. China did not make a claim under Article 4.1 of the *ADA*.

18. **Claim II.4** Regarding Prodcom, if China is really of the view that the possible presence of related companies invalidates a legal analysis under Article 3.4 of the *ADA*, China is effectively saying that in situations where the domestic industry is very large, an analysis of the relevant factors cannot be made consistently with Article 3.4 *ADA*, since there is always the risk that some such companies would be included. Regarding China's assertion concerning the reliance on information from the national associations in the analysis of the injury factors assessed at the macroeconomic level, China misunderstands the analysis which was undertaken. The European Union also does not see a reason for which reasonable estimates should not constitute positive evidence.

19. **Claim II.5** A determination of likelihood of injury under Article 11.3 should not be equated with a determination of likelihood of dumping in so far as reliance is placed on a finding of existing injury or dumping.

20. **Claim II.6** The failure of one interested party to appreciate that some EU producers had not replied to the Community Interest questionnaires was not the European Union's fault. The burden lies on China to prove the factual assertions (disputed by the European Union) that form part of its claim. China's reiterations of its criticisms of the grant of identity confidentiality to EU producers remain unconvincing. The EU producers' had limited legal assistance. The Commission assisted all interested parties, without discrimination, in providing the information that had been requested of them.

21. **Claim II.7** The obligation in Article 6.4 to 'provide timely opportunities for all interested parties to see all information' available does not extend to the investigating authority's intentions or reasoning. China's contentions regarding the notification obligations of the investigating authority during the course of the investigation have no basis in law. The European Union's decision on the analogue country did not become irrevocable at the stage that is alleged by China.

22. **Claim II.9** China has not produced further effective criticisms of the decision to accord EU producers confidentiality for their identities.

23. **Claim II.10** The European Union prefers to use actual data rather than 'facts available', even if that means accepting corrections to evidence that has been submitted. Such efforts are just what is required by Article 3.1. China has provided no evidence that could establish a case of discrimination by the European Union in exercising this power.

DEFINITIVE REGULATION

24. **Claim III.1 and III.20** The European Union considers that the examination of the MET applications was not required with respect to exporting producers which, as was the case in the Footwear investigation, did not fall within the sample and did not qualify for individual examination. On this basis, the Panel should reject China's claims in their entirety. Moreover, China fundamentally ignores that, according to paragraph 342 of China's Working Party Report, the commitments listed therein "are incorporated in paragraph 1.2 of [China's Protocol of Accession]". Thus, only the commitments listed in paragraph 342 of the Working Party Report are integral part of the covered agreements. Since paragraphs 150 and 151 of China's Working Party Report are not listed in paragraph 342, it should be concluded that they are not part of the covered agreements. China also takes issue with the meaning of Section 15(a)(ii) of its Protocol of Accession and argues that the term "industry" does not imply that the use of NME methodologies is precluded only if it can be established that the "industry", rather than the single operators within such industry, operate on market economy conditions. The European Union disagrees. In general terms producers requesting MET must show that market economy conditions prevail in the industry (as opposed to individual companies) producing the like product with regard to manufacture, production and sale of that product. However, as a unilateral concession vis-à-vis China, the European Union examines whether an individual producer can be considered as a market economy producer (and thus grant MET) even if market economy conditions cannot be shown to prevail in the industry or sector producing the like product. Finally, China considers that sampling cannot apply to a determination whether market economy conditions prevail in the industry concerned. In this respect, the European Union notes that China again disregards the consequences of using sampling. Even in cases concerning market economy countries, prices or costs of non-sampled cooperating exporting producers are not examined and there is no obligation to do so, other than Article 6.10.2 of the *ADA*. Similarly, there was no obligation to examine MET applications of non-sampled cooperating exporting producers in the Footwear investigation. In view of the above, the Panel should reject China's claim in their entirety.

25. **Claim III.2** China's proposal of an alternative basis for determining administrative, etc., expenses and profits is irrelevant in the light of the standard of review set by Article 17.6(i) in regard to evaluations of the facts. China could succeed only by showing bias or non-objectivity on the part of the European Union.

26. **Claim III.5** The European Union decided to opt for the bifurcated approach and based its analysis on multiple sources of information, subject to multiple cross-checking. This method is entirely reasonable and yields possibly the most reliable results under the circumstances. China satisfies itself with criticizing this method without offering a credible and feasible alternative. The EU IA could, instead of relying on its bifurcated approach, simply extrapolate information from the sample composed of complainants to the entire domestic industry. Intuitively, it would seem that China would not really prefer such an approach, given the context of a discussion provided by China's claim II.4.

27. **Claim III.9** The issue of the collective effect of 'other factors' as a cause of injury was not raised by any interested party in the investigation, nor in this dispute by China until the Panel itself poses a question. China's notion that the European Union's 'break the causal link' methodology precludes a collective assessment is mere assertion. China has given no basis for its contention that the European Union should have carried out a quantitative analysis. It has adduced no evidence to support a claim that failure to make a collective assessment in the initial investigation 'attributed improperly to dumped imports the injuries caused by other factors.' Since the European market operates in euros it is in that currency rather than dollars that undercutting must be assessed. The causation issue to be determined under the *ADA* is the effect of the 'dumped imports' and not that of the margin of dumping. The concentration of dumped imports at a particular time is not an 'other cause' of injury but may constitute an exacerbated form of injury caused by the dumped imports.

CONCLUSION

28. For the reasons set out in this and previous submissions by the European Union, China's claims should be rejected in their entirety.

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, *without anything more*, are permissible in *any* 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.

ANNEX G

REQUEST FOR CONSULTATIONS AND REQUEST FOR THE ESTABLISHMENT OF A PANEL

ANNEX G-1

REQUEST FOR CONSULTATIONS BY CHINA

WORLD TRADE ORGANIZATION

WT/DS405/1
G/L/916
G/ADP/D82/1
8 February 2010

(10-0706)

Original: English

EUROPEAN UNION – ANTI-DUMPING MEASURES ON CERTAIN FOOTWEAR FROM CHINA

Request for Consultations by China

The following communication, dated 4 February 2010, from the delegation of China to the delegation of the European Union and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Union pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* and Article 17 of the Agreement on Implementation of Article VI of GATT 1994 ("*Anti-Dumping Agreement*") regarding the following:

(a) Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community[1] as amended,[2] which has now been codified and replaced by Council Regulation (EC) No. 1225/2009[3] (the *"Basic AD Regulation"*).

[1] Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56, 6.3.1996, p.1.

[2] Council Regulation (EC) No. 2331/96 of 2 December 1996, OJ L 317, 6.12.1996, p.1, Council Regulation (EC) No. 905/98 of 27 April 1998, OJ L 128, 30.4.1998, p. 18, Council Regulation (EC) No. 2238/2000 of 9 October 2000, OJ L 257, 11.10.2000, p.2, Council Regulation (EC) No. 1972/2002 of 5 November 2002, OJ L 305, 7.11.2002, p.1, Council Regulation (EC) No. 461/2004 of 8 March 2004, OJ L 77, 13.3.2004, p. 12 and Council Regulation (EC) No. 2117/2005 of 21 December 2005, OJ L 340, 23.12.2005, p. 17.

[3] Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, p.51 and corrigendum to Council Regulation (EC) No. 1225/2009, OJ 7, 12.1.2010, p.22.

(b) Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from *inter alia* China.[4]

(c) Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in *inter alia* China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96.[5]

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1. China considers that Article 9(5) of the *Basic AD Regulation* which provides that in case of imports from non-market economy countries, the duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will only be specified for exporters that demonstrate that they fulfil the criteria listed in that provision, is inconsistent, as such, with the EU's obligations under Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization;* Articles VI:1 and X:3(a) of the GATT 1994; Articles 6.10, 9.2, 9.3, 9.4, 12.2.2 and 18.4 of the AD Agreement, since these provisions require an individual margin and duty to be determined and specified for each known exporter or producer. Furthermore, the criteria listed in Article 9(5) of the *Basic AD Regulation* to obtain an individual duty are unreasonable and not objective. Moreover, by imposing these conditions only to imports from, allegedly, non-market economy countries, the EU's measure is also discriminatory and thus contrary to Article I:1 of the GATT 1994.

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2. China considers that the Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from *inter alia* China[6] ('Definitive Regulation') is inconsistent, among others, with the following provisions of the *Anti-Dumping Agreement*, the GATT 1994 and Part I, paragraph 15 of China's Protocol of Accession.

1. Part I, paragraph 15 (a) (ii) of China's Protocol of Accession, Paragraph 151(e), (f) of the Report of the Working Party on the Accession of China, Articles 2.4 and 6.10.2 of the *Anti-Dumping Agreement* because the EU did not examine the non-sampled cooperating Chinese exporters' Market Economy Treatment and Individual Treatment applications.

2. Article 2.2.2 of the *Anti-Dumping Agreement* because the amounts for administrative, selling and general costs and profits established by the EU for the company granted Market Economy Treatment were not calculated on the basis of a reasonable method as the EU used the administrative, selling and general costs and profits of Chinese exporters in other anti-dumping cases involving products other than the product concerned.

3. Article 2.4 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 because by selecting Brazil as the analogue country; using the PCN methodology established; and making adjustments for differences in production costs when normal

[4] OJ L 275, 6.10.2006, p.1.
[5] OJ L 352, 30.12.2009, p. 1.
[6] OJ L 275, 6.10.2006, p. 1.

value is based on prices or constructed values in the analogue country, on the basis of the data of Chinese exporters that were not granted market economy treatment, the EU precluded a fair comparison between the export price and the normal value.

4. Article 2.6 jo. 4.1 of the *Anti-Dumping Agreement* because the EU wrongly established the like product by not excluding STAF below €7.5/pair even though conceptually and technically there is no difference between STAF below and above €7.5/pair.

5. Articles 3.1 and 17.6(i) of the *Anti-Dumping Agreement* because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products, as the EU used different sampling procedures for Chinese exporters on the one hand, and EU producers on the other hand; the EU made the injury assessment partially on the basis of the verified data of the sampled EU producers and partially on the basis of the unverified data provided by the complainants and national federations;

6. Articles 3.1, 3.2 and 17.6(i) of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because the EU's underselling calculation was based on a very low quantity of exports of the sampled Chinese exporting producers; the EU wrongly calculated the underselling margin by applying a volume-based reduction ratio to the originally calculated price-based margin and by allocating the non-injurious import value in relation to import values for a period outside the investigation period.

7. Article 3.3 of the *Anti-Dumping Agreement* because the cumulative assessment of imports from China and Vietnam by the EU was inappropriate in light of the conditions of competition between the imported products and the like domestic products.

8. Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because several key injury indicators were analysed on the basis of the data of the whole EU production and not on the data of the sampled EU producers or EU industry; and the EU inappropriately established the profit margin for the EU industry.

9. Article 3.4 of the *Anti-Dumping Agreement* because the EU failed to examine the impact of the dumped imports on the domestic industry concerned by evaluating all of the relevant economic factors and indices having a bearing on the state of the EU industry, notably production capacity and capacity utilization.

10. Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because the EU failed to ensure that injury caused to the EU industry by other factors, which included among others, the export performance of EU producers, the effects of counterfeiting, the lifting of the quota on Chinese footwear, changes in pattern of consumption, the decline in EU demand and

the effects of exchange rate fluctuations, was not attributed to dumped imports from China.

11. Article 6.1.2 of the *Anti-Dumping Agreement* because the EU failed to ensure the prompt availability of evidence presented in writing by one interested party to other interested parties.

12. Articles 6.2, 6.4 and 6.5 of the *Anti-Dumping Agreement* because the EU failed to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defence of their interests including, but not limited to, the identity and sampling of the EU producers, non-confidential summaries of the questionnaire responses of EU producers, information on the adjustments for differences affecting price comparability.

13. Article 6.5.1 of the *Anti-Dumping Agreement* because the EU failed to ensure the disclosure of the names of the complainants; the provision of non-confidential summaries of confidential information relating to the EU industry, and sampled EU producers in the complaint and questionnaire responses respectively, and data provided by national federations or, where provided, failed to ensure the provision by the EU industry and/or the sampled EU producers, of sufficiently detailed summaries to enable a reasonable understanding of the substance of that information.

14. Article 6.5.2 of the *Anti-Dumping Agreement* because the EU failed to determine that the request for confidentiality of the names of the complainants is not warranted; and the EU failed to reject the confidential information provided by the sampled EU producers, the non-confidential summary of which was not provided.

15. Article 6.1.1 of the *Anti-Dumping Agreement* and Part I, paragraph 15 of China's Accession Protocol because Chinese exporting producers were granted only 15 days by the EU to submit their written reply to the Market Economy Treatment and Individual Treatment questionnaires.

16. Article 6.9 of the *Anti-Dumping Agreement* because the additional definitive disclosure regarding a change in the form of the measures was not made by the EU in sufficient time for the interested parties to defend their interests.

17. Article 6.10 of the *Anti-Dumping Agreement* because the sample of the Chinese exporting producers selected by the EU was not based on the largest percentage of export volumes of the product concerned from China as the sample was established before the exclusion of STAF from the product scope of the investigation; and the domestic sales volumes of the sampled companies were also taken into account for sample selection.

18. Article 6.10.1 of the *Anti-Dumping Agreement* because the sample of the Chinese exporting producers was not selected by the EU in consultation with, and with the consent of the parties concerned.

19. Articles 3.1 and 9.2 of the *Anti-Dumping Agreement* because the anti-dumping duty on Chinese exports was not imposed and collected by the EU on a non-discriminatory basis as the duty rate established for China was higher than that for Vietnam, although both the dumping and injury margins found for Vietnamese exporters were higher than those for Chinese exporters.

20. Articles 6.10, 6.10.2, 9.2 and 9.3 of the *Anti-Dumping Agreement* because although sampling was resorted to in the current case by the EU for Chinese exporting producers, a country-wise duty was imposed on the sampled Chinese exporting producers.

21. Articles 6.10, 6.10.2, and 9.2 of the *Anti-Dumping Agreement* because the EU applied additional conditions by way of the Individual Treatment criteria to deny individual dumping margins to cooperating Chinese exporting producers.

22. Article 12.2.2 of the *Anti-Dumping Agreement* because the EU failed to provide sufficiently detailed explanations in the Definitive Regulation regarding matters of fact and law which led to the acceptance or rejection of the arguments of the interested parties, and on matters of fact and law and reasons which led to the imposition of final measures.

23. Article 17.6(i) of the *Anti-Dumping Agreement* because the analogue country selection process by the EU and the calculation of a dumping margin for the non-sampled cooperating Chinese exporting producers without the examination of their Market Economy Treatment and Individual Treatment applications, did not amount to a proper establishment of facts and an unbiased and objective evaluation of those facts.

24. In consequence, Articles 1 and 18.1 of the *Anti-Dumping Agreement* because an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the *Anti-Dumping Agreement*.

The EU's measure, therefore, nullifies and impairs benefits accruing to China under the *Anti-Dumping Agreement* and the GATT 1994.

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3. The EU initiated an expiry review of the anti-dumping measure on imports of certain footwear with uppers of leather from *inter alia* China by publishing a notice of initiation on 3 October 2008.[7] By Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 ('Review Regulation'), the Council decided to extend the anti-dumping measure.

China considers that the Review Regulation extending the duties is inconsistent, among others, with the following provisions of the *Anti-Dumping Agreement* and the GATT 1994:

1. Article 5.3 of the Anti-Dumping Agreement because the EU failed to examine the accuracy and adequacy of the evidence provided in the expiry review request in order to determine whether there was sufficient evidence to justify the initiation of the expiry review.

2. Articles 3.1 and 17.6(i) of the *Anti-Dumping Agreement* because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products, as the EU used different sampling procedures for Chinese exporters and EU importers, on the one hand, and EU producers on the other hand.

[7] OJ C 251, 3.10.2008, p. 21.

3. Articles 3.1 and 17.6(i) of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products; and Article 6.10 of the *Anti-Dumping Agreement*, because the EU producers' sample selected was neither statistically valid nor representative of the largest volume that could reasonably be investigated; the EU producers' sample was not representative of the product types covered under the scope of the measure and produced in the EU, and of the geographic spread of EU production; the data of the sampled EU producers, pertaining to product types produced differed significantly at different points of the investigation; the EU producers' sample included a producer that outsourced its entire production of the product concerned to a third country in the review investigation period; an incorrect product classification methodology was used by the EU mid-way through the investigation; in constituting the EU importers' sample, the EU failed to cover the largest volume that could reasonably be investigated.

4. Article 2.1 of the *Anti-Dumping Agreement* because the affirmative findings of the EU regarding dumping were based on an unrepresentative volume of the total Chinese imports into the EU during the review investigation period.

5. Article 2.4 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 because the analogue country selection process of the EU; and the PCN methodology, as initially used by the EU and suddenly changed in the middle of the investigation, of necessity precluded a fair comparison between the export price and the normal value.

6. Articles 3.1, 3.4 and 17.6(i) of the *Anti-Dumping Agreement* because the EU failed to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry because several key injury indicators were analysed on the basis of the data of the whole EU production and not the data of the sampled EU producers or the EU industry.

7. Articles 3.1, 3.5 and 17.6(i) of the *Anti-Dumping Agreement* because the EU failed to make an objective examination, on the basis of positive evidence, that dumped imports are, through the effects of dumping, causing injury; and because the EU failed to ensure that injury caused to the EU industry by other factors was not attributed to dumped imports.

8. Article 6.1.2 of the *Anti-Dumping Agreement* because the EU failed to provide other interested parties prompt access to the information in the non-confidential questionnaire responses filed by sampled EU producers.

9. Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* because the EU failed to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defence of their interests concerning sampling of EU producers, selection of the analogue country and other procedural issues.

10. Article 6.5.1 of the *Anti-Dumping Agreement* because the EU failed to ensure the disclosure of the names of the complainants; and the provision of summaries of confidential information relating to the EU industry, and sampled EU producers in the expiry review request and questionnaire responses respectively, or, where provided, failed to ensure the provision by the EU industry and/or the sampled EU producers, of

sufficiently detailed summaries to enable a reasonable understanding of the substance of that information.

11. Article 6.5.2 of the *Anti-Dumping Agreement* because the EU failed to determine that the request for the confidentiality of the names of the complainants is not warranted; and failed to reject the confidential information provided by the sampled EU producers, the non-confidential summaries of which were not provided.

12. Article 6.8 of the *Anti-Dumping Agreement* because the EU did not apply facts available when faced with incorrect and deficient information, including product classification information, provided by sampled EU producers in the injury questionnaire responses.

13. Article 6.9 of the *Anti-Dumping Agreement* because the EU failed to inform all interested parties of the essential facts under consideration with regard to the Market Economy Treatment and Individual Treatment applications of Chinese exporters.

14. Article 11.3 of the *Anti-Dumping Agreement* because the EU's determination that expiry of the measure is likely to lead to a continuation of dumping and injury is based on determination of continued dumping and injury in violation of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the *Anti-Dumping Agreement*.

15. Article 12.2.2 of the *Anti-Dumping Agreement* because the EU failed to provide sufficiently detailed explanations in the Review Regulation regarding matters of fact and law and reasons which led to the extension of the measures; and of reasons which led to the acceptance or rejection of the arguments of the interested parties.

16. Article 17.6(i) of the *Anti-Dumping Agreement* because the analogue country selection process by the EU did not amount to a proper establishment of the facts and an unbiased and objective evaluation of those facts.

17. In consequence, Articles 1 and 18.1 of the Anti-Dumping Agreement because an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the Anti-Dumping Agreement.

The Government of China reserves its right to raise further factual claims and legal issues during the course of the consultations.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.

ANNEX G-2

REQUEST FOR THE ESTABLISHMENT OF
A PANEL BY CHINA

WORLD TRADE ORGANIZATION

WT/DS405/2
9 April 2010

(10-1877)

Original: English

EUROPEAN UNION – ANTI-DUMPING MEASURES ON CERTAIN FOOTWEAR FROM CHINA

Request for the Establishment of a Panel by China

The following communication, dated 8 April 2010, from the delegation of China to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 4 February 2010, The People's Republic of China ("China") requested consultations with the European Union ("EU") pursuant to Article 4 of the DSU, Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 17.3 of the Agreement on Implementation of Article VI of GATT 1994 ("*Anti-Dumping Agreement*") with respect to Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community as amended, codified and replaced by Council Regulation (EC) No. 1225/2009 (the "*Basic AD Regulation*"), Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from *inter alia* China, and Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in *inter alia* China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96.

The request for consultations was circulated in document WT/DS405/1 - G/L/916 - G/ADP/D82/1 dated 8 February 2010.

Consultations were held on 31 March 2010 with a view to reaching a mutually satisfactory solution. These consultations however failed to resolve the dispute.

Therefore, China respectfully requests, pursuant to Articles 4 and 6 of the DSU, Article XXIII:2 of the GATT 1994 and Articles 17.4 and 17.5 of the *Anti-Dumping Agreement*, that

the Dispute Settlement Body ("DSB") establish a Panel with standard terms of reference as set out in Article 7.1 of the DSU to examine China's claims.

I. Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community[1] as amended,[2] codified and replaced by Council Regulation (EC) No. 1225/2009[3] (the "*Basic AD Regulation*")

Article 9(5) of the Basic AD Regulation effectively provides that, in case of imports from non-market economy countries (including China), the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will effectively only be specified for the exporters which can demonstrate, on the basis of properly substantiated claims, that they fulfil all the criteria listed in that provision.

China submits that Article 9(5) of the Basic AD Regulation is inconsistent as such with, at least, the EU's obligations under the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organisation:

I.1 Articles 6.10 of the *Anti-Dumping Agreement* because in order to benefit from an individual dumping margin, an exporter from China must fulfil specific conditions that are not provided for in that article or elsewhere in the *Anti-Dumping Agreement*.

I.2 Article 9.2 of the *Anti-Dumping Agreement* because in order to benefit from an individual anti-dumping duty, an exporter from China must fulfil specific conditions that are not provided for in that article or elsewhere in the *Anti-Dumping Agreement*.

I.3 Article 9.3 of the *Anti-Dumping Agreement* because on account of the additional conditions in order to be entitled for an individual dumping margin, for those producers/exporters who do not fulfil the conditions for the individual treatment regime, the anti-dumping duty is determined on the basis of a dumping margin likely to exceed the dumping margin established in accordance with Article 2 of the *Anti-Dumping Agreement*.

I.4 Article 9.4 of the *Anti-Dumping Agreement* given that the anti-dumping duty that is applied to imports from producers/exporters who are not included in the sample is calculated on the basis of the dumping margins of the sampled producers/exporters, including dumping margins of those who do not qualify for individual treatment in accordance with Article 9(5) of the *Basic AD Regulation*.

I.5 Article I of the GATT 1994 since, by laying down additional conditions for Chinese exporters/producers to benefit from an individual dumping margin and an individual anti-dumping duty, the EU fails to accord to China advantages granted to other contracting parties.

I.6 Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organisation and Article 18.4 of the *Anti-Dumping Agreement* since the EU has not taken all necessary steps, of a

[1] Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56, 6.3.1996, p.1.

[2] Council Regulation (EC) No. 2331/96 of 2 December 1996, OJ L 317, 6.12.1996, p.1, Council Regulation (EC) No. 905/98 of 27 April 1998, OJ L 128, 30.4.1998, p. 18, Council Regulation (EC) No. 2238/2000 of 9 October 2000, OJ L 257, 11.10.2000, p.2, Council Regulation (EC) No. 1972/2002 of 5 November 2002, OJ L 305, 7.11.2002, p.1, Council Regulation (EC) No. 461/2004 of 8 March 2004, OJ L 77, 13.3.2004, p. 12 and Council Regulation (EC) No. 2117/2005 of 21 December 2005, OJ L 340, 23.12.2005, p. 17.

[3] Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, p.51 and corrigendum to Council Regulation (EC) No. 1225/2009, OJ 7, 12.1.2010, p.22.

general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the GATT 1994 and the *Anti-Dumping Agreement*.

I.7 Article X:3(a) of the GATT by not administering the provisions of Article 9(5) of the *Basic AD Regulation* in a uniform, impartial and reasonable manner.

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II Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in *inter alia* China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96[4]

The EU initiated an expiry review of the anti-dumping measure applicable to the imports of certain footwear with uppers of leather from *inter alia* China on 3 October 2008. Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 extended the measure for a period of fifteen months.

China considers that Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 is inconsistent, at least, with the EU's obligations under the following provisions of the *Anti-Dumping Agreement* and the GATT 1994:

II.1 Articles 2.1 and 2.4 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the EU precluded a fair comparison between the export price and the normal value:

- on account of the analogue country selection procedure and the selection of Brazil as the analogue country; and

- by using the PCN methodology applied in the original investigation and suddenly reclassifying the footwear categories in the middle of the investigation.

II.2 Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products, as the EU used different sampling procedures for Chinese exporters, EU importers, and non-complaining EU producers on the one hand, and complainant EU producers on the other hand.

II.3 Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products; and Article 6.10 of the Anti-Dumping Agreement, because:

- the EU selected the EU producers' sample in the absence of requisite data which is normally solicited in a sampling form, is essential for the selection of the sample, and was requested from non-complainant EU producers who made themselves known;

- the EU producers' sample selected was neither statistically valid nor represented the largest percentage of volume that could reasonably be investigated and the EU failed to cover the largest percentage of volume that could be investigated;

[4]OJ L 352, 30.12.2009, p. 1.

- the EU producers' sample included a producer that outsourced its entire production of the product concerned to a third country in the review investigation period; and

- the EU used an incorrect product classification methodology and suddenly reclassified the footwear categories in the middle of the investigation.

II.4 Articles 3.1, 3.4 and 17.6(i) of the Anti-Dumping Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry because several key injury indicators were analysed on the basis of the data of the whole EU production as termed by the EU, that included data pertaining to EU producers not part of the EU industry.

II.5 Articles 3.1, 3.5 and 17.6(i) of the Anti-Dumping Agreement because the EU failed to make an objective examination, on the basis of positive evidence, that dumped imports are, through the effects of dumping, causing injury; and because the EU failed to ensure that injury caused to the EU industry by other factors was not attributed to dumped imports.

II.6 Article 6.1.2 of the Anti-Dumping Agreement because the EU failed to provide other interested parties prompt access to the information in the non-confidential questionnaire responses filed by sampled EU producers.

II.7 Articles 6.2 and 6.4 of the Anti-Dumping Agreement because the EU failed to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defence of their interests concerning but not limited to sampling of EU producers, selection of the analogue country and other procedural issues.

II.8 Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement because the EU failed to ensure among others, the disclosure of the names of the complainants; and the provision of summaries of confidential information relating to the EU industry, and sampled EU producers in the expiry review request and questionnaire responses respectively; and data used for selecting the sample of EU producers, or, where provided, failed to ensure the provision by the EU industry and/or the sampled EU producers, of sufficiently detailed summaries to enable a reasonable understanding of the substance of that information.

II.9 Articles 6.2 and 6.5.2 of the Anti-Dumping Agreement because the EU failed to determine that the request for the confidentiality of the names of the complainants is not warranted; and failed to reject the confidential information provided by the sampled EU producers, the non-confidential summaries of which were not provided.

II.10 Articles 3.1 and 6.8 of the Anti-Dumping Agreement because the EU did not apply facts available when faced with incorrect and deficient information, including but not limited to the product classification information, provided by sampled EU producers in the injury questionnaire responses.

II.11 Article 11.3 of the Anti-Dumping Agreement because the EU's determination that expiry of the measure is likely to lead to a continuation of dumping and injury is based on determination of continued dumping and injury in violation of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the Anti-Dumping Agreement.

II.12 Article 12.2.2 of the Anti-Dumping Agreement because the EU failed to provide sufficiently detailed explanations in the Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, regarding matters of fact and law and reasons which led to the extension of the measures; and of reasons which led to the acceptance or rejection of the arguments of the interested parties.

II.13 Article 17.6(i) of the Anti-Dumping Agreement because the analogue country selection process by the EU did not amount to a proper establishment of the facts and an unbiased and objective evaluation of those facts.

II.14 In consequence, Articles 1 and 18.1 of the Anti-Dumping Agreement because an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the Anti-Dumping Agreement.

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III. Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from *inter alia* China[5]

China submits that Council Regulation (EC) No. 1472/2006 of 5 October 2006 leading to the imposition of an anti-dumping duty of 16.5% on the imports of certain footwear with uppers of leather from China with the exception of one Chinese producer-exporter, is inconsistent, at least, with the obligations of the EU under the following provisions of the *Anti-Dumping Agreement*, the GATT 1994 and Part I, paragraph 15 of China's Protocol of Accession:

III.1 Part I, paragraph 15 (a) (ii) of China's Protocol of Accession, Paragraph 151(e), (f) of the Report of the Working Party on the Accession of China, Articles 2.4 and 6.10.2 of the *Anti-Dumping Agreement* because the EU did not examine the non-sampled cooperating Chinese exporting producers' Market Economy Treatment and Individual Treatment applications.

III.2 Article 2.2.2 of the *Anti-Dumping Agreement* because the amounts for administrative, selling and general costs and profits established by the EU for the company granted Market Economy Treatment were not calculated on the basis of a reasonable method as the EU used the administrative, selling and general costs and profits of Chinese exporters in other anti-dumping cases involving products other than the product concerned.

III.3 Article 2.4 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 because the EU precluded a fair comparison between the export price and the normal value:

- on account of the analogue country selection procedure and the selection of Brazil as the analogue country;
- by using the PCN methodology established; and
- by making adjustments for differences in production costs when normal value was based on prices or constructed values in the analogue country, on the basis of the data of Chinese exporters that were not granted market economy treatment.

III.4 Article 2.6 of the *Anti-Dumping Agreement* read together with Articles 3.1 and 4.1 of the *Anti-Dumping Agreement* because the EU wrongly established the like product/product concerned by not excluding STAF below €7.5/pair even though conceptually and technically there is no difference between STAF below and above €7.5/pair.

[5]OJ L 275, 6.10.2006, p.1. This measure confirms, and incorporates reasoning from Commission Regulation (EC) No. 553/2006 of 23 March 2006 imposing provisional anti-dumping duty on imports of certain footwear with uppers of leather from *inter alia* China. OJ L 98, 6.4.2006, p.3.

III.5 Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products; and Article 6.10 of the Anti-Dumping Agreement, because:

- the EU used different sampling procedures for Chinese exporters on the one hand, and EU producers on the other hand; and

- the EU made the injury assessment partially on the basis of the verified data of the sampled EU producers and partially on the basis of the unverified data pertaining to the EU industry provided by the complainant producers at the complaint stage, as cross-checked, where possible, with the overall information provided by the relevant associations throughout the EU.

III.6 Articles 3.1, 3.2, 9.1 and 17.6(i) of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because:

- the EU's underselling calculation was based on a very low quantity of exports of the sampled Chinese exporting producers; and

- the EU wrongly calculated the underselling margin by applying a volume-based reduction ratio to the originally calculated price-based margin and by allocating the non-injurious import value in relation to import values for a period outside the investigation period;

- the EU inappropriately established the profit margin for the EU industry.

III.7 Article 3.3 of the *Anti-Dumping Agreement* because the cumulative assessment of imports from China and Vietnam by the EU was inappropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

III.8 Articles, 3.1, 3.2 and 3.4 of the *Anti-Dumping Agreement* because the EU failed to examine the impact of the dumped imports on the domestic industry concerned by evaluating all of the relevant economic factors and indices having a bearing on the state of the EU industry, notably production capacity and capacity utilization.

III.9 Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because the EU failed to ensure that injury caused to the EU industry by other factors, including but not limited to the export performance of EU producers, the lifting of the quota on Chinese footwear, changes in pattern of consumption, the decline in EU demand and the effects of exchange rate fluctuations, was not attributed to dumped imports from China.

III.10 Articles 6.2, 6.4 and 6.5 of the *Anti-Dumping Agreement* because the EU failed to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defence of their interests including, but not limited to, the identity and sampling of the EU producers, information on the adjustments for differences affecting price comparability.

III.11 Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* because the EU failed to ensure the disclosure of the names of the complainants; the provision of non-confidential summaries of confidential information relating to the EU industry and sampled EU producers in the complaint and questionnaire responses respectively; information used for sampling, among others or where provided, failed to ensure the provision by the EU industry and/or the sampled EU producers, of sufficiently detailed summaries to enable a reasonable understanding of the substance of that information.

III.12 Articles 6.2 and 6.5.2 of the *Anti-Dumping Agreement* because the EU failed to determine that the request for confidentiality of the names of the complainants is not warranted; and the EU failed to reject the confidential information provided by the sampled EU producers, the non-confidential summary of which was not provided.

III.13 Article 6.1.1 of the *Anti-Dumping Agreement* and Part I, paragraph 15 of China's Accession Protocol because Chinese exporting producers were granted only 15 days by the EU to submit their written reply to the Market Economy Treatment and Individual Treatment questionnaires.

III.14 Article 6.9 of the *Anti-Dumping Agreement* because the additional definitive disclosure issued on 28 July 2006 regarding a change in the form of the measures was not made by the EU in sufficient time for the interested parties to defend their interests.

III.15 Article 6.10 of the *Anti-Dumping Agreement* because the sample of the Chinese exporting producers selected by the EU was not based on the largest percentage of export volumes of the product concerned from China as:

- the sample was established before the exclusion of STAF from the product scope of the investigation; and

- the domestic sales volumes of the sampled companies were also taken into account for sample selection.

III.16 Articles 3.1 and 9.2 of the *Anti-Dumping Agreement* because the anti-dumping duty on Chinese exports was not imposed and collected by the EU on a non-discriminatory basis as the duty rate established for China was higher than that for Vietnam, although both the dumping and injury margins found for Vietnamese exporters were higher than those for Chinese exporters.

III.17 Articles 6.10, 6.10.2, 9.2 and 9.3 of the *Anti-Dumping Agreement* because although sampling was resorted to in the current case by the EU for Chinese exporting producers, a country-wide duty was imposed on the sampled Chinese exporting producers.

III.18 Articles 6.10, 6.10.2, and 9.2 of the *Anti-Dumping Agreement* because the EU applied additional conditions by way of the Individual Treatment criteria to deny individual dumping margins to cooperating Chinese exporting producers.

III.19 Article 12.2.2 of the *Anti-Dumping Agreement* because the EU failed to provide sufficiently detailed explanations in Council Regulation (EC) No. 1472/2006 of 5 October 2006 regarding matters of fact and law which led to the acceptance or rejection of the arguments of the interested parties, and on matters of fact and law and reasons which led to the imposition of final measures.

III.20 Article 17.6(i) of the *Anti-Dumping Agreement* because the analogue country selection process by the EU and the calculation of a dumping margin for the non-sampled cooperating Chinese exporting producers without the examination of their Market Economy Treatment and Individual Treatment applications, did not amount to a proper establishment of facts and an unbiased and objective evaluation of those facts.

III.21 In consequence, Articles 1 and 18.1 of the *Anti-Dumping Agreement* because an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the *Anti-Dumping Agreement*.

The EU's measure therefore nullifies and impairs benefits accruing to China under the *Anti-Dumping Agreement*, the GATT 1994, the Marrakesh Agreement Establishing the World Trade Organisation and China's Protocol of Accession.

China asks that this request be placed on the agenda of the DSB meeting scheduled to take place on 20 April 2010.